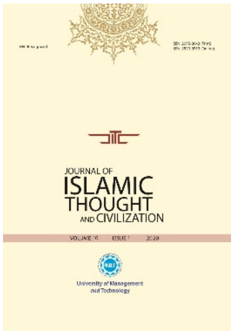

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National Social Security Fund of Kenya: An Assessment from Islamic Jurisprudence

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Abstract

The social security fund operated as a community collective system prior to the colonial period. The colonial government proposed establishing a provident fund for African workers. They noted that the pension scheme was not favorable because it required the investment of significant resources and subsidies by the government. Following independence, the Kenyan government announced the implementation of social security for its people. The National Social Security Fund (NSSF) was established by an Act of parliament Cap 258 in November 1965, however, contributions began in July 1966 to allow it to operate as the National Provident Fund. Since her independence Kenya has undergone several pension reforms, culminating in the enactment of the NSSF Act in 2013. The pension scheme has received significant attention from the Muslim clerics. Some *fatawa* have been issued stating that the retirement benefits are not *Sharīʻah* compliant. This situation might jeopardize the retirement goal and put the retirees in financial difficulty by denying them their benefits. The main objective of this study is to evaluate the conformity of *Sharīʻah* in Kenya's pension fund operation. Inductive method was used to examine the operational methods of the social security fund from both the perspectives of pension scheme and Islamic jurisprudence in order to mutually integrate them. Likewise, the researchers used the analytical approach to clarify the opinions of the Muslim scholars regarding the pension scheme products and to highlight some areas of inconsistency with Islamic law in order to provide Islamic alternatives. The results showed that pension scheme funds are inconsistent with Islamic law. Therefore, it is recommended for NSSF to open Islamic windows to meet the demands of the Muslim workers seeking *Sharīʻah* compliant products / services.

Keywords: Islamic jurisprudence, Kenya, National Social Security Fund (NSSF), pension reforms, voluntary contribution

Introduction

The Social security fund operated in the pre-colonial period as a community system in 1961.[1] However, the colonial government recommended the establishment of a provident

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[1]P. M. Mullei, "Social Security in Kenya," *International Social Security Review* 41, no. 4 (1988): 433.

fund for African employees. But they noted that the pension scheme was not favorable because it needed substantial resources and subsidization from the national treasury.2 After independence, the Kenya government declared the introduction of social protection for its citizens but realized that they could not manage to achieve their objective owing to the lack of financial resources and the growth rate of the population. Therefore, the government established National health insurance and National provident schemes, although savings in provident schemes were not compulsory for all workers. The National Social Security Fund (NSSF) was established by an Act of parliament Cap 258 in November 1965, but contributions began in July 1966, operating as a national provident fund.[3] Kenya's retirement benefits have recently been divided into two categories: (a) public schemes and (b) private schemes. Later, the NSSF Act 1965 and its regulations were revoked by the NSSF Act 2013. It was transformed from a Provident Fund to a Pension Scheme to which every employed Kenyan citizen has to contribute a certain percentage of his/her gross salary to be guaranteed basic compensation in the case of disability, death or pension upon retirement.[4] The Act establishes two funds known as: (a) the Pension Fund and (b) the Provident Fund. The different funds are: the pension fund is compulsory for employees in the formal economy and is paid monthly, while the provident fund is voluntary for the self-employed and is paid in a lump sum payment. The constitution of Kenya 2010 (43) (1) (e) states that "every Kenyan has a right to social security"; and Article 21 of the same constitution commits that "the state should take whatever legislative, policy, and other measures as necessary, including the setting of standard to ensure effective and efficient provision of social security."[5] The pension system provides a platform for employees to make monthly contributions to cover their living expenses during retirement and other outcomes such as death or invalidity, among others. The NSSF Act assented to Article (43) (1) (e) and Article 21 of the Kenya constitution, vision 2030, National Social protection policy of 2013 and the 1952 convention 102 of ILO. NSSF in year 2017-2018 collected a large fund compared to previous years: "we recorded a surplus of Ksh. 25.75 billion as compared to Ksh. 23.89 billion in the previous year." Our fund value grew from Ksh 196.57 billion to Ksh. 221.73 billion, an equivalent of a 13% increase. This growth is attributable to prudent investments."[6] The NSSF investment portfolio includes: Deposits, GOK

[2]Ibid., 433.

[3]Nyabuto Rose Osebe, "Influence of Strategic Evaluation on Operational Efficiency of National Social Security Fund in Kenya," *International Journal of Economics, Commerce and Management*, Vol. VI, Issue 5 (United Kingdom 2018): 728, http://ijecm.co.uk/

[4]Overview of NSSF, official website: https://www.nssf.or.ke/background, Accessed/ February 10, 2020.

[5]"The Constitution of Kenya, 2010," Published by the National Council for Law Reporting with the Authority of the Attorney-General, Article (43) Economic and social rights and Article (21) Implementation of rights and fundamental freedoms.

[6]"NSSF 2017-2018," Annual Report and Audited Financial Statement.

Securities, Corporate Bonds, Equities, Properties and TPS.[7] It is obvious that the most financial instruments are not *Sharīʻah* compliant. A pension fund must be managed in accordance with Islamic law, meaning it must be free from elements of *Riba*, *Maisir*, *Gharar* and other void elements. Furthermore, there are many studies that have been carried out to investigate pension schemes in Kenya but have yet to cover the pension scheme from an Islamic perspective. This paper is, therefore, a continuation of the discussion on the pension schemes in Kenya from an Islamic *Sharīʻah* perspective. It reviews the types of contributions, financial instruments, and retirement benefits, as well as points out areas that call for improvement.

2. Assessment of Pension Schemes in *Sharīʻah* Law

2.1. Mandatory Contribution

According to NSSF Act 45 of 2013 Section 20 (1) and Act 45 Section 19 (6),[8] every employer who employs one or more employees shall register and contribute 12% split as follows:-Employer 6% and employees 6% of the salary. Furthermore, every employer who fails or refuses to register employees under the NSSF scheme commits an offense and shall be liable to a fine not less than Ksh 50, 000, equivalent to US $500. It is evident that contribution to the scheme is mandatory for everyone who meets the conditions regardless of his/her income level. Its aim is to maintain the standard of living of its participants. Arising from the above discussion, there are debatable issues among the Muslim scholars about mandatory contribution to pension schemes. Some scholars have objected to mandatory contribution, but those who advocate mandatory contribution hold that it is permissible under Islamic law's principle of co-operation. Even though both sections of the Muslim scholars share some legal proof, as follows:

(1) Pension scheme is permissible. This opinion was supported by Sheikh Dr. Abdallah bin Abdulrahman Al-jibrein after he released the statement as follows: “There has been a lot of argument about what the government is doing in deducting salaries from the employees known as pension scheme, or what other Saudi companies did. For example, in the Aramco company, after retirement age, the worker receives a continuous salary for the rest of his life, or for his minor offspring after him, or a gratuity. On the other hand if his

[7] “NSSF, our investment, official website: https://www.nssf.or.ke/investments. Accessed/ October 2, 2020.

[8]The National Security Fund Act, 2013, Kenya Gazette Supplement Number 179 Act No 45, Printed and Published by The Government Printer, Nairobi, 2013, 27 “From the commencement date and subject to the provisions of subsection (3) and section 21, an employer shall pay to the Pension Fund in respect of each employee in his or her employment- the employer’s contribution at six per centum of the employee’s monthly pensionable earnings; and (b) the employee’s contribution at six per centum of the employee’s.” The same Act 45 Section 19 (6) demonstrate the fine to refuse registration of NSSF scheme as follows: “Any employer who fails, neglects or refuses to register under this section commits an offence and shall be liable to a fine not exceeding Kenya shillings fifty thousand.”

service is of a short time period, he is given a bonus. What is deducted from his salary and given double or half ..., and this transaction is free from interest."[9] Sheikh Mohammad Utheimein responded to the same issue, saying, "It is permissible to take pension fund because it is a reward from employees' salary when needed."."[10] In the same matter, Sheikh Abdulaziz bin Baz replied "it is permissible to take, and this fatwa has been issued by senior scholars."[11] The same opinion was seconded by the permanent committee for scholarly and research and *Ifta* as follows: "If this is the case, it is permissible to take a retirement pension, because it is a reward for the service you performed during your work for the government."[12]

They support their opinion with the following justifications: Mandatory contribution does not contradict the principle of *Sharīʻah* where a pension scheme aims to achieve cooperation, solidarity and justice among the members. Furthermore, employees contribute much less than what they will receive after retirement, because any excess is rewarded and motivates employees[13] In this regard, the prophet Muhammad (*SAW*) said: "Man's property may not be taken except with his goodwill." Another justification is that the employee donates to needy colleagues. The state donates what it pays its employees because it does not seek any profit from its citizens.[14] The situation is supported by holy Qur'ān verse "Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression."[15] They also argue the pension scheme is a bond and reward from the state to its citizens. The retirement system takes into account the interests of the employees, and it is therefore permissible to receive a gift as a bonus from the state.[16] Another point of contention is that the Islamic state is the guardian of its employees. Therefore, they propose pension scheme to take care of employees after retirement. The state may not fulfill the needs of the employees unless through their salaries, which they take as benefit after retirement. In fact, it is a matter of cooperation which Almighty Allah commanded in the Qur'ān.[17]

[9]Al-Ğibrēyīn, *Ḥukmu Niẓam Idḫār* [The Rules of Saving System], Fatwā No: (11843), official website: http://www.ibn-jebreen.com/fatwa/vmasal-11843-.html. Accessed/ January 25, 2021.

[10]Muhammad ibn Salih al-`Uthaymin, *Majmu` Fatawa* (Saudia Arabia: Dar Al-Watan, Vol 18, 1413), 175.

[11]Mohammad bin Sad Fahd Dawsary, *Ratib Taqaud* [Pension Scheme]. (Riyadh, 2012), 187.

[12]Resolutions of the Council of the International Islamic Fiqh Council emanating from the Organization of the Islamic Conference In its sixteenth session in Dubai (30/2-5/1426) Resolution No: 142 (1/16).

[13]Ibid., Mohammad bin Sad Fahd Dawsāry, *Ratib Taqaud* [Pension Scheme], 188.

[14]Ibid., 190.

[15]Al-Ma'idah 05:02.

[16]Omar bin Abdulaziz Al-Matrook, *Riba wa Muamalat Masrafiya fi Nadri Shariah Al-Islamiya* [Interest and Bank Transactions in the Islamic law Perspective], Vol 1, (Riyadh: Darul Asimah, 2nd ed, 2010), 420; Maida, 05:02.

(2) Other jurists argue that mandatory contribution is illegal because it contains a number of legal prohibitions, including: (i) the existence of *Riba Fadl,* as it involves the exchange of money for money with an additional amount, and it also contains a component of *Riba Al-Nasi'ah*, as it is postponed indefinitely until one retires.[18] (ii). Mandatory contribution also contains an element of gambling, as participants pay a certain amount of contribution in the hope of receiving a large amount, or vice versa. They also argued that gambling comes into existence when a participant dies during the earlier period of the contract.[19] (iii) Mandatory contribution includes an illegal condition, namely shareholder apathy. A contract which is based on unlawful elements is not valid as Allah (SWT) said: "O believers! Do not devour one another's wealth illegally, but rather trade by mutual consent."[20] On the other hand, some Islamic scholars such as Sheikh Al-Burak have argued that:

> The Pension scheme is a western economic system inherited and applied by the Muslim society without being indifferent to what Islamic law requires. An example of insurance is a pension scheme which engages in deduction of a certain amount of salary from the employees and pays monthly after retirement for the duration of their life. For example, if a member dies after or before retirement age, the pension board will terminate all contributions. Therefore, the pension scheme is unlawful, because it contains the element of *Riba* and *Maisir*.[21]

After close observation of the two opinions, the researcher concurred with the majority of Muslim jurists for the following reasons: (i) the interest requires obligating employees to contribute to the pension scheme is to get stable incomes which will be interrupted after retirement because of disability, unemployment, and poverty and so on. That is why the state deducts salaries for the benefits of employees and this does not contradict the Islamic Law. (ii) The Islamic Law encourages saving and avoiding inappropriate expenditure. (iii) Mandatory contributions will add to developing a country by accumulation of saving, maintaining financial stability and channeling funds into long-term investments (iv) The pension management transactions scheme is free from *Riba al-Fadl*; because of the rule of exchange counter value, one must be exchanged on spot and two commodities must be equal in quantity. Also, it is free from *Riba al-Nasiah* because repayment of deduction in return for extra payment is a reward from the state.

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[18]Suleimān bin Ibrahīm Thuniyāh, *Ātāmin Wa-Ahkamuhū* [Insurance and its Rules], (Riyādh: Darul-ibn Hazmī,Vol 1, 2003), 212-217.

[19]Ahmad Salim Mulhim, *Altaamin Al'iislamy* [Islamic Insurance], (Oman: Darul Al-ilam, Vol 1, 2000), 111

[20]An Nisa 04:29.

[21]Ibid., Dawsāry, *Ratib Taqaud*, [Pension Scheme], 193.

2.2. Voluntary Contribution

NSSF Act 45 of 2013 Section 23 (1)[22] A self-employed person willing to contribute to the provident fund will pay ksh 200/= as the minimum amount. The minimum aggregation contribution shall be ksh 4800/= yearly.[23] From what has been preceded, saving is legislated in the holy Qur'ān, hadith and consensus of the Muslim Jurists. Allah (SWT) said: "You will plant grain for seven consecutive years, leaving in the ear whatever you will harvest, except for the little you will eat."[24] Ibn Jarīr in his commentary commented that: "He orders them to keep their food."[25] In the other verses, Allah (*SWT*) said: "And give the relative his right, and [also] the poor and the traveler, and do not spend wastefully. Indeed, the wasteful are brothers of the devils, and ever has Satan been to his Lord ungrateful."[26] Spending wastefully was forbidden at the same saving part of income is highly recommended. Narrated Salama bin Al-Aqua, Prophet Muhammad (*SAW*) encouraged to saving, This is based on a hadith recorded in the book of *Al-Ihsan fi Taqrib Sahih ibn Hibbān* in which Prophet Muhammad (*SAW*) said, "*Kulū wa Ātimū wa Idahirū"* (Eat it and feed of it to others and store of it in that year the people were having a hard time).[27] Without a doubt, saving helps when an emergency arises, necessitating the search for additional funds. Therefore accumulated saving can help ease the situation. It was a great caution against job loss. Lastly, saving will accumulate into a substantial amount which will help prepare for retirement, because many retirees do not have enough money to cater for their needs. Based on the above discussion, voluntary contribution to pension scheme is formed on the basis of Islamic co-operative insurance. This view is supported by Dr. Wahba Zuheili who said "Voluntary contribution to the pension scheme it is a co-operative insurance."[28] In legal perspective, Co-operative insurance (*Al-ta'min Al-taa'wun*) is defined as "an arrangement based on mutual assistance under which *takaful* participants agree to contribute to a common fund providing for mutual financial benefits

[22]Ibid., The National Security Fund Act, 28,"Every voluntary member shall contribute to the Provident Fund- (a) a minimum amount of two hundred shillings; (b) a minimum aggregate contribution in a year of four thousand eight hundred shillings; (c) contributions may be paid directly to a designated Fund office, by mobile money or any other electronic transfer specified by the Board; and (d) the Fund shall notify the member of the receipt of the contribution as soon as the contribution is received. (2) The contributions made under this section shall be paid into the Provident Fund and immediately credited to the member's individual account as the Provident Fund Credit provided for under section 24."

[23]NSSF Guide book, The official guide to National Security Fund Act No. 45, 2013, 2.

[24]Yousuf 12:47.

[25]Ibn Jarīr Twabary, *Jamiʿ Al-Bayān fi Ta'wil Qur'ān*, vol. 1 (Beirut: Muasasah Risalah, 16th ed, 2000), 126.

[26]Isra 17:26-27.

[27]Muhammad bin Hiban, *Al-Ihsān fi Taqrīb Saḥīh ibn Hibbān*, vol. 1, (Beirut: Muasasah Risalah, 1998), 253.

[28]Wahbah Zuhaili, *Qadhwaya Al-Fiqh wa Al-fikr Al-Muaswwir* [Fiqh and Contemporary Issues], (Damascus: Darul fikr, 2006), 138.

payable to the *takaful* participants or their beneficiaries on the occurrence of pre-agreed events."[29] According to the previous definition, co-operative insurance takes the form of *Ta'awun*, which means mutual co-operation, in which members contribute to a common fund for the sake of mutual benefits. Contributions are also made as *Tabarru* (Donation), and a member is entitled to receive benefits if a certain situation occurs. In the study of Rusni Hassan and others, they clarify differences between Takaful and conventional insurance in terms of the method of risk, profit motive, nature of contract, obligation of the parties, ownership, liability to pay claims and investment instruments [30]

Another juristic opinion is to accept voluntary contribution as *Qard Hassan* (interest free loan). Which means: giving funds to the NSSF scheme in order to utilize it and returning it immediately or after a specific agreed time. Furthermore, a receiver (NSSF) is permitted to use the funds and enjoy all profits and losses, owing only the principal amount borrowed to the owner (Voluntaries).[31] This view was disparaged because it does not serve the interests of the participant. Therefore, the researcher concludes that participation in the voluntary fund is considered a *Tabarru* (Donation) which will aim at saving and investment profit for the insurance company.

2.3. Investment of Pension Scheme

Investment in NSSF is extending across the various sectors of the economy. The following chart shows the portfolio allocation of NSSF [32]:

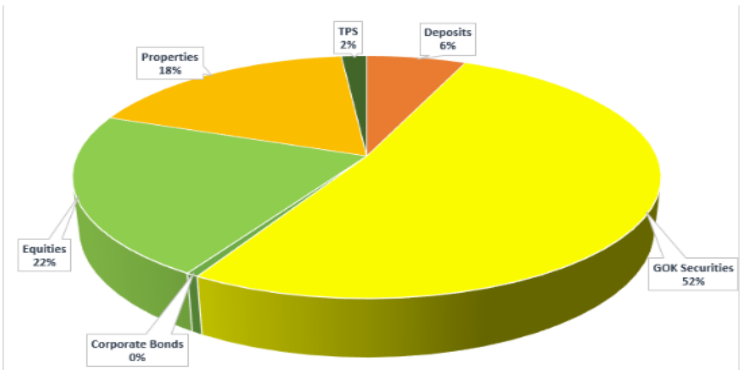

Figure 1. The portfolio allocation of NSSF

[29]Mohd. Daud Bakar, "Sharīʻah Principles Governing Takaful Model," In Archer. S. Rifaat Ahmed Abdel Karim and V. Nienhaus, *Takaful Islamic Insurance Concepts and Regulatory Issues* (John Wiley and Sons (Asia), Singapore, 2009), 31.

[30]Rusni Hassan Ahmad, et.al., *Islamic Banking and Takaful* (Pearson Malaysia Sdn Bhd 2016), 201.

[31]Ahamd Ausaf, *Contemporary Practices of Islamic Financing Techniques* (Islamic Research and Training Institution, Islamic Development Bank, Saudi Arabia: 1993), 4-5.

[32] Overview of NSSF, official website https://www.nssf.or.ke/investments, Accessed/ December 1, 2020.

2.3.1. Deposits

According to the report of the auditor-general on NSSF for the year 2018, fixed deposits which are net of a provision of ksh 329,500 deposits in Chase bank and Imperial bank [33] based on the foregoing, banks accept fixed deposits as a loan because they are guaranteed to be returned to the depositors after a certain period of time; thus, a bank acts as a guarantor in the event of theft. This opinion was supported by the Muslim contemporaries like Sheikh Ali Salusy, Mohammed Shabir and among others. This view was seconded by the Islamic Fiqh council at the 9th conference held in Abu Dhabi 1-6/Dhul Qadah/1415 same as 1-6/April/1995 after they reviewed presented research papers.[34] They supported this view based on the following grounds:

i. Textual evidence from the words of *Zubeir* when people brought some money to deposit with him: "I won't receipt it as a trust, but I take I take it as a debt"[35]
ii. The depositors satisfy the bank to use money upon receiving it. Therefore, money takes the form of debt, not a trust.[36]
iii. The bank is the guarantor of these deposits if they are damaged by an infringement. If this money were a trust, the bank would not have guaranteed it. The indebtedness and the guarantee contradict with trust. Rather than that, if a trustee puts conditions to guarantee the money is not valid.[37]
iv. It is well known that the bank does not accept deposits as a trust that it keeps and returns to its owners, but instead consumes and invests them. For this, a conventional

[33]"Note 17(b) to the financial statements reflects a total of Kshs. 3,009,277,681 in respect of fixed deposits (held to Maturity) as at 30 June 2018 which is net of a provision of Kshs. 329,500,000 in respect of deposits held in Chase Bank and Imperial Bank amounting to Kshs. 70,000,000 and Kshs. 259,500,000 respectively. These amounts were invested between 8 September 2015 and 3 March 2016 and were to mature between December 2015 and May 2016. However, and as previously reported, Chase Bank and Imperial Bank were put under statutory management by Central Bank of Kenya (CBK) on 7 April, 2016 and 13 October 2015 respectively and only Kshs. 26,682,488 has been recovered from Imperial Bank. In the circumstances, recoverability of fixed deposits totaling Kshs. 302,817,512 invested in the two banks under statutory management is in doubt."

[34]*Jounal of Islamic Fiqh* council published by Organization of the Islamic Conference, Jeddah, Saudi Arabia 9/701.

[35]Muhammed bin Ismail Al-Bukhari, *Sahih Al-Bukhari,* Vol 4 (Beirut: Dar Tuq Alnaja, 1422), 86, *Hadīth* No: 3129.

[36] Masoud bin Musād Al-Thubaiti, "Al-Hisabatul Al-Jariyah wa Atharuha fi Tanshit Al-Harakatuh Al-Iqtisadiyah," [Current Accounts and their Impact on Revitalizing Economic Movements], *Journal of Islamic Fiqh Council* 9, 624-626.

[37]Shifa Dhiyab Ubeid, "Al-Takhrīj Fiqhiyu li Wadai Al-Masrafiyah fi al-Bunuk al-Taqlidiyah inda Sheikh Momhammed Takiyu Uthman," [Legal Jurisprudential on Bank Deposit conventional banks by Sheikh Momhammed Takiyu Uthman], 12, No 44 (2016): 324.

bank pays interest to depositors. To keep the deposits and return them to their owners.[38]

Deposits are collected from both the conventional banks and Islamic banks, but there are some differences between the two institutions that lie in the agreement of rewards. The bank interest is fixed and predetermined in conventional banking, whereas Islamic bank deposits are accepted in Islamic banking as *Mudarabah* [39] and *Musharaka* contract[40] where the profits are changeable. Another major difference is, a conventional bank is born by a bank and its interests belong to depositors at a fixed rate, while under the Islamic *Sharī'ah* perspective, risk (profits and loss sharing) is shared between the bank and depositors depending on the outcome of the investment. [41]

2.3.2. Corporate Bonds

Corporate Bonds[42] is a kind of debt security issued by a firm and sold to investors. The financial institution earns capital and returns the investor with fixed or variable interest. In view of this, the majority of the contemporary Muslim scholars forbid all kinds of conventional bonds, including government securities, because they contain the element of *Riba*. This opinion was supported by Dr. Abdulaziz Al-Khayat, Dr. Yussuf Al-Qardhawy, Dr. Swaleh Marzouq, Dr. Ali Salusy, Sheikh Omar Al-Matrouq, Sheikh Shaltut, Dr. Mohammad Yussuf Musa, Sheikh Abdulrahman Zaitar, Sheikh Muhammad Othman Shubeir, Dr. Ahmad Muhyidiin, Dr. Abdulrazak Al-Heity, Dr. Abdulrahman Sheibany, Sheikh Mustafa Al-Hamthary, Sheikh Muhammad Abu Zuhra, Sheikh Abdurahman Taj, Sheikh Abdulmajid Suleim (former of Sheikh Al-Azhar) Sheikh Mohammad Hasanein Makhlouf, Sheikh Mohammad Yaqout, Dr. Abdulghafour Shariff, Dr. Wahbatul Zukheil, Dr. Samy Hassan Hamouda, Dr. Mohammad Al-Qary, Sheikh Mohammad Jubeir Allah,

[38]Ibid., 324.

[39]"A partnership for participation for profit in which the capital is provided by one party known as *Rabb al-mal* (investor/capital provider) and the labour or skill provided by the other party known as *Mudharib* (entrepreneur) profit will be shared between the investor and entrepreneur while the loss will be borne solely by investor/capital provider." See, Rusni Hassan et.al., 97.

[40]"A form of partnership where two person or more share capital or creditworthiness together, to share profits, enjoying similar rights and liabilities." See S. M. Hasanuzzam, "The Liability of Partners in an Islamic Sharī'ah," *Journal of Islamic Studies* (1971): 319.

[41]Muhammad Hanif, "Differences and Similarities in Islamic and Conventional Banking," *International Journal of Business and Social Sciences* 2, no. 2 (2014): 169.

[42]"Note 20 to the financial statements reflects corporate bonds balance of Kshs. 7,677,218,892 as at 30 June 2018 which is net of a provision of Kshs. 666,900,000 in respect of Imperial Bank and Chase Bank bonds amounting to Kshs. 132,200,000 and Kshs.534,700,000 respectively. The bonds were invested between 28 September 2015 and 6 October 2015 and were to mature between February 2022 and September 2022. As previously stated, the two banks were put under statutory management by Central Bank of Kenya (CBK) before maturity of the bonds. Consequently, it has not been possible to confirm recoverability of the money invested in corporate bonds totaling Kshs. 666,900,000 as at 30 June 2018."

Sheikh Twantwawy Mustafa, Sheikh Jada Rab Ramadhan, Sheikh Suleiman Ramadhan, [43] and this opinion was concurred by International Islamic Fiqh Academy.[44] They supported this view based on the following proofs:

(i) Bonds are considered debt which at the end the issuer will receive principal amount plus fixed interest on maturity date.[45] The image of usury in bonds is exactly like the image of usury in the *Jāhilīyā*, which was revealed in the holy Qur'ān Outlawed. In addition, *Riba* is prohibited by both the holy *Qur'ān and Sunnah*. The verses in the prohibition of *Riba* are "The usury (interest) that is practiced to increase some people's wealth, does not gain anything from God. But if you give to charity, seeking God's pleasure, these are the ones who receive their reward many fold." [46] *Al-Imām Fakhru Razi*, in his commentary, commented that: *Riba Al-Nasiyah* is something that was denounced and known in the *Jāhilīyā* (pre Islam Arab) era. They used to pay money and collect it after a certain period. The capital remains. If the debt is settled, they demanded capital plus interest. If the borrower was unable to pay, they extended period and interest. This is a kind of *Riba* they were dealing with it.[47] (ii) Bond holders receive fixed interest payments bearing no loss, and this contradicts the principles of *Sharī'ah* among them "There should be neither harming nor reciprocating"[48] When companies get losses, they will pay the bond holder capital plus interest and this is unfair. How do you take profit on money that got lost?[49]

From what has been discussed above, Islamic debt instrument (*Sukūk*) is an alternative source of financial system compared to corporate bonds. *Sukūk* are "certificates of equal value representing undivided shares in the ownership of tangible assets, usufructs and services or (in the ownership of) the assets of particular projects or special investment activities," according to AAOIFI (Accounting and Auditing Organization for Islamic Financial Institutions).[50] Similarities between *Sukūk* and bonds are considered as liquidity operated in the financial market. However, *Sukūk* differs from bonds in several aspects, as follows: First, the *Sukūk* holder owns a partial ownership of the underlying assets while

[43]Ahmad Mohammad Khalil, *Al-As'humy wa-al-Sanadāt wa-ahkāmuhā fī Al-Fiqh Al-Islāmī* [Stocks, Bonds and Provision in Islamic Jurisprudence], Vol 1, (Saudia: Darul ibn Jawzy, 1426), 292.

[44]*Majallah Majma` Fiqh Islami* 1410, No 6, Decision No: 62/11/6, Vol. 2, 1723.

[45]Sheikh Abdulrahman Zaitar, *Hukmu al-Islam fī Shahadatu al-Istithmar wa Sanadiq Atawfīr wa Wadayie Al-Bunuk*, Amman, [The Ruling of Islam on Investment Certificates, Savings funds, and Bank Deposits]. (Amman; Jordan: Al-Hassan House for Publishing and Distribution, 2013), 93.

[46]Ar-Rūm 30:39.

[47]Fakhr ad-Dīn Rāzī, *Mafatīh al-Ghayb*, vol. 7 (Beirut: Darul Ihya Al-Turathy Al-Arabi, 1420), 72.

[48]Muhammad bin Yazeed Al-Qazwini, *Sunan bin Majah,* vol. 3 (Beirut: Darul Risalah Ilmiyah, 2009), 430.

[49]*Al-Itihadi Dauli Lil-Bunuk Al-Islamiyah, Al-Mausua Al-Ilmiyah Wal Alamiyah lil-Bunuk Al-Islamiyah* [The International Federation of Islamic Banks and the International and Scientific Encyclopedia of Islamic Banks], vol. 1 (Cairo: Maktaba Fahd, 1982), 437.

[50]The AAOIFI Shari'ah Standard (17) on investment *Sukūk.*

bonds are just considered debt obligation, the holder does not have a share or right of ownership.[51] The relationship between the issuer and purchaser of conventional bond is considered as lender and borrower. Secondly, *Sukūk* holders accept profit and loss from any underlying project, whereas bondholders receive fixed interest payments on a regular schedule. The principal amount is assured and will be returned back on the bond's maturity date.[52] Thirdly, the subject assets of *Sukūk* shall be approved by *Sharī'ah* law, whereas, security bonds may want to be backed with aid of intangible assets and even assets not permitted by Islamic law.[53] Fourth, selling *Sukūk* to the financial market is considered as selling of the ownership of an asset while selling conventional bonds is similar to selling ownership rights.[54] Lastly, issuance of conventional bonds obliges the risk on the financial institutions; while, the issuing of *Sukūk* imposes the risk on the investors and financing parties. The conclusions from a study show that the total imposed risk in the latter case is extra than those the risks emerged from insolvency of those who issue bonds.[55]

2.3.3. Equities

These are company shares; the holder of equities in the company is a shareholder/stockholder in the corporation.[56] It has been reported that the NSSF invested some of its equities in Safaricom in the year ended June 2018.[57] Based on the above, it is permissible to buy and sell shares of companies, as long as they do not engage in forbidden transactions. This is the choice of Sheikh Abdulaziz bin Baz, Sheikh Abdulrazak Afif, Sheikh Muhammad Utheimein, Sheikh Abdallah bin Muneig, Sheikh Abdulwahab Khalaf, Sheikh Mahmoud Shaltut, Dr. Yussuf Al-Qardhawy, Dr. Mohammad Yussuf Musa, Sheikh Ali Khafif, Dr. Abdulaziz Khayat, Dr. Swaleh Marzouq, Dr. Ahmad Muhyidin.[58] They supported this view on the basis of the following proofs:

i. subscribing to share is permitted under company's contract. Allah said: "So send one of you with these silver coins of yours to the city, and let him find which food is the purest, and then bring you provisions from it."[59] Sheikh Mohammad Al-Amin Shinqit, in his

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[51] Nafis Alam, et. al., "Are Islamic bonds different from conventional bonds? International evidence from Capital Market Tests," *Borsa Istanbul Review* 13 (2013): 22-23.

[52] Mohammad Ali Taskhiri, "Sharī'ah-Defined Foundations of Islamic Securities (Sukūk)," *Islamic Economy Quarterly* 7, No.27 (2007): 1.

[53] Pegah Zolfaghari, "An Introduction to Islamic Securities (Sukūk)," *Uppsala Faculty of Law Working Paper* 2 (2017):16.

[54] Ibid., 17.

[55] Andreas Jobst, Heiko Hesse, Juan SolA, "Trends and Challenges in Islamic Finance," *World Economics* 9, No. 2 (2008): 182.

[56] Paul Hoang, *Business and Management* (Victoria: IBID Press, 2007), 71.

[57] *Daily Nation*, NSSF Puts 25pc Equity Portfolio in Safaricom, official website: https://www.business dailyafrica.com/bd/markets/market-news/nssf-puts-25pc-equity-portfolio-in-safaricom-2267654.Accessed/ January 13, 2021.

[58] Ibid., 110-111.

[59] Kahf 18:19.

commentary, commented that: company's contract is permissible; because people of cave participated in silver coins, therefore they send one of them to buy them food.[60] Abu Huraira (*RA*) traced to the prophet the statement of Allah, "I make a third with two partners as long as one of them does not cheat the other, but when he cheats him I depart from them."[61] In this hadīth, there is a clear indication of the legitimacy of the company's contract as long as the participation is based on trust and rights preservation.

That mutual consent is essential in contracts, and fulfillment of contracts is legally imposed. Allah said: "O believers! Honour your obligations."[62] Another verse "O believers! Do not devour one another's wealth illegally, but rather trade by mutual consent."[63] Then what is known by the Muslims is that the condition is permissible to binding after the agreement. Prophet Mohammad (*SAW*) said: "The Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful, or makes lawful something which is unlawful."[64] These legal principles indicate the permissibility of buying and selling companies' shares as long are free from usury.

Although buying and selling shares is legal in Islam, there are some rules and regulations that distinguish Islamic shares from a conventional system. In the study of Chowdhury and others, they summarized Islamic *Sharī'ah* Principles for Investment in the Stock Market

(i) Nature of business: Companies must be involved in accepted (Halāl) and not engage in haram activities such as engaging in any kind of *Riba* (usury and interest), selling of liquor, gambling, pornography, pubs etc. (ii) Nature of the Assets of the Company: it does not authorize to invest in a company which has got only liquid assets. If the company does not have any non-liquid assets, it would only be permissible to trade at the par-value of the shares, because in this case, the shares represent similar to cash money. (iii) Nature of the Ownership: *Sharī'ah* allows trading in common stock because selling a common share is like selling of shares of the company. On the other hand, it allows investing in the preferred share if the company complies with *Sharī'ah* law. (iv) Nature of the Transaction: the Muslim Jurists forbid margin and derivative trading in the stock market to manipulation, speculation and selling goods that a person does not own. (v) Nature of the *Zakat* (compulsory tax) Provision: Tax is compulsory in the conventional stock market. Under Islamic law, shareholders will pay *zakat*. There are two formulas of calculation depending

[60]Muhammad al-Amin Shanqiti, *Adwa' al-Bayan fi Idah al-Qur'ān bi-al Qur'ān* (Lebanon: Dar Al Fikr, Vol 3, 1995), 232.

[61]Sulaiman bin Ash'ath, *Sunan Abu Daud,* vol. 5 (Beirut: Darul Al-Risalah Al-Alamiyah, 2009), 265, No of *Hadīth*: 3384.

[62]Al Maida 05:01.

[63]An Nisa 04:29.

[64]Sulaiman bin Ahmad Ayyub Atwabarany, *Al-Mu'jam Al-Kabīr,* Vol. 17 (Cairo: Maktab ibn Taymeiyah, 1994), 22, *Hadīth* Number: 30.

on the period of investment. (a) Short term investment: *Zakat* will be calculated on the full market value of share every year. (b) long term investment: zakat will be calculated based on divided amount every year and paying zakat of the full selling price at the time of selling share. [65]

2.3.4. Properties

The NSSF intends to invest approximately KSh. 500 billion in a project to build 30,000 affordable houses in Mavoko (Machakos County). It is reported the initial phase will bring 8,200 units on 55 acres of land and another 15,000 units on 1000 acres owned by NSSF. NSSF owns large assets in the local property market. Some of these include: (a) Social Security Building in Nairobi's Community area (b) Hazina Trade Center (c) Mountain View Estate in Kangemi (d) Bruce House in Nairobi's Central Business District (CBD). Lastly, NSSF has also constructed Nyayo Estate in Embakasi, 35 million shilling apartments in Milimani.[66] According to the reports, some properties, such as Hazina Close Milimani, are ready for sale.[67] The legislation of trading has been mentioned in the Qur'ān: "But Allah has permitted trade and prohibited *riba*."[68] *Murabahah* (sale commodity with addition profit) also encouraged by the Prophet Mohammad *(SAW*) when was asked regarding the best occupation and he replied "The work of a man with his own hands, and an honest trade."[69] Implementing the *Murabaha* Model is too difficult for lower income earners in terms of affording a housing unit because the cost of living is constantly rising in Kenya. Therefore the researcher suggests applying *Musharaka Mutanaqisa* (Diminishing Partnership). Dr. Zuḥaylī defines Diminishing Partnership as an agreement between a company and a client in which the bank finances the project in exchange for a certain share of net profit, and the client has the right to pay a lump sum or various investments during the agreement period, during which the bank shares will decrease and the customer shares will automatically increase at the end of the contract.[70] The legislation of the *Musharaka* was mentioned in holy Qur'ān. Allah said: "…And, verily, many partners oppress one another, except those who believe and do righteous good deeds, and

[65] Md Mahmudul Alam, Chowdhury Shahed Akbar, Shawon Muhammad Shahriar, and Mohammad Monzur Elahi, "The Islamic Sharī'ah Principles for Investment in Stock Market," *Qualitative Research in Financial Markets* (2017): 133-141.

[66] Estate Cloud, NSSF to construct Sh. 500 billion homes in Mavoko, official website: https://estatecloud. co.ke/ nssf-to-construct-sh-500-billion-homes-in-mavoko/ Accessed/ January 18, 2021.

[67] NSSF, Nssf Milimani Close Apartment, official website: https://www.nssf.or.ke/nssf-milimani-close-apartments. Accessed/ January 25, 2021.

[68] Al Baqarah 02:275.

[69] Mohammad bin Abdallah al-Nīsābūrī, *al-Mustadrak 'alā Ṣaḥīḥayn*, Vol. 2 (Beirut: Dar al-Kutub Illimiyyah, 1990), *Hadīth* No: 2158.

[70] Dr. Wahbah Al-Zuḥaylī, *Al-Muāmalāt Al-Māliyah Al-Muāṣirah* [Contemporary Financial Transactions], *Buhūth wa Fatāwā wa Ḥulūl* (Dimashq: Dārul Fikr, 2002).

they are few...."[71] Legitimacy of *Musharaka* is also supported by the Hadith: "I make a third with two partner as long as one of them does not cheat the other but when he cheats him I depart from them."[72] In this regard, members of NSSF pay down payment to the developer and own 10% of the house project. Then Members and NSSF entered into a Diminishing Partnership contract. Following the partnership, NSSF pays the remaining amount of 90% to the developer. Thereafter, NSSF sells shares of the house periodically, thus decreasing the share of NSSF and increasing the members' shares. Lastly, members will possess the house, making him/her the sole owner.

2.3.5. TPS

The Tenant Purchase Scheme is an option for developers to own house property by making monthly installment payments. The model is used by the National Security Fund (NSSF) to favour lower income earners. Investors are required to pay monthly installments plus an interest rate, which reduces the selling price over an agreed period. The developer will own the property when the price is fully paid after 15 years with the interest rate of 7% as provided by (KMRC) Kenya Mortgage Refinance Company.[73] Monthly installment payments for the Tenant Purchase Scheme can be made via M-PESA Pay bill 333300 or by dialing * 303 * 1 #.[74] The Muslim Jurists *Hanafi*, *Maliki*, *Shafii* and *Hanbali* permitted increasing the price of hire purchase as long as the interest is not stipulated in the agreement.[75] This opinion has been supported by the contemporary Muslim Scholars: Wahbah Zuḥaylī, Ali Qura Dai, Rafiq Misri, Adil Eid, Muhammad Subhi, Abdusatar Abu Ghuda, Muhammad Uqla and International Islamic Fiqh Academy.[76] The proofs demonstrating that Hire Purchase is legislated in Islam are: "But Allah has permitted trade."[77] Another verse: "O believers! Do not devour one another's wealth illegally, but rather trade by mutual consent.[78]" The verses referred to above permit increasing of price in hire purchase. These verses also free transactions from any restrictions, which is in line

[71] As-Sād 38:24.

[72] Al-Hakim Mohammad Al-Naisaburi, *Al-Mustadrak ala Sahihein*, vol. 2 (Beirut: Dar-Alkutub Al-Illmiyyah, 1990), 60, Hadīth No: 2322.

[73] David Ndung'u, "The Affordable Housing Project in Kenya-Are you the Target Market?," Official website: https://invhestia.com/2019/05/17/the-affordable-housing-project-in-kenya-are-you-the-target-market/ Accessed/ January 29, 2021.

[74] NSSF-MPESA, NSSF to Collect Tenant Purchase Scheme Installments, Service Charge through M-PESA, Official website: https://tech-ish.com/2020/03/31/nssf-mpesa-collection/?amp Accessed/ January 29, 2021.

[75] Ali Abubakar al-Marghinani, *Al-Hidaayah fī Sharh Bidaayat Al-Mubtadi*, Vol 3 (Beirut: Dar Ihyaa Al-Turath Al-`Arabi. n.d), 24.

[76] Abdallah Abu Wahdan, and Ahmed Nofal, "Ahkam Bai' At-Taqsīt fi Al-Fiqh al-Islami," [Rules of Hire Purchase in Islamic Jurisprudence], *Journal of University of Najah*, 27, No 2, (2013): 427.

[77] Al-Baqara 02:275.

[78] An Nisa 04:29.

with legal maxim "any transactions is permissible unless is a clear prohibition against it,"[79] and International Islamic Fiqh Academy has stated "it is permissible to sell with an increase in the price if it is paid at a later date than the current price."[80] Another jurist's opinion forbids the sale of commodities in installments with an increase in the current price. This opinion was supported by the contemporary Muslim scholars like Mohammad Abu Zuhra, Abdulrahaman bin Abdukhaliq, Sheikh Albany.[81]They mentioned Hadith from Prophet Mohammad (*SAW*) "Forbade two transactions in one bargain"[82] Sheikh Abdulkhaliq, in his book, commented that: "meaning of Hadith applied if the current sale is not like a deferred payment sale."[83] He continues saying, "*Sadd Darai* is one of the sources in Islamic law which means leaving permissible things that lead to evil. He mentioned several examples. One of them is the selling of products by installment with an increase in the price, which opens the door of *Riba* usury and it works to facilitate the debt and make people fall into it; also depriving people of virtue."[84] After observing the two opinions, the author suggests the implementation of AITAB (*Al-Ijara Al-Muntahiyyah bit Tamlīk*) as an alternative to TPS, which is leasing the property for a specific period by paying an agreed fixed amount at the end of *ijara* (Lease). Ownership will be transferred to the lessee effectively in the form of *Hibah* (Gift).

3. Retirement Benefits

According to the old fund, the NSSF provides lump sum benefits for those who reach the age of 50 (withdrawal) and 55 (age benefits). In respect of pension fund, the earlier retirement age is 50 years at normal retirement pension and 60 years at early retirement pension, while the new Provident Fund requires at least five years[85] a part of the lump sum provided after retirement age, the members receive interest at a minimum rate of 2.5% per year.[86] Retirement income has been observed as *Non-Sharīʻah* compliant, because it contains an element of *riba* interest. NSSF makes profits for its shareholders by insuring the policy holders against risks in return for fixed premiums. *Wakala* Model[87] is an Islamic alternative to ensure the investment in line with *Sharīʻah* principle. There are several verses

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[79] Muhammad Siddiq Al-Ghazi, *Mausu'ah Al-Qawaid Al-Fiqhiyah* [Encyclopedia of Legal Maxims], vol. 1 (Beirut: Muasasatul Al-Risalah, 2003), 78.

[80] International Islamic Fiqh Academy, Resolution No 51 (6/2) on Hire Purchase, 9-14 May 1992.

[81] Ibid., Abdallah Abu Wahdan, 433.

[82] Ahmad bin Hanbal, *Musnad Imam Ahmad bin Muhammad bin Hanbal,* Vol 4 (Cairo: Darul *Hadīth*, 1995), 30, *Hadīth* No: 3783.

[83] Abdul Rahman Abdul Khaliq, *Al-Qaul Al-Faslu fi Bai Al-Ajel* [The Final Statement of the Sale on Credit], (Kuwait: Maktaba ibn Taymiyyah, 1405), 23.

[84] Ibid., 26.

[85] NSSF, Benefits Application Form, Official website: Accessed/ January 22, 2021.

[86] Sundeep K. Raichura, "Analytical Review of the Pension System in Kenya," *Mombasa: OECD/IOPS* (2008): 8.

[87] Contractual Relationship between Fund Manager and Participants can be done under *Mudaraba* Model, *Waqf* Model or *Wakala* and *Mudaraba* Model (Hybrid Model).

from the holy Qur'ān and Hadīth mention the permissibility of *wakala* contract. Allah said: "So send one of you with this money to city, so that he can see any good food that he can bring to us as sustenance."[88] Hadīth of the Prophet (*SAW*) as narrated by Jabir ibn Abdullah (May Allah be pleased with him): "I intended to go (on expedition) to Khaybar. So I came to the Holy Prophet (*SAW*), greeted him and said: I intend to go to Khaybar. He said: When you come to my agent, you should take from him fifteen Wasqs (of dates). If he asks you for a sign, then place your hand on his collar-bone."[89] The operation commences when members appoint the NSSF as an agent to manage and invest in the fund. Consequently, members pay contributions and *Wakala* fee and administration expenses for providing its services. To cover the risk, the net contribution will be credited to two accounts: (i) a personal savings account and (ii) a risk account. Under this account, members contribute a certain amount which will be utilized to pay for clams etc. Finally, the amount from both accounts will be invested in *Sharī'ah* compliant. Profits earned from the investment will be allocated to both accounts as per original ratio. In addition to that, any surplus will be distributed to the personal saving account.[90] In the case of loss of funds, the NSSF will not be liable, however, in the case of negligence and misconduct will be responsible.

3.1. Survival Legal Benefits

The NSSF set a policy for dependent relatives who qualify for benefits and gave priority to the following legal heirs in the following order: (1) Spouse/Spouses (i) Husband/wife (s) (ii) Children (3) Both Parents (4) Brother/Sister (5) Grand Parents (6) Others/Next of kin[91] According to the previous Policy, NSSF is inconsistent with the principle of Islamic inheritance. If a Muslim dies, the following rights must be settled: (a) Burial preparation: which consists of ritual bath, dress for the grave and so on. (b) Settlement of debt: which must be taken from his/her property unless the legal heir voluntarily settles the debt for the deceased person's sake. (c) Execution of Will or Bequest: this should not exceed 1/3 of the property and not in favour of any of the legal heirs.[92] Further, whatever remains, shall be distributed among legal heirs given priority to primary legal Heirs are always entitled to a share of the inheritance. They are never excluded by anybody and they will get a fixed portion. These consist of: spouses (husband/wife), parents (Mother/Further) and children (daughters/Sons). Violating the inheritance system will create conflicts, fights, disputes, hostility and a split among family members.[93] The

[88]Khaf 18:19.

[89]Sulaiman bin Ash'ath, *Sunan Abu Dawud*, vol. 7 (Beyrūt: Darul Risalaẗ: 2009), Hadīth No: 3632.

[90]Waheed Akhter, "Takaful Models and Global Practices," *MPRA Paper* No. 40010 (2012). 7.

[91]NSSF, Applicants for Survivors benefits.

[92]Manswab Mahsen Abdulrahman, "Distribution of Estate in Islamic Law: A Case Study of Missing Person, Child in the Womb and Hermaphrodite," *Journal of Islamic Studies and Culture* (2020): 32 http:// DOI: 10.15640/jisc.v8n1a4

[93]Ibid.

researcher recommended that if a participant dies, a predetermined sum must be handed over to the Kadhis court for proper distribution.

4. Conclusion and Recommendations for Pension Scheme

Pension funds help employees to maintain the standard of living after retirement age by obtaining a better retirement package. Many studies have been conducted in Kenya to study pension schemes, but none have yet covered the pension scheme from an Islamic perspective. The research paper reviews types of contribution to NSSF (Mandatory and Voluntary), retirement benefits and financial instruments including; Deposits, GOK Securities, Corporate bonds, Equities, and TPS. The research finds that the Muslim scholars have different opinions regarding Mandatory contribution. Some advocate that it is permissible under the principle of co-operation among employees, while other scholars state that mandatory contribution is unlawful because it contains elements of *Riba*, gambling and unlawful consent of participants. Also, the researcher observes that voluntary contributions are made among the participants for protection of their common interest and to assist those who need assistance. The research finds that NSSF is inconsistent with Islamic law in financial instruments including: *Riba, Maisir, Gharar* and other void elements. It has also been found that providing a lump sum plus interest by insuring the policy holder is against risks. Another inconsistency is denying inheritance to other legal heirs, which will cause conflict and hostility among family members. Therefore, it is recommended for NSSF to open Islamic Windows whereby the funds will be invested in *Sharīʻah* -compliant.

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