

Title: **Fundamental conceptions underlying areas of jurisprudence and how they shape related rulings: a comparative study with special reference to partnership**

Author: Muhammad Abdurrahman Sadique, PhD
Assistant Professor
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia
53100 Kuala Lumpur
Malaysia

Email: sadique@iiu.edu.my

Abstract:

In studying Islamic law, it becomes evident that in many areas, the relevant rulings are linked together by a fundamental conception that acts as the foundation for all the related rulings. These fundamental conceptions dictate the structural framework of the relevant area, providing shape to the rulings governing diverse issues. These underlying theories are often not referred to explicitly in the works of Islamic law, which generally suffice with explaining the relevant rules.

It is noted that different schools of Islamic law had sometimes formed individual conceptions, based on which their approach to, and rulings on, detailed issues have varied. However, when a school is taken individually, its rulings on a particular area of law are always found to be coherent and uniform, without giving rise to contradiction. In order to highlight the existence of fundamental conceptions that give shape to detailed rulings, the paper takes the contract of commercial partnership (*shirkah al 'aqd*) as an example. Each school of Islamic law has adopted a distinct conception regarding the essential nature of partnership, on which all the detailed rules related to different areas of partnership are based.

In modern developments taking place in Islamic law, these fundamental theories have not received the attention they deserve. This may result in newly developed rulings contradicting the basic theory, thus losing their relation to the general body of law. As such, it is vital that the new rules developed be assessed for conformity with the fundamental conceptions of shari'ah on the subject, so as to preserve the uniformity and coherence of shari'ah regulations. It is recommended that in practical efforts to apply Islamic law through legislation, such overall theories be taken in to consideration. Concurrent research into overall theories of shari'ah should be undertaken, in order to ensure that legislated rulings maintain their coherence.

Introduction

A researcher taking a comprehensive view of the developments in the modern Islamic rulings without delimiting his purpose to viability and practicability in the short term, is bound to notice certain areas where thorough research is yet to be undertaken, despite their importance. One of these pertain to the theoretical basis and foundation of practical rulings that provide the overall framework and core structure which link the detailed rulings together.

Such underlying theories that serve as the foundations for the rulings pertaining to various subjects do not seem to have received the attention they deserve. This appears to have resulted in the rulings at times contradicting the basic theory where there is one, or the rulings on a topic lacking an overall theory altogether, possibly due to no effort having been taken to discover, or to formulate, one. This situation could be attributed to the rulings on various issues having been derived in isolation, with the limited objective of finding a practical solution to a problem at hand, so that a product or an instrument in question could be implemented in a Shari'ah acceptable manner. For this purpose, more often than not, the most compatible view from among the positions of the schools of Islamic law that is congruent with the need of the product is usually given preference. Indeed, at times, obscure and relatively unknown positions adopted by individual scholars have been preferred over those that have enjoyed more support, for meeting a specific expediency. Instances when entirely new rulings have been formulated also abound, with weak or no support from the existent precedents of Islamic law.

In all the above situations, it is of paramount importance to assess the conformity of such rulings to the theoretical foundations of Shari'ah on the subject. For this purpose, it is necessary to discover the relevant overall theory or philosophy of the Shari'ah on the issue in question. Often, this underlying theory is not referred to explicitly in the works of Islamic law, which generally suffice with an explanation of the rulings. The reason could be that such basic theories are not of importance as far as practical adherence to Shari'ah is concerned, and happen to be of interest only to those scholars who are involved in the formulation of rulings through the application of *ijtihad*, i.e. *mujtahids* at any level. However, in developing rulings for addressing a novel issue and formulating new rulings, awareness of the underlying theory is of vital importance, so as to preserve the uniformity of Shari'ah regulations and to maintain their coherence.

Theoretical foundation of rulings

A deeper perusal of the works of the major schools of Islamic law amply highlights that in each area of law, a theoretical foundation has acted as the basis for all the rulings on the subject. Sometimes, the schools had developed individual theoretical foundations, based on which their approaches to, and rulings on, detailed issues related to the topic have varied. The underlying theory reflected the individual perception of the *mujtahid* regarding the overall foundation relevant to the topic, the nature of which was also influenced by his verdict on matters relating to various other areas of Shari'ah. However, when a school is taken individually, its rulings on a topic are always found to be coherent and uniform, that do not give rise to contradiction within the school.

A broad study of various areas of Islamic law would reveal that such general theories exist in almost all major fields, which serve as the basis for the detailed rulings or the *furū'*. In order to highlight the existence of underlying theories that fashion and give form to detailed rulings in the *ijtihadic* process undertaken by *mujtahids*, we may use the contract of *shirkah al 'aqd* or joint venture, especially with regard to its capital and formation, as an example. It is also appropriate because each school of Islamic law appears to have adopted a distinctly unique underlying theory or foundation in the matter of *shirkah al 'aqd*, which is amply illustrative of the argument.

Is there a theory underlying conventional law on commercial partnership?

Conventional laws on partnership in the modern context do not appear to have a common theory that serves as the foundation linking all relevant rules pertaining to capital and other issues. In conventional law, in the case of a partnership, there are generally no fixed rules regarding contributions to capital or its maintenance. Under the partnership agreement a partner may be required to inject further funding from time to time; it could be credited to its capital account, if stated, or in effect be regarded as a loan.¹ With regard to limited companies, both public and private, the members are liable to pay for their shares either in money or in money's worth, i.e. non-cash assets, goodwill or know-how.² While only a quarter of the shares of a public company must be paid up, there is no minimum payment requirement for a private company. If the shares of a public company are to be paid for by the transfer of a non-cash asset, it could take place within five years of the allotment.³ When the issued or subscribed capital is partly paid up, the amount represented by the uncalled proportion is known as the uncalled capital, which may be called up by the company as and when required.⁴ Uncalled capital is an asset equivalent to debtors, the debtors in this case being the members,⁵ i.e. the shareholders. Reserve capital is uncalled capital the company has resolved only to call up on liquidation.⁶ It is evident from the above that partnerships could be formed on the basis of capital yet to be paid, and may come into being while the whole capital or part of it remains in the form of debt, without facing an objection at common law. While capital requirements for the formation of companies are relatively stricter, no inter-relation is apparent between the rules that govern capital and other areas. Therefore, it appears that as long as the agreement is valid and the legal requirements fulfilled, the nature of capital at the finalization of the contract is not of material relevance in conventional law.

Core theory of *shirkah al-'aqd* as perceived by Sunni schools of Islamic law

In order to comprehend how each school has perceived the essential core structure of *shirkah*, it is necessary to analyse the treatment of *shirkah* capital in the texts of each school. Concerning the nature of capital in *shirkah*, the preferred position of the Hanafi and Hanbali schools recognizes *shirkah al-māl* only on the basis of monetary currency, while the Shāfi'i school has extended the permissibility to include other *mithliyyāt* (i.e. fungibles that are sold by weight or measure or consist of equal units) such as grains. The Māliki school also accepts non-liquid commodities other than *mithliyyāt*. Another report narrated from Imām Ahmad indicates acceptability of non-liquid assets as partnership capital. In the case of *mudārabah*, all the schools of Islamic law are observed to be in agreement that the capital necessarily has to be of monetary currency. The only divergent opinion appears to be a second report from Imām Ahmad, that allows *shirkah* as well as *mudārabah* on the basis of commodities as capital.⁷

¹ Ian Hewitt, *Joint Ventures*, 2nd Ed, London, Sweet & Maxwell, 2001, 189.

² Keith Abbott, *Company Law*, 5th Ed, London, DP Publications, 1993, 74.

³ Abbot, 46. This is the British common law position.

⁴ T G Reeday, *The Law Relating to Banking*, London, Butterworths, 1976, 150-157.

⁵ Abbot above, 100.

⁶ Francis Roundell, *Company Law in a Nutshell*, London, Sweet & Maxwell, 1980, 12.

⁷ References are given in the detailed analysis that follows. For additional clarification, see Muhammad Abdurrahman Sadique, *Essentials of Musharakah and Mudarabah: Islamic texts on theory of partnership*, Kuala Lumpur, IIUM Press, 2009.

However, recognition of capital by the schools as above is not a simple premise ranging from monetary currency to commodities, as each school has elaborated in detail the scope and nature of capital sanctioned by them. Thus, recognition of commodities as capital does not necessarily incorporate recognition of all types of currency and *mithliyyāt*. A school that allows commodities could be found to impose restrictions on currency or some types of *mithliyyāt*. For instance, the Māliki school that allows commodities as capital, does not recognise the possibility of *shirkah* on currency of different denominations such as gold and silver, or according to Imām Mālik, on foodstuff.⁸ Each school is noted to have recognized the assets eligible to form the capital in *shirkah al-māl* on the basis of its own theoretical concept of partnership, and the specific injunctions found in each school in this regard could always be traced back to fundamental doctrines peculiar to the school. This is because of the fact that each school of Islamic law has developed a coherent theory of the principles of partnership and investment through its distinctive interpretation of the Qur'an and the Sunnah, and has attempted to elaborate all relevant aspects in a way conforming to the individual perspective adopted by the school on the subject.

It could be postulated in this regard that the basis of difference among the schools on the issue of capital is related to the distinct perception as found in each school regarding the essential structure of *shirkah*. Therefore, a partial analysis of the theoretical concept of *shirkah* in each school and its effect on defining the nature of capital is attempted below, in order to comprehend how perception of the essence of *shirkah* has influenced the *ijtihadic* process of jurists.

Theory of *shirkah* in the Shāfi'i school and their approach to capital

Existence of property is considered essential for the formation of *shirkah al-'aqd* in the Shāfi'i school, who insist on the presence of jointly owned capital for the purpose. This ensues from their recognition of *shirkah al-'aqd* as an entity based on *shirkah al-milk* coupled with mutual permission by the partners to transact in the shares belonging to each other. As such, the prior existence of common property is of paramount importance for the establishment of *shirkah al-'aqd*. It should be noted that the rejection of *shirkah al-abdān* and *shirkah al-wujūh* in the Shāfi'i school is primarily due to the absence of joint capital based on *shirkah al-milk* in these two modes. Based on the central position given to joint capital, profit distribution too necessarily takes place according to the ratio of capital input. Common property could result through a means such as joint inheritance or joint purchase, which establishes undivided joint ownership in the asset concerned. When mutual permission to transact is incorporated to this, the contract of *shirkah* is complete. Based on this position, when jointly owned property is not available at the inception, the Shāfi'i school insists on the creation of such stock that could serve as the basis of the contract, before the contract of partnership is concluded.

When each potential partner contributes monetary currency for establishing an equity venture, in order to establish a joint capital base as required by the Shāfi'i theory, the monies offered have to be mixed until differentiating the input of each becomes impossible. This is held necessary even in the case of monetary currency, based on the fundamental principle upheld by the Shāfi'i school that units of monetary currency could

⁸ Sahnūn ibn Sa'īd, *al-Mudawwanah al-Kubrā*, Bayrūt, Dār Sādir, vol. 12, p. 59, al-Khurashi, *Hāshiyah al-Khurashi*, vol. 6, p. 343.

be specifically distinguished, i.e. particularised.⁹ As such, a *shirkah* may not be formed until the capitals are thoroughly mixed creating a joint stock where the contribution of each partner cannot be separately known. This is because the Shāfi'i theory holds that as long as the capitals are distinguishable, each party shall be individually liable for his own stock, which is not acceptable in *shirkah*. Thus, common liability for each unit of the capital appears central to the Shāfi'i perception of partnership.

Accordingly, monetary currency contributed by the partners must be of identical denomination. A partnership may not be created on the basis of different denominations of capital such as gold and silver coins, as the capital of each being identifiable, the liability of each capital will continue to lie with its owner. In addition to being of the same denomination, the capital components should be identical in quality. Capital is also allowed to be contributed in *mithliyyāt* other than monetary currency such as grains and other items sold by weight or measure or consist of equal units, when the inputs are homogeneous and are identical in quality. Here, too, the formation of a jointly owned capital base is possible through mixing the capitals. The partners' shares in the venture are based on the value of the respective inputs, and not on their quantity.

With regard to non-liquid assets, Shāfi'i jurists concede that these may form partnership capital if they happen to be in the joint ownership of the partners when the partnership is intended to be created, due to such assets having been jointly inherited or jointly purchased, etc. Indeed, they note that joint ownership over non-liquid assets established in this manner is stronger than what is artificially produced through mingling of homogeneous fungibles. Some Shāfi'i authorities have gone to the extent of rejecting the occurrence of an authentic *shirkah* when different capitals are mingled.¹⁰ In the absence of a jointly owned pool, the logical result of the above theory is that non-liquid commodities be excluded from forming *shirkah* capital. This is because such assets, by their nature, could be identified as the property of their owners. Unlike monetary currency and *mithliyyāt*, in the case of non-liquid commodities, a jointly owned capital base cannot be created through mingling the inputs of partners. Even when they could be mingled, the inputs of each partner would remain identifiable as such, and consequently, each partner would bear the liability of his stock individually. Due to this reason, commodities may not be directly contributed towards capital of *shirkah* according to the Shāfi'i school.¹¹

However, it is evident from a perusal of Shāfi'i legal works that the above represents a strict rehearsal of the theoretical position underlying the Shāfi'i perspective of partnership capital. After delineating the theoretical position, Shāfi'i jurists are noted to invariably

⁹ The Shāfi'i school holds that units of monetary currency could be specifically identified by distinctively indicating a particular unit/units (i.e.). When specific units are particularised in a transaction, the legal effects thereof will confine to the units thus indicated. Thus, if a sale is contracted on the basis of specific units of currency, the sale becomes void if they meet with loss before payment. The purchaser is not allowed to substitute them with other similar units of currency in this event, as the sale had involved the specified units, similar to a specific commodity. Conversely, if the units of currency are left unspecified as is normal in trade, payment could be made through any unit of the stated denomination. See al-Nawawi, *al-Majmū' Sharh al-Muhadhdhab*, Bayrūt, Dar al-Fikr, 1996, vol. 9, p. 256.

¹⁰ Al-Nawawi has reported this position from al-Juwayni, according to whom the proceeds from the sale of assets will belong to the respective owners in this event. See al-Nawawi, *Rawdah al-Tālibīn*, vol. 3, p. 517.

¹¹ Al-Ghazālī, *al-Wasīt*, vol. 3, p. 261, Abu al-Hasan 'Alī ibn Muhammad al-Māwardī, *al-Hāwī al-Kabīr*, Bayrūt, Dar al-Kotob al-Ilmiyah, 1999, vol. 6, p. 473, al-Nawawi, *Rawdah al-Tālibīn*, vol. 3, p. 509, Muhammad al-Sharbīni al-Khatīb, *al-Iqnā'* ayrūt, Dar al-Fikr, 1415H, vol. 2, p. 317, Sulaymān ibn 'Umar al-Bujayrami, *Hāshiyah al-Bujayrami*, Diyār Bakr, al-Maktabah al-Islāmiyyah, vol.3, p. 42.

point out the *hīlah* prescribed for the creation of a *shirkah* based on commodity capital through concluding a mutual sale that results in jointly owned capital eligible to become the basis of *shirkah*. This technique does not involve the process of mingling, thus removing the impediment to forming a partnership between two partners who are away from each other. In fact, Shāfi'i jurists have expressly stated that the bar on non-liquid capital is only applicable when two partners produce specific amounts of capital and intend to form a partnership based on them straight away. Otherwise a partnership could be initiated conveniently on the basis of any type of asset if the appropriate process is adopted. Thus, al-Nawawi categorically declares that the rules prohibiting or allowing partnership based on the nature of capital pertain to a situation where one submits a quantity of assets belonging to him and another his, seeking to form the partnership capital directly. If not, formation of partnership is feasible in a manner other than this in all types of property.¹²

Theory of *shirkah* in the Hanafi school and their approach to capital

Hanafi school perceives the core concept of *shirkah al-'aqd* to be built around the contract of agency. Hanafi jurists do not consider the existence of property, jointly owned or otherwise, essential for the validity of *shirkah al-'aqd* in general. Their recognition of *shirkah al-abdān* (*taqabbul*) and *shirkah al-wujūh* as valid forms of partnership ensues from this basis. Since these two modes, although lacking in capital, consist of mutual conferring and acceptance of agency by the partners respectively for undertaking contracts of labour and sharing the ownership of merchandise purchased, their validity is upheld in the Hanafi school. When *shirkah al-'aqd* does involve capital, i.e. in the case of *shirkah al-amwāl*, Hanafi theory insists on the capital consisting of absolute mediums of value (*athmān mutlaqah*) where the units are totally indistinguishable from each other and are not subject to specific identification. This attribute is only found in monetary currency.¹³ As property is not the sole basis of *shirkah*, profit distribution could be on a ratio agreed at the outset, also taking management responsibilities into consideration.

Thus, according to the Hanafi school, *shirkah al-'aqd* based on property is primarily permitted only on the basis of monetary currency. All units of monetary currency belonging to the same denomination are identical in value, and individual units do not possess any characteristic that differentiates them from others. This means that any distinctive attribute found in particular units such as the age of the unit, its colour or level of purity in gold and silver coins (provided the gold or silver content is more) are non-consequential legally. Hanafi jurists have adopted the position that units of monetary currency cannot be specifically identified by particularization, except in certain transactions.¹⁴ This presumption is inextricably related to the concept of *shirkah* capital in

¹² al-Nawawi, *Rawdah al-Tālibīn*, vol. 3, p. 509.

¹³ al-Bābarti, *al-'Ināyah*, printed with Ibn al-Humām, *Fath al-Qadīr*, vol. 6, p. 171, and al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 6, p. 94.

¹⁴ I.e. Muhammad ibn Ahmad al-Samarqandi, *Tuhfah al-Fuqahā'*, Bayrūt, Dar al-Kutub al-'Ilmiyyah, 1405H, vol. 2, p. 38. This means that in transactions of exchange, particular units of currency cannot not be specified as the counter value. If some units are particularized, it is ineffective, and payment could be made in an equal number of other units belonging to the same denomination.

the Hanafi school, which considers it essential that the capital in *shirkah al-'aqd* be of absolute mediums of value, i.e. money, which defies specific identification.¹⁵

In *shirkah al-'aqd* involving capital, Hanafi theory emphasises on the possibility of *wakālah* (agency) of a required nature in the asset concerned.¹⁶ This means that the capital should be such that, when a partner contracts a sale (i.e. a purchase) exercising his agency, the liability of settlement could primarily relate to the agent. As stated above, this could be conceived only in monetary currency, according to the explanation of Hanafi jurists. If the capital is such that an agency of the required nature could materialise therein, this is sufficient for the valid formation of *shirkah*. Therefore, Hanafi jurists do not insist on the existence of a jointly owned pool of capital, or on mingling of the capital inputs in order to create such a common pool. This is because a valid mutual agency (i.e. of the required nature), which is the crux of *shirkah*, could materialize even without such mingling of capitals. Accordingly, the meaning of 'mingling' and 'sharing' conveyed by the term *shirkah* is not taken by Hanafi jurists to denote sharing in a common capital necessarily. The common sharing as connoted by the term could well mean joint ownership in assets purchased through the *shirkah* capital, or joint entitlement to the profits of the venture. Such sharing could be found even in the absence of a jointly owned capital pool.¹⁷

Based on the above, there is no bar to the capital contributions of the partners consisting of different denominations of currency or of varying qualities, as the existence of *shirkah al-milk* is not regarded necessary in the Hanafi theory. Since agency to purchase using the capitals of each other for commonly sharing the item purchased can be valid even when the capitals consist of different denominations, *shirkah al-'aqd* is held valid in this situation.¹⁸

As dictated by this line of reasoning, the Hanafi school does not recognize the validity of non-liquid commodities as capital in *shirkah al-'aqd*. Non-liquid commodities, as opposed to absolute mediums of value, i.e. monetary currency, are by nature distinguishable. As such, when a purchase is done against such an asset, if the particular asset is destroyed before delivery, its replacement is not necessary and the transaction becomes void. The partner would not bear personal liability for 'payment', i.e. by submission of another asset in this instance, as the transaction related to the particular asset only.¹⁹ In addition, if the major part of the profits resulted through the sale of the assets of one partner, the other would share in such profits without having borne liability for the former's assets.²⁰ Therefore, Hanafi jurists reason that the involvement of non-liquid assets as capital entails profit without bearing liability, prohibited in Hadith.

¹⁵ See for details Muhammad Abdurrahman Sadique, *A study of equity financing modes for Islamic financial institutions from a shari'ah perspective*, Kuala Lumpur, International Islamic University Malaysia, March 2007, unpublished doctoral thesis.

¹⁶ I.e. agency where the liability of settlement could primarily relate to the agent. This could be conceived only in monetary currency, according to the explanation of Hanafi jurists.

¹⁷ Al-Sarkhasi, *al-Mabsūt*, vol. 11, p. 152. This could be one reason why the presence of capital is not deemed necessary in the Hanafi school at the inception itself of the contract.

¹⁸ Al-Sarkhasi, *al-Mabsūt*, vol. 11, p. 153.

¹⁹ al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 6, p. 95.

²⁰ al-Bābarti, *al-'Ināyah*, printed with Ibn al-Humām, *Fath al-Qadīr*, vol. 6, p. 169. This apparently means that neither partner will bear liability of the required nature, not that non-bearing of liability is confined to the smaller investor.

Consequently, non-liquid capital is disallowed due to inadmissibility of agency in the necessary manner therein.²¹

The Hanafi theory does not recognize the validity of *mithliyyāt*, i.e. fungible items sold by weight or measure and commodities consisting of identical units, as *shirkah* capital due to the fact that *mithliyyāt*, being subject to particularization, are similar to non-liquid commodities in this respect. As such, agency as necessitated by *shirkah* is not feasible in them due the objection described above. Therefore, irrespective of whether the inputs of partners consist of identical types of *mithliyyāt* or otherwise, they could not form capital of *shirkah* outright, and each partner will be responsible for any loss or profit resulting through his own capital.

Although non-liquid assets are categorically ruled out from forming *shirkah* capital due to their being completely distinguishable, thus constituting the perfect antithesis of absolute mediums of value, Hanafi jurists have opted to recognize their admissibility as *shirkah* capital if the contract is formed on a pre-existing joint pool of non-liquid capital. When a *shirkah* is sought to be established on the basis of non-liquid inputs from both parties, they propose that each potential partner initially sell an undivided share of his assets against a similar share in the assets of the other, thus creating a *shirkah al-milk* comprising both capitals, and contract the *shirkah* thereafter. If the partners wish, the proportion of the shares to be exchanged could be fixed in such a way that the proportionate ownership of the partners' in the joint capital reflects the proportionate value of the initial capital input.²²

Theory of *shirkah* in the Hanbali school and their approach to capital

The Hanbali school does not regard partnership to be inextricably related to property. In addition to property, *shirkah* could also exist on the basis of sharing liability or labour. Hence, *abdān* and *taqabbul* are held valid. In *shirkah al-'inān* where property is involved, agency (*wakālah*) and trust (*amānah*) are identified as the basic characteristics, as each partner makes the other a trustee in his share of the capital and appoints him as an agent through permitting him to transact. The contract of *shirkah* itself takes the place of express permission by each partner to the other, as *shirkah* consists of agency. When *shirkah* involves capital, Hanbali school insists that it be of monetary currency, which serves as the medium of evaluation and payment.²³ Distribution of profit is based on a ratio agreed between the partners.

Where a jointly owned pool of assets is existent, resulting through joint inheritance etc, *shirkah* could be contracted on its basis if the proportion of the partners' ownership is known. However, Hanbali theory does not require the pre-existence of a jointly-owned pool of capital for the formation of *shirkah*, and does not prescribe mingling of capitals for the creation of such a pool. This is not because joint ownership of capital is not essential for the validity of *shirkah* as agency may materialize even without such joint capital, which is the position of the Hanafi school. On the contrary, it is due to a fundamental

²¹ Al-Sarkhasi, *al-Mabsūt*, vol. 11, p. 160, 161, al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 6, p. 95,

²² Ibn al-Humām, *Fath al-Qadīr*, vol. 6, p. 174, al-Haskafi, *al-Durr al-Mukhtār* and Ibn 'Ābidīn, *Radd al-Muhtār*, vol. 4, p. 310.

²³ Mansūr ibn Yūnus al-Bahūti, *Kashshāf al-Qinā'*, Bayrūt, Dār al-Fikr, 1402H, vol. 3, p. 497, Ibn Qudāmah, *al-Mughni*, vol. 5, pp. 115, 129.

principle that stands prominent in the Hanbali perception of *shirkah*. In the context of partnerships involving capital, Hanbali theory maintains that the contract of *shirkah* results in each partner becoming the owner of half the capital input of the other. Thus, the contract of *shirkah*, by itself, produces the transfer of ownership of half of each partner's capital to the other, without the need for any external measure to achieve this end.²⁴ The capital contributed by each becomes commonly owned between them as a result of the *shirkah* contract, even though no mingling had taken place.²⁵ Consequent to this principle, mingling as required by the Shāfi'iyyah for the creation of jointly held capital becomes unnecessary, as this end is realized automatically. Due to the fact that mingling is not required, capital could be contributed in different denominations of currency. Thus, the partners may contribute currency of dissimilar denominations towards the *shirkah*, which shall become jointly owned immediately upon the finalization of the contract.

Consequently, the capital contributed by each partner, even when not mingled, does not remain in his individual ownership after the contract as conceived by the Hanafi theory, but becomes commonly owned. It is significant that ensuring possession of the respective shares that entered the ownership of each partner through the contract of *shirkah* is not emphasized. Hanbali jurists hold that the contract itself makes the capitals become 'mingled', thus leading to joint liability and joint sharing of any increase that takes place in the capitals. They regard joint sharing of liability and loss as a necessary outcome of *shirkah* similar to profit. The case of *khars*, i.e. exchange of dates and raisins against fresh dates on palms and grapes on vine respectively by estimation, is cited in support of treating the contract itself tantamount to possession. Hence, loss befalling the capital of any partner is held to be a loss affecting the joint capital, the liability of which is shared by the partners.²⁶

Non-liquid assets, inclusive of *mithliyyāt*, are not admissible as capital of *shirkah* in the Hanbali school according to one of two reports from Imām Ahmad, due to the fact that co sharing or partnership as dictated by *shirkah* may not materialize in commodities. This is held to be the stronger position of the Hanbali school.²⁷ Hanbali jurists explain that such partnership could take place in the case of non-liquid assets in the assets themselves, in their values, or in the prices received through their sale. Occurrence of *shirkah* in the assets themselves is not admissible, as redistribution of capital is not possible here; if the value of the input of one partner rises, the entire profit could accrue to him. Partnership in the value of capitals too is not feasible, as the element of value being indefinite, its ascertainment could lead to dispute. Similarly, partnership may not take place in the prices received upon the sale of the assets, as these are non-existent and not owned at the time of contracting.

²⁴ Ibn Qudāmah, *al-Mughni*, vol. 5, p. 128.

²⁵ Ibn Qudāmah, *al-Mughni*, vol. 5, p. 128, al-Bahūti, *Kashshāf al-Qinā'*, vol. 3, p. 497. It is important that Hanbali jurists are not observed to use the term 'sale' to denote the mutual of transfer of ownership in part of the capitals, as done by Māliki jurists.

²⁶ Ibn Qudāmah, *al-Mughni*, vol. 5, p. 128, al-Bahūti, *Kashshāf al-Qinā'*, vol. 3, p. 499. Hanbali school is noted to be less restrictive on the issue of taking possession in general. Transfer of liability is contingent on possession only in the case of items sold by weight, measure or count, i.e. *mithliyyāt*, or according to a second position, in the case of foodstuff that belong to *mithliyyāt*. See Ibn Qudāmah, *al-Mughni*, vol. 4, pp. 88, Ibn Qudāmah, *al-Kāfi*, Bayrūt, al-Maktab al-Islāmi, 1988, vol. 2, p. 27.

²⁷ al-Bahūti, *Kashshāf al-Qinā'*, vol. 3, p. 498.

Another report from Imām Ahmad recognizes the permissibility of *shirkah* as well as *mudārabah* on the basis of non-liquid capital. After citing Hanbali jurists who have given preference to this report, al-Mardāwi has upheld it as the correct position.²⁸ This stance is supported by the argument that the objective of *shirkah*, namely, the right to transact in both capitals and the mutual sharing of profits, is realizable in commodities, similar to monetary currency. As far as distribution is concerned, the value of the assets contributed at the inception could be taken as the basis, as is done in the case of Zakah.²⁹

Theory of *shirkah* in the Māliki school and their approach to capital

Shirkah in essence consists of agency and sale in the approach of the Māliki school.³⁰ Equality in all aspects of partnership is considered as the fundamental principle common to all types of *shirkah*, i.e. in contributions of capital and labour and sharing of profit and loss.³¹ Where the capital inputs of the partners are unequal, labour as well as profit and loss should necessarily be proportionate to the capital input ratio. *Shirkah* could exist only on the basis of either capital or labour. However, where capital exists, labour is considered subordinate to capital.³² While *shirkah al-abdān* is held valid, *shirkah al-wujūh* is rejected, as the labour element is considered imprecise in the latter.

An essential principle that appears unique to the Māliki perception of *shirkah* is the disapproval of a combination between *shirkah* and *sarf* (monetary exchange). In Māliki law, a contract of *sarf* is described as an exchange of monetary currencies belonging to different denominations.³³ *Sarf* has not been allowed to take place simultaneously with the contract of *shirkah*. According to Māliki theory, a valid partnership cannot form when the inputs of the partners consist of different currencies, as here a contract of *sarf* is assumed to accompany the contract of *shirkah*. The reason for this prohibition is the general stipulation of the Māliki school that a contract of *sarf* may not be accompanied by any other contract. In addition, a contract of *sarf* requires immediate transfer of possession (*munājazah*) of the currencies exchanged, which does not materialize in the case of forming a *shirkah* involving monetary capital.³⁴

Thus, where the partners contribute currency towards the *shirkah*, in order to eliminate the occurrence of *sarf*, Māliki jurists hold it necessary that the contributions be of identical denomination. It could be argued here that according to the Māliki perception of *shirkah*, *sarf* (or in Māliki parlance, *murātalāh*) of an imperceptible nature should be deemed to occur even when the inputs are identical in denomination, which could invalidate the contract due to the absence of immediate possession. Ibn Rushd explains that the absence

²⁸ ‘Ali ibn Sulaymān al-Mardāwi, *al-Insāf*, Bayrūt, Dār Ihya al-Turāth al-‘Arabi, vol. 5, p. 410.

²⁹ al-Mardāwi, *al-Insāf*, vol. 5, p. 410, Abū Ishāq Ibrāhīm ibn Muhammad Ibn Muflih, *al-Mubdi’*, Bayrūt, al-Maktab al-Islāmi, 1400H, vol. 5, p. 5.

³⁰ Al-Khurashi, *Hāshiyah al-Khurashi*, vol. 6, p. 338.

³¹ Abū ‘Umar ibn ‘Abd al-Barr, *al-Kāfi*, Bayrūt, Dār al-Kotob al-Ilmiyyah, 1407H, vol. 1, p. 390.

³² Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, pp. 275, 277.

³³ Māliki school restricts the application of the term *sarf* to exchange of currencies belonging to different denominations. When the exchange involves homogeneous currencies, it is referred to as *murātalāh*. See Muhammad ‘Arfaḥ al-Dasūqi, *Hāshiyah al-Dasūqi*, Bayrūt, Dar al-Fikr, vol. 3, p. 2. The other schools are observed to use the term *sarf* to denote both these transactions.

³⁴ Ibn ‘Abd al-Barr, *al-Kāfi*, vol. 1, p. 390, Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 273.

of immediate possession in this instance is tolerated due to the existence of *Ijmā'* on the permissibility *shirkah* based on homogeneous monetary currency.³⁵

This perception ensues from a vital assumption upheld by the Māliki school pertaining to the reality of *shirkah*. Māliki theory holds that with the finalization of the contract, an undivided share of the capital input of each partner is sold to the other against a similar share in the latter's input. It is significant to note that Māliki texts refer to this mechanism as a sale, where undivided shares in the capitals of the partners change ownership. This recognition indicates that when capital is involved, a commonly held capital pool is considered essential in the Māliki school for the establishment of *shirkah*, although its prior existence is not deemed necessary. Creation of the jointly held assets as required in this regard is achieved through the presumption that the contract of *shirkah* necessarily accompanies an instantaneous sale, a fact that is perceived to constitute the crux of business partnership in Māliki theory. Consequently, since contribution of different types of monetary currency towards *shirkah* necessarily gives rise to a contract of *sarf* where, in addition to the contract of *sarf* being accompanied by another contract, i.e. *shirkah*, different currencies are sold against each other without ensuring immediate transfer of possession, it is not allowed.³⁶

The same theoretical assumption that led to the inadmissibility of different types of currency forming *shirkah* capital, namely, that it is a combination of *sarf* and *shirkah* with the absence of immediate possession, has led to the permissibility *shirkah* based on contribution in kind, i.e. non-liquid capital. Since barter sale involving non-liquid assets is other than *sarf*, there is no bar to capital inputs consisting of commodities on both sides. Similarly, a valid *shirkah* may be formed on the basis of commodities contributed as capital on one side and monetary currency on the other.³⁷ In these instances, a simple sale is held to take place in the respective shares of capitals, resulting in joint ownership of the capital inputs. The value of the commodities on the date of contract is taken as the capital share of the partners for the purpose of recognizing profits.³⁸ It is noteworthy in this regard that in holding non-liquid capital admissible, Māliki theory does not differentiate between *mithliyyāt*, i.e. generic commodities sold by weight or measure, and the rest. However, capital consisting of foodstuff is noted to be subject to specific rules, as discussed below.

The two fundamental factors described above, i.e. perception of *shirkah* as a mutual sale involving undivided shares of capital inputs and the resultant rejection of *shirkah* where it involves *sarf* in the Māliki sense, have led to another ruling. Imām Mālik holds that a valid *shirkah* may not be formed on capital inputs consisting of foodstuff from both sides. The reason is that similar to monetary currency, foodstuff too falls under the category of items where deferment is impermissible. In exchanges of foodstuff, immediate transfer of possession is mandatory. When capital inputs consist of foodstuff, the contract of *shirkah* would result in a mutual sale of foodstuff where, however, immediate possession would

³⁵ Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 273.

³⁶ Al-'Abdari, *al-Tāj wa al-Iklīl*, vol. 5, p. 123.

³⁷ The validity of *shirkah* in these instances is recognized by Imām Mālik and endorsed by Imām Ibn al-Qāsim. Ibn Rushd has referred to an unconfirmed report from Imām Mālik that disapproves of *shirkah* in these instances. See Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 273.

³⁸ Muhammad ibn 'Abd al-Rahmān al-Maghribi al-Hattāb, *Mawāhib al-Jalīl*, Bayrūt, Dār al-Fikr, vol. 5, p. 123, 124, Sahnūn ibn Sa'īd, *al-Mudawwanah al-Kubrā*, vol. 12, p. 55.

not take place. Even if sharing of liability is achieved through mingling the capitals, this could not be construed as possession.³⁹ Therefore, *shirkah* based on foodstuff alone is rejected by Imām Mālik in general, which forms the preferred position of the Māliki school. According to the lesser position, Imām ibn al-Qāsim has recognized *shirkah* as valid when foodstuff contributed as capital are homogeneous. Ibn Rushd explains that the recognition of ibn al-Qāsim is based on equating (i.e. *qiyās*) *shirkah* based on homogeneous foodstuff to that of homogeneous monetary currency permitted by *ijmā'*, while Imām Mālik holds that *qiyās* may not be resorted to where the original permission is based on a concession upheld by *ijmā'*.⁴⁰

Summary of the theoretical positions of the schools on *shirkah*

The significance awarded by schools of Islamic law to joint ownership of *shirkah* capital is twofold. The majority of the schools hold joint ownership of capital important for the continuation, if not existence, of *shirkah* based on property. The Hanafi school, although allowing that *shirkah* would lead to joint ownership in some form in the course of its tenure, does not hold it a necessary ingredient for its existence. Although partnerships may be created based on joint ownership of capital, it is not essential for the concept of *shirkah*.

According to Shāfi'i jurists, a *shirkah* may not form except on the basis of pre-existent joint capital. Joint ownership in capital should be established before finalising the *shirkah* contract, i.e. granting each other permission to transact in one's share. Joint ownership could result from bona fide means such as joint inheritance, joint purchase, etc, or through an independent contract such as a mutual sale specifically effected for facilitating formation of the *shirkah* subsequently. A crude form of joint ownership could also be created through an artificial means such as mingling the capitals together until separation is unfeasible. Pre-existent joint ownership is emphasised in order to ensure the partners' joint liability for the capital from the inception of *shirkah*. Thus, joint liability for the whole capital is central to *shirkah* in the Shāfi'i school, which regards the partners being separately liable for their respective capitals unacceptable. When joint ownership is ensured beforehand, a *shirkah* could be created on any type of capital such as different denominations of money, different commodities etc without restriction.

Similar to the Shāfi'i school, Māliki and Hanbali schools, too, have considered joint ownership significant for the acceptance of *shirkah*. However, these schools do not require prior establishment of such joint ownership necessary, because the process of forming a *shirkah* itself is deemed to result in joint ownership. As far as the Māliki school is concerned, the contract of *shirkah* is held to accompany the occurrence of a mutual sale between the partners, through which the partners become joint owners in the whole capital proportionately. This sale finds its full expression when the partners had produced assets other than monetary currency as capital. The mutual sale takes place based on the value of the assets, for which purpose valuation of the assets is mandatory at the inception of *shirkah*. The *shirkah* contract is held to become finalised upon valuation, at which point the mutual sale is held to take place establishing the partner's joint ownership. When the

³⁹ 'Ali ibn Ahmad al-'Adawi, *Hāshiyah al-'Adawi*, printed with al-Khurashi, *Hāshiyah al-Khurashi*, vol. 6, p. 343, 344, Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 274.

⁴⁰ Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 274.

capital is formed of commodities, together with joint ownership, joint liability too results through the mutual sale. Possession is irrelevant here in the Māliki school.

The Hanbali approach to formation of *shirkah* is in essence similar to that of Māliki jurists, with a significant difference. It is that, while the Hanbali theory also holds that *shirkah* itself results in the partners' joint ownership in the capitals, instead of referring to this process as a mutual sale, they have chosen to regard it a direct result of the *shirkah* contract. The mutual establishment of ownership over proportionate shares of each other's capital takes place as a necessary legal consequence of *shirkah*, and not due to a mutual sale understood to take place along with the *shirkah* contract. Along with joint ownership, the contract of *shirkah* also results in the joint liability of partners for the whole capital. Therefore, joint ownership and joint liability both result automatically consequent to the contract of *shirkah*. Hanbali theory also recognises that *shirkah* could also be formed based on capital jointly owned by the partners before the *shirkah*.

In comparison with the above, the Hanafi approach to joint ownership and joint liability in the context of *shirkah* is found to be unique. While the other three schools had emphasised on the indispensability of joint ownership, either making it a prerequisite such as the Shāfi'i school or considering it an immediate outcome of a valid *shirkah* contract, the Hanafi school considers the formation of a valid *shirkah* unrelated to joint ownership of capital. Neither is joint ownership a prerequisite for *shirkah*, nor does the latter result in joint ownership through a process such as mutual sale or exchange. On the contrary, even after the contract of partnership, the capitals remain in the individual ownership of the respective partners. As a result, the liability for the capitals remain with the owners, each of whom is liable even after the formation of the *shirkah*, to bear any loss befalling his capital alone, until his capital is utilised in purchases. Since joint ownership is not sought in *shirkah*, capital could be of different denominations. The resultant individual liability is acceptable, as joint liability for capital is not required.

To summarise the issue, it is evident that while three of the schools have taken the position that a *shirkah* is essentially based joint ownership of property, the Hanafi school does not regard joint ownership of property mandatory for the purpose. Of the three schools, the Shafi'i school regards *shirkah al-'aqd* possible only on pre-existing joint property, while the other two, i.e. the Maliki and the Hanbali schools consider the formation of the joint venture itself to result in the creation of joint ownership over property, albeit in different ways. The Maliki school considers the essence of *shirkah al-'aqd* to consist of the component contracts of agency and sale in an implicit manner. Thus, the contract of *shirkah* involves an internal sale contract where a part of the assets of one partner is sold to the other against a part of the latter's assets. The Hanbali school, however, considers the contract of *shirkah* itself to lead to joint ownership in the assets, without upholding the occurrence of an implicit sale in the process. As far as the Hanafi perception of the essence of *shirkah* is concerned, it is understood by them as an agency granted mutually, which does not result in, or require, joint ownership of the capital. Joint ownership, according to them, only takes place in the profits, and the assets purchased for the venture.

Importance of ascertaining the core theory

The analysis above illustrated the fact that the rulings of each school on various aspects of *shirkah* have been directly influenced by the position adopted by the school with regard to its essence and substance. Each school, as shown above, has perceived the core essence

that forms the relationship of *shirkah* in a distinct manner. This unique perception adopted by each school had dictated its approach to the admissibility of various types of capital, the occasion when capital should be present, and a multitude of related rulings that were all modelled and given shape to by the perceived core theory.

Thus, for the purpose of modern equity financing, the question arises as to which of the above core theories should be adopted in the modern context, or whether an entirely new theory should be formulated. A less scientific approach would be to disregard such core theories totally and to suffice with adopting rulings that are convenient, irrespective of which school they originate from and the theoretical foundations that gave rise to them. However, while this could be less offensive perhaps from a layman's approach where the purpose could be expediency alone, in formulating rulings with a view to giving shape to an entire economic system, it could hardly be considered adequate or responsible. For ensuring consistency and regularity of Shari'ah rulings, the matter should be studied in depth, and a theory that is most suitable in the modern scenario adopted as the basis. Otherwise, serious discrepancies may result that should only be too obvious to a researcher delving into the theoretical foundations, which may critically undermine the credibility and authority of Shari'ah rulings.

Besides equity financing, the above is true of many other areas relevant to modern developments in Islamic finance. Due to various practical needs, rulings from various schools have been adopted, or new rulings developed. In this situation, where the rulings on a topic cannot be included under an existent theory, there is an evident danger of the Shari'ah regulations losing their relation to each other through a general theory that links them together so as to form a well-knit single unit. This situation calls for a careful attempt to discover or formulate afresh theoretical foundations of various topics, which could accommodate related regulations. Although deeper research into theoretical aspects of modern Shari'ah rulings with the hostile intent of discovering vulnerabilities and instances where they contradict overall positions of Shari'ah are not in evidence yet, this should not lead to complacency on the issue. The apparent lack of criticism in this direction could only be due to the want of expertise on the part of potential critics, which is necessary for undertaking thorough researches of the required depth into the sources of Shari'ah that could accomplish the purpose. However, with a perceivable rise in the success levels of Islamic financial ideals, in-depth studies could be expected to be undertaken in order to discover inconsistencies in the Islamic rulings, so as to undermine them on an academic and ideological plane. Opponents having some awareness of the general nature of Islamic financial theory are observed to have already raised misgivings regarding certain aspects of modern rulings. This trend could only be expected to attain further momentum.

Conclusion

In many areas of Islamic law, core theories that serve as the theoretical foundation for whole sets of rulings have been adopted by *mujtahids*. These reflect the best possible model that could explain and accommodate all the shari'ah directives relating to a topic in the approach of a *mujtahid*, and therefore such a fundamental theory is adopted by him as the essence or basis for formulating extended rulings. Using *shirkah al-'aqd* as an example, it was analysed above how a unique core theory pertaining to the essential identity of *shirkah* had acted as the foundation for the application of the *ijtihadic* process in the major schools of Islamic law, in deriving detailed rulings. It was shown that each school had formulated rules pertaining to various aspects of *shirkah* based on its distinct

perception of the essential foundation of *shirkah*, that had directly influenced the major regulations of the school on the subject. Consequently, rules of *shirkah* of an school are all seen to form a single consistent unit, free of contradiction, coming under the general theory of *shirkah* as perceived in that particular school. This could be considered true of other areas of shari'ah as well.

Therefore, in undertaking *ijtihad* for the amendment of existing regulations or formulation of new ones that are applicable to situations newly arisen, it is vital to ensure that such rulings come under the umbrella of a common theory pertaining to the relevant area of shari'ah. This is especially true with regard to *ijtihad* in the field of Islamic banking and finance, and also Islamic economics, where the consequences of inconsistencies in rulings formulated could be severely detrimental. In order to facilitate this, as a preliminary step, academic effort devoted to the unveiling of common theories in different areas of shari'ah should be undertaken.

Thus, with attempts to obtain practical solutions to problems arising in Islamic finance, it is necessary that concurrent research into overall theories of Shari'ah be undertaken separately, in order to gauge the conformity of the modern rulings to general theories on the relevant subjects and to ensure their coherence. This is of vital importance in order to maintain the theoretical invincibility of the Shari'ah. The existing general theories upheld by the Islamic schools of law should be subjected to meticulous scrutiny; those that are most conducive to modern requirements while accommodating both the past as well as modern rulings on the topic, in addition to having the capacity to allow further amplification of Shari'ah regulations in the light of unfolding situations, should be adopted as the basic theories. However, where existent general theories of the schools prove inadequate in modern circumstances, new theories may have to be configured afresh for the purpose, despite the arduous nature of this task.

For this end, it is proposed that a body comprising senior scholars having in-depth knowledge of various fields of Shari'ah be formulated and assigned with the task of undertaking research into theoretical foundations of major topics relevant to modern Islamic finance such as sale, partnership, debt, money, etc, and expounding them in a manner that is congruent with modern circumstances and requirements. Another body of scholars should be appointed for the purpose of assessing the conformity or otherwise of the large array of rulings developed in the last few decades to such general theories uncovered, and suggesting modifications or replacement with more compatible rulings where necessary. At the same time, new rulings developed should be monitored and studied for ensuring their being in harmony with the general theories. This could result in bringing the modern developments in the field of Shari'ah regulations on banking and finance within an overall framework more conducive to the general congruency and consistency of Shari'ah.