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TABLE OF CONTENTS

e-ISSN – 2682-8855

A COMPARATIVE ANALYSIS OF THE FUNDAMENTAL THEORY OF CAPITAL-BASED JOINT VENTURE IN ISLAMIC LAW

Muhammad Abdurrahman Sadique
Associate Professor
Dept. of Islamic Law
Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia
Email: sadique@iium.edu.my

ABSTRACT

Of the major concepts pertaining to commercial activity advanced by Islamic legal system is the concept of joint participation for generating and sharing gain. While commercial activity and investment for making gain could be done individually, pooling resources together in the form of joint mobilization of capital in business could allow business operations on a larger scale, and result in greater gain for the participants while limiting the possibility of failure and loss. However, the successful and equitable implementation of such a system requires there being in place a well formulated framework of laws and regulations, that addresses every aspect pertaining to joint commercial activity and lays down rules for preventing injustice and wrongdoing. The current paper attempts to discuss the basic framework laid in Islamic law for such pooling together of capital based on a contract between the participants, with a comparative synopsis of the positions of the schools of Islamic law on the necessary criteria.

Keywords: joint venture, partnership, capital, shirkah, Islamic law

e-ISSN – 2682-8855

INTRODUCTION

Islamic law provides a system for capital contribution with a view to sharing gain, through the teachings of the holy Qur'an and the prophetic traditions, that lays down a consistent and coherent system of rules that emanate from a well formulated central theory.[1] Based on the recognition of the concept of joint sharing in an entity that is termed the concept of shirkah, Islamic law goes on to discuss the two major varieties in the application of this concept, that could be found in joint proprietorship of and entity without commercial investment (shirkah al-milk), and in joint participation based on a contract for generating gain (shirkah al-ʻaqd). The latter form that is more relevant to commercial application is discussed in Islamic legal sources in detail, where rules pertaining to all aspects of such a business relationship are meticulously laid down. Although developments in the current field of business and commerce as well as changes in the intrinsic nature of money and monetary value have presented additional areas whose rules require continuous verification,[2] the principal issues pertaining to such joint commercial activity remain well established, such as rights of partners and their liability, formation of partnership and the investment of capital, division of profit and loss, invalidity and its forms and other related issues. As is the norm is Islamic law, these rules are all deduced and derived through an intricate process by the use of highly systematic methodology from the holy Qur'an and prophetic traditions, where the schools of Islamic law differ in some situations due to variations in their methodology. The application of Islamic economic and commercial concepts in the development of Islamic banking and finance products based on shirkah, has created a renewed interest in the relevant original Islamic legal criteria. This paper attempts to highlight some key elements pertaining to commercial partnership in Islamic law, as discussed in the principle works of the four major Islamic legal schools, adopting a comparative approach.

COMMERCIAL PARTNERSHIP IN ISLAMIC LAW

A partnership established on the basis of a contract between the partners for realising commercial gain and sharing is termed sharikah al-ʻaqd in Islamic law. Sharikah al-ʻaqd according to Muslim jurists denotes a partnership that comes into existence consequent to a mutual contract between two or more parties.[3] The *Majallah* defines shirkah al-ʻaqd as a contract of partnership between two or more parties on the basis of joint participation in capital and profit.[4] Hanbali jurists define it as joint participation in transacting through sale etc.[5] Whereas shirkah al-milk may come into existence even through inadvertent merging of assets, a contract, even with an acceptance taking place only through conduct, is necessary for the formation of shirkah al-ʻaqd.[6] Through the contract, the partners become agents of each other, empowered to utilise the capital specified by the other in purchasing.[7] The legal consequence of such a contract is that the subject matter of the contract, i.e. the fruits of the contract become jointly owned by them.[8] This based on the Hanafi position that shirkah here involves only partnership in the outcome of the venture, in the form of assets purchased and profits realized. According to the other schools, joint partnership is established even in capital. The contract in this instance relates to joint ventures entered into for commercial purposes that usually involve joint investment with a view to realising profits.

Shirkah al-ʻaqd is generally divided in to four categories by most jurists, viz. ʻinan, mufawadah, abdan and wujuh, although there is some difference among them as to which of these can be held permissible and the conditions thereof. The form of partnership referred to as shirkah al-ʻinan is universally agreed on with regard to its validity and

1 For a discussion on the underlying theory in commercial partnership according to schools of Islamic law to which all rules and regulations are intrinsically related, see part 2 of the author's *Essentials of musharakah and mudarabah: Islamic texts on theory of partnership*, Kuala Lumpur: IIUM Press (2009).

2 For details on issues related to money and capital, and profit sharing especially in the context of implementing Islamic rules of partnership in the context of current Islamic banking and finance, see author's *Capital and Profit Sharing in Islamic Equity Financing: Issues and Prospects*, Kuala Lumpur: The Other Press (2012).

3 Al-Haskafi, *al-Durr al-Mukhtar*, vol. 4, p. 305.

4 Al-Attasi, *al-Majallah*, vol. 1, p. 254.

5 Mansur ibn Yunus al-Bahuti, *al-Rawd al-Murbiʻ*, Maktabah al-Riyad al-Hadithah, al-Riyad, 1390H, vol. 2, p. 260.

6 Ibn al-Humam, *Fath al-Qadir*, vol. 6, p. 152.

7 Al-Sarkhasi, *al-Mabsut*, vol. 11, p. 152.

8 Zayn ibn Ibrahim ibn Muhammad, *al-Bahr al-Raʼq*, Bayrut, Dar al-Maʻrifah, n.d., vol. 5, p. 180.

e-ISSN – 2682-8855

permissibility.[9] Hanbali jurists have considered mudarabah as a type of partnership, thus dividing contractual partnership into five categories. 'Inan comprises of a business partnership based on the contribution of specific amounts of capital by all the partners where the contributions need not necessarily be equal, for investment of the capital in trade and sharing the proceeds. When shirkah al-'aqd is referred to, it signifies the partnership of 'inan based on capital in general, unless otherwise stated. In the following, important conditions and rules of such commercial partnership pertaining to the contractors, capital, profit and loss etc. as provided in the major works of Islamic law are scrutinised.

CONDITIONS FOR THE VALIDITY OF SHIRKAH AL- 'AQD

Capacity of partners to confer and accept agency

Capital based partnerships in particular, and the other forms of shirkah al-'aqd according to the schools that allow them, require that the partners be capable of conferring agency as well as bearing it. In contractual partnership, each partner permits the other to transact on his behalf in purchase, sale, entering into contracts of service etc. as this is necessitated by the nature of shirkah al- 'aqd. One who transacts with the permission of the other is an agent and therefore, it is imperative that the partners are legally capable of agency.[10] However, Shafi'i jurists have allowed that if only one partner is expected to transact, he should be capable of bearing agency while it is sufficient for the other partner to be capable of conferring agency only. Therefore, the partner who confers agency could be blind, thereby being ineligible to bear agency according to Shafi 'i jurists, while the other partner who accepts agency may not be so.[11]

Knowledge of the profit ratio

The proportion of profit should be known and agreed upon at the time of effecting the contract, according to the Hanafi school. If the proportion of profit accruing to each partner remains undecided at the time of contracting, the contract is invalid as profit, as explained by al-Kasani, is the subject of the contract here. Ignorance of the subject of the contract results in the invalidity of the contract, similar to the case of sale and lease. Hanbali jurists dictate that if the ratio of profit sharing is not agreed at inception of the contract, profit would be divided according to the proportion of capital investment. Shafi 'i and Maliki schools rule that profit would necessarily be shared in accordance with the capital participation ratio, even in the absence of any stipulation to the effect. If another proportion is agreed for this purpose, the contract is rendered invalid.[12]

Profit being a ratio and not a specific amount

The profit agreed on for each partner should necessarily be an undivided portion (*juz' sha'i* ') of the whole profit, and not a specific amount such as ten or one hundred. If such a specific amount is agreed on for a partner, the contract is invalid. This is because the contract of partnership requires absolute sharing in the profit, and allocation of a specific amount of the profit to one party would disrupt such sharing. This could result in a partner not receiving any part of the profit, if the whole profit realised through the venture is equal to the amount thus specified.[13] Therefore, each partner should be allocated a share of profit as a proportion of the actual profit earned by the venture. Thus, the profit share of a partner may not be fixed as proportion of the capital invested by him.

9 Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, al-Qahirah, Maktabah al-Kulliyyat al-Azhariyyah, 1969, vol. 2, p. 273; Ibn Qudamah, *al-Mughni*, vol. 5, p. 124.

10 al-Kasani, *Bada'i* '*al-Sana'i* ', vol. 6, p. 94.

11 Shams al-Din al-Ramli, *Nihayah al-Muhtaj*, Bayrut, Dar al-Kutub al-Ilmiyyah, vol. 5, p. 5.

12 al-Kasani, *Bada'i*'*al-Sana'i*', vol. 6, p. 94, Ibn Qudamah, *al-Mughni*, vol. 5, p. 140, al-Nawawi, *Rawdah al-Talibin*, vol. 3, p. 516, al-Khurashi, *Hashiyah al-Khurashi*, vol. 6, p. 349. The importance of the free operation of the profit sharing mechanism is discussed in detail in the author's *Capital and Profit Sharing in Islamic Equity Financing: Issues and Prospects*, Kuala Lumpur: The Other Press (2012).

13 al-Kasani, *Bada'i*' *al-Sana'i*', vol. 6, p. 94.

e-ISSN – 2682-8855

Capital being existent (ʻayn) and available, not debt (dayn) or absent

The capital in shirkah al-mal should necessarily be present and available at the inception of the contract, or at the initiation of operations. Therefore, a debt may not become venture capital in a contract of partnership.[14] Similarly, wealth that is absent or is not under the control of the partners does not qualify as capital. This is necessary because the objective in partnership is earning of profit, which could not be attained except through transacting using the capital. Transaction is not feasible when capital is in the form of debt or is absent, resulting in the failure of the objective. However, presence of the capital at the initiation of transactions is sufficient, although unavailable at the time of contract, according to Hanafi jurists.[15]

Capital being in the form of monetary currency

Hanafi and Hanbali jurists have stipulated the condition that the capital in Shirkah al-ʻaqd should be in the form of monetary currency, i.e. gold and silver coins. Contemporary scholars are generally in agreement that fiat currencies in use today in all countries, which are inconvertible paper money made legal tender by government decrees and lack gold backing, could be capital in contracts such as musharakah and mudarabah. They have arrived at this conclusion by adopting different lines of argument and thus vary in some of the particulars involved.[16] Therefore, contribution in kind (ʻ*urud*) is not acceptable as capital. However, when commodities (ʻ*urud*) are contributed as capital, some Hanafi jurists, i.e. Imam Abu Hanifah an Imam Muhammad, allow it if they belong to the same type of *mithliyyat*, and are thoroughly mixed together. A second report from Imam Ahmad recognises the validity of commodities as capital. According to Shafiʻi jurists, capital could be in all types of *mithliyyat*, i.e. monetary currency and what is sold by weight or measure such as grains, or are equal units, but may not be in other types of commodities. They require that the capitals contributed should be homogeneous, and be mixed together. The Zahiri school too stipulates homogeneity of capitals, and that it be mixed together.[17] Maliki jurists have allowed that capital may also be in kind, and the amount of capital is determined based on the value of the commodities invested.

Shirkah is not permitted based on metal coins (*fulus*) according to Imam Abu Hanifah, Ahmad, al-Shafiʻi and the Maliki jurists, due to the fact that they may go out of currency (*kasad*). The Hanafi jurist al-Marghinani has stated the permissibility of metal coins as capital in shirkah when they are in circulation (*nafiqah*). Ibn Qudamah too has inferred permissibility when the metal coins are in circulation, as Imam Ahmad has likened them to gold and silver (i.e. *sarf*) elsewhere.[18]

Shafiʻi jurists, in allowing *mithliyyat* as capital, state that they could be equated to monetary capital, because they could easily be replaced with the like if redistribution becomes necessary. However, they do not allow commodities other than *mithliyyat*. The reason given by Shafiʻi jurists is that *mithliyyat* could be mixed together when they belong to the same type and the possibility of distinction between the individual capitals invested by partners could be removed, while commodities of other types cannot be thus mixed, and in case of destruction, each partner would be liable for the loss of his own commodity only.[19] The reason why the capital contributions are required to be mixed here is that absolute joint ownership in capital is necessary, in order to avoid the possibility of each partner bearing liability for his capital solely, which is not admissible in the Shafi'i school. If the joint ownership in capital is established from before, i.e. if the partners

14 Ibn Qudamah, al-Mughni, vol. 5, p. 127, al-Kasani, *Bada'i*ʻ *al-Sana'i*ʻ, vol. 6, p. 96, al-Mawardi, *al-Hawi al-Kabir*, vol. 6, p. 482, al-Khurashi, *Hashiyah al-Khurashi*, vol. 6, p. 342. Existence of capital at the inception of shirkah is an issue especially relevant to joint ventures financed by Islamic banks. For the far reaching effects of the Islamic injunctions on capital and profit sharing, see author's *Capital and Profit Sharing in Islamic Equity Financing: Issues and Prospects*.

15 al-Kasani, *Bada'i*ʻ *al-Sana'i*ʻ, vol. 6, p. 96.

16 A detailed discussion on the issue, where the author has ruled that modern currencies could be considered equal to metal coins (*fulus*) of former times and are overall subject to similar rules, could be found in *Ahkam al-Awraq al-Naqdiyyah* by Mufti Muhammad Taqi Usmani (Karachi, Idaratul Ma'arif, 1998).

17 Ibn Hazm, *al-Muhalla*, vol. 8, p. 124, 125.

18 al-Marghinani, *al-Hidayah*, vol. 3, p. 6, Ibn Qudamah, *al-Mughni*, vol. 5, p. 126.

19 al-Ramli, *Nihayah al-Muhtaj*, vol. 5, p. 7, Ibn Qudamah, *al-Mughni*, vol. 5, p. 125.

e-ISSN – 2682-8855

initiate the partnership on the basis of capital that is jointly owned by them at the time, this external measure of mixing capitals would not be called for.[20]

For investing other commodities that are not of *mithliyyat*, Shafi'i jurists have suggested the *hilah* or alternative device that one partner may sell an undivided share of his capital in kind to the other against a share in the capital of the latter, thus the two becoming joint owners in the whole capital. Thereafter, each partner permits the other to transact in the share that remains in his ownership. However, it is essential here that the sale takes place without any condition regarding the subsequent partnership, as the sale would be invalid then.[21]

The distinguishing feature found in monetary currency that qualifies it for this purpose according to Hanafi jurists is the fact that every unit of currency is equal to every other unit of the same denomination, the physical attributes of particular units of currency being immaterial. In other words, one unit cannot be specified in itself due to any distinguishing feature found in it, as it is equal to any other. Only monetary currency has this attribute, which qualifies it as capital in partnership.

Contribution of capital in commodities is not accepted by Hanafi jurists due to the fact that agency which is a necessary component of partnership is not feasible in commodities, according to the description given by them. This leads to the unacceptable position of laying claim to the profit of something the risk of which was not borne. A main reason among others due to which they have disallowed commodities as capital is that it leads to uncertainty of profit at the time of winding up. This is because the capital in this instance happens to be the value of the commodities contributed as capital, which can only be estimated, thus leading to uncertainty of the exact amount of profit at the time of distribution.[22]

Hanafi jurists have suggested a device similar to what was suggested by the Shafi'i jurists for contracting partnerships based on commodity capital. They have proposed the sale of half the capital of each partner with that of the other, thus giving rise to shirkah al-milk, and then entering into a contract of shirkah al-'aqd.[23] This is when the commodities of each partner are equal in value. When they differ, the partner whose capital is less sells a portion of his capital to the other in a proportion that would result in each partner having the same share in both the capitals. However, Ibn al-Humam has favoured the view that the contract is one of Shirkah al-'aqd here from the inception.[24]

Hanbali jurists state that it is also not acceptable due to the difficulty it poses if redistribution of capital is needed. Redistribution would not be possible in this case if the commodities have been sold. If their value is adopted, the value of the commodities invested would have fluctuated, and due to the increase of the value of the commodity invested by one partner, he may receive all the capital, or in case of depreciation, the other partner may receive part of the original price paid by the former in addition to his own capital. According to the second position of Imam Ahmed, shirkah as well as mudharabah is permissible on the basis of commodities, and the capital is determined on the value of the commodities at the inception of the contract.[25]

Maliki jurists do not allow partnership based on different monetary capitals, i.e. gold and silver, and on foodstuff. They object to the possibility of a concurrence of *shirkah* and *sarf* (monetary exchange) here, as partnership involves an initial sale between the partners according to them. A second position allows partnership on the same type of foodstuff.[26] In allowing commodities as capital, irrespective of whether they belong to *mithliyyat* or otherwise, they have stated that these could be equated to monetary capital as they can be evaluated, and the capital participation determined on the basis of evaluation.[27] The partners are allowed to invest different commodities as capital. It should be noted here that the original verdict of Imam Malik has been that partnership is not permissible in foodstuff, as they involve *sarf* (monetary exchange). However, this has been permitted by other jurists of the Maliki school, when the capitals belong to the same type of foodstuff. The Maliki jurists have taken into consideration the value of the commodities on the date of contract

20 See for details part 2 of the author's *Essentials of musharakah and mudarabah: Islamic texts on theory of partnership*, Kuala Lumpur: IIUM Press (2009).

21 al-Ramli, *Nihayah al-Muhtaj*, vol. 5, p. 7.

22 al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 94.

23 Ibid, vol. 6, p. 95.

24 Ibn al-Humam, *Fath al-Qadir,* vol. 6, p. 175.

25 Ibn Qudamah, *al-Mughni*, vol. 5, p. 124.

26 Al-Khurashi, *Hashiyah al-Khurashi*, vol. 6, p. 343.

27 Sahnun ibn Sa'id, *Al-Mudawwanah al-Kubra*, Bayrut, Dar Sadir, vol. 12, p. 59.

e-ISSN – 2682-8855

if the contract was valid, or on certain other dates based on the nature of the commodity in the case of invalid contracts, according to details given by them.[28]

Some contemporary jurists have given preference to the Maliki position that recognises the admissibility of commodities as capital in shirkah al-'aqd with regard to the requirements of modern business, and have allowed adopting the ruling given by Maliki jurists in this issue due to the ease it provides in current day commercial activities.[29]

Important rules of shirkah al-'aqd

Of the diverse rules pertaining to different types of shirkah al-'aqd set out in detail in all major works of Islamic law, major rules that are more relevant to commercial partnerships based on capital discussed below, with reference to the positions of individual schools of Islamic law regarding them.

Ratio of profit and loss

There is complete unanimity among all schools of Islamic law that loss in partnership is suffered by each partner according to the proportion of his capital. Thus, when the capitals of both are equal, the loss will be divided among them equally. If any condition is imposed to the effect that the loss shall be suffered in a proportion different from the proportion of capital investment, the contract becomes invalid.[30]

With regard to profit, The Maliki and Shafi'i jurists require that the ratio of profit distribution be equal to the ratio of capital participation, as in shirkah al-milk. The Zahiri school too has adopted this position.[31] Therefore, both profit and loss will necessarily be claimed according to the proportion of investment. According to Hanafi and Hanbali jurists, it is permissible to agree on a profit division ratio different from the investment ratio. Therefore, while it is permissible for the profit to be divided according to capital, the partners may agree to divide the profit equally when the capitals are not so, or to divide it unequally when the capitals are equal.[32] Imam Zufar from the Hanafi school has taken a position similar to that of the Shafi'i school. However, Hanafi jurists have stated that when the profit ratio is different from the investment ratio, if it is agreed that management will be the responsibility of one partner solely, it is not permissible in this instance for the other partner who has been relieved of labour to claim a ratio of profit higher than the ratio of his investment.[33]

According to Shafi'i jurists, both profit and loss will be divided according to the capital investment ratio. It should be noted that the value of the capitals invested, not the amounts, would be taken into consideration for ascertaining their proportion. If a different ratio is agreed for division of profit or loss, the contract of partnership is invalid, as this contradicts the nature of partnership. It currencies of different denominations are invested, the foreign currency will be valued on the basis of the local currency.[34]

Shafi'i jurists consider profit and loss to be the outcome of the original capitals, and therefore, have to be proportionate to the latter. It is not permissible to agree on a different ratio for profit or loss division. When it is agreed that loss would be according to investment, profit, too, should necessarily be so, as both result from capital. Stipulating a condition to accept only part of the loss is not admissible; similarly, an additional amount of profit may not be claimed. Effort contributed by the partners is dependent on capital, and may not serve as an individual basis for entitlement to additional

28 Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah,* vol. 3, pp. 82, Ibn Qudamah, *al-Mughni*, vol. 5, p. 125, Muhammad ibn Abdillah al-Khurashi, *Hashiyah al-Khurashi*, vol. 6, p. 339, Sahnun ibn Sa'id, *Al-Mudawwanah al-Kubra*, vol. 12, p. 59.

29 Muhammad Taqi Usmani, *An Introduction to Islamic Finance,* Karachi, Idaratul Ma'arif, 2000, p. 41. The author has drawn support from the fatwa of Moulana Ashraf Ali Thanvi recorded in *Imdad al-Fatawa*.

30 Ibn Qudamah, *al-Mughni*, vol. 5, p. 147, Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 292.

31 Ibn Hazm, *al-Muhalla*, vol. 8, p. 125.

32 Ibn Qudamah, *al-Mughni*, vol. 5, p. 147.

33 al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 100.

34 al-Ramli, *Nihayah al-Muhtaj*, vol. 5, p. 12.

e-ISSN – 2682-8855

profit in the case of partnership.[35] If a higher profit share is allocated to a partner who works more for the partnership, the condition becomes void.[36]

Hanafi jurists compare the situation to that of mudarabah, where the mudarib justly claims a share of profit against his labour, without there being any contribution towards capital. They argue that a partner may stipulate additional profit in view of his labour, as men are different in contributing labour as well. They explain that profit could be claimed not only against capital, but also against labour and bearing liability (*daman*).

In entitlement to profit against labour, stipulation of labour in the contract is taken into consideration, irrespective of whether labour is contributed in reality by one of the partners or both. Thus, if a share of profit higher than the proportion of his investment is allocated for the partner who is made responsible for the total management of the partnership, it is permissible, as the additional profit could be justified based on the stipulation of labour. If a share of profit higher than the investment ratio is allocated to the other partner who is excluded from work in the contract, it is not valid, as there is no justification in this case for his claiming a higher share.[37]

Management of shirkah

Every partner in shirkah al-'aqd is expected to contribute his labour towards the partnership, and therefore is entitled to its management. As dictated by the nature of shirkah al-'aqd, every partner is an agent of the others, and is entitled to carry out transactions on behalf of the partnership as governed by the rules of agency. The capital in the hand of each partner is deemed to be in custodial hand (*yad amanah*), which means that if an asset of the partnership is destroyed without any shortcoming on his part, no compensation is due. The labour contributed by partners could be equal or otherwise, and the partners may agree to be dissimilar in the amount of work done be each, except according to Maliki jurists. According to the latter, labour contributed by each partner should be proportionate to the capital invested by him.[38]

Labour in itself is not recognised as a basis for entitlement to profit by Maliki and Shafi'i jurists, while Hanafi and Hanbali jurists do so, as described above. Therefore, while it is permissible for the partners to agree that the amount of labour contributed by the partners shall be unequal or that only one partner shall work for the partnership while others will remain sleeping partners, this could justify a departure from sharing profit on the basis of capital participation only according to Hanafi and Hanbali jurists. As mentioned above, Hanafi jurists also require that if a condition is stipulated to the effect that labour will be contributed only by one of the partners, the other may not claim a share of profit higher than his investment ratio. This means that the profit share of the sleeping partner who has been excluded from work in the contract cannot exceed the ratio of his investment.[39]

Termination of shirkah

Shirkah al-'aqd belongs to the category of contracts termed '*uqud ja'izah*, that could be terminated by any partner whenever he wishes. The partnership comes to an end with its termination by any one of the partners.[40] Hanafi jurists stipulate that it could be terminated only with the knowledge of other partners, as their interests could be harmed otherwise.

Shirkah is also terminated in the event of the death of a partner or his becoming insane. When the deceased partner leaves an inheritor who is legally capable, he is entitled to continue the shirkah or demand liquidation. According to Shafi'i

35 Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 275, Ibn Qudamah, *al-Mughni*, vol. 5, p. 140.

36 Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 292.

37 Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 275, al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 100.

38 Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, pp. 275, 277.

39 Al-Ramli, *Nihayah al-Muhtaj*, vol. 5, p. 13, al-Nawawi, *Rawdah al-Talibin*, vol. 3, p. 515, Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 275, Ibn Qudamah, *al-Mughni*, vol. 5, p. 129, al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 100.

40 Al-Nawawi, *Rawdah al-Talibin*, vol. 4, p. 515, Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 328, al-Sarkhasi, *al-Mabsut*, vol. 16, p. 194, Ibn Rushd, *Bidayah al-Mujtahid*, vol. 2, p. 277, Ibn Qudamah, *al-Mughni*, vol. 5, p. 133.

e-ISSN – 2682-8855

jurists, continuation of the shirkah takes place through initiating a fresh contract, after settling any outstanding debt on the deceased and fulfilling any bequest.[41]

In the event of termination, if the capital of the partnership is in the form of assets, the partners may agree on distributing the assets themselves or on liquidation. If they disagree, the wish of the partner seeking distribution of assets will be upheld.[42]

Some contemporary jurists opine that when one of the partners is desirous of terminating the partnership while others wish to continue, the latter may opt to purchase the share of the leaving partner, after fixing its value by mutual consent. In case of dispute, the leaving partner may compel on liquidation. The partners may also agree at the inception of the contract that liquidation or separation of the business shall not be effected unless all the partners or the majority of them want to do so, and that a single partner who wants to come out of the partnership shall have to sell his share to the other partners and shall not force them on liquidation or separation.[43]

Invalid shirkah

When the contract of partnership becomes invalid due to some reason, according to Shafi'i, Maliki and Hanbali schools, the profits are distributed according to the ratio of capital investment, and each partner is entitled to claim just recompense (*ujrah al-mithl*) from the other for the labour he had undertaken in the latter's share.[44]

Maliki jurists require that if the partnership had been on the basis of commodities, when it becomes invalid, the sale price of the commodity invested by each partner be taken into consideration for liquidation. The value of the commodities on the date of contract is not of consequence here, as each partner had continued to bear the risk pertaining to his own commodity himself up to its sale due to the contract being invalid, and is himself entitled to its price.[45] Maliki jurists explain that in the case of a valid partnership, a mutual sale of half of one partner's capital with half the capital of the other partner takes place at the time of the contract, thus making the partners jointly liable. Due to this, the value of the commodities on the date of the contract is taken into consideration for profit distribution. However, this does not take place in the case of an invalid partnership.

According to Hanafi jurists, when the partnership becomes invalid due to the absence of any condition required for its validity, any agreement to distribute profit according to a ratio other than the capital investment ratio becomes void. The profit is necessarily divided in this instance according to the capital investment ratio. The reason is that when the contract is invalid, the profit no longer remains appended to the contract, due to the absence of a valid contract; instead, it becomes appended to the capital, and follows the capital in proportion.[46] It is noteworthy that according to Hanafi jurists, in this event the partners may not claim any wages from each other for the labour rendered to each other. Hanafi jurists argue that as each has become entitled to the profit against his labour, additional wages cannot be claimed.[47]

CONCLUSION

Of the four major types of shirkah al-'aqd or commercial partnership, viz. 'inan, mufawadah, abdan and wujuh, the permissibility of shirkah al-'inan is universally upheld. Major conditions for the validity of shirkah al-'aqd stipulate that the partners be capable of agency. Schools that allow the profit distribution ratio to differ from that of capital contribution require that the profit ratio be stipulated at inception. Profit agreed on for each partner should necessarily be an undivided portion, i.e. a proportion of the total profit to be realised. The profit share of a partner may not be fixed as a specific numerical amount or as a proportion of the capital invested by him. Capital in shirkah al-mal should necessarily be present and available at the inception of the contract, or as required by Hanafi jurists, at the initiation of operations. Thus,

41 Al-Nawawi, *Rawdah al-Talibin*, vol. 4, p. 516. Ibn Qudamah, *al-Mughni*, vol. 5, p. 134, al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 122, Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 327.

42 Ibn Qudamah, *al-Mughni*, vol. 5, p. 133.

43 Muhammad Taqi Usmani, *An Introduction to Islamic Finance,* Karachi, Idaratul Ma'arif, 2000, p. 44.

44 Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 292, al-Khurashi, *Hashiyah al-Khurashi*, vol. 6, p. 349, Mansur ibn Yunus al-Bahuti, *Kashshaf al-Qina'*, Bayrut, Dar al-Fikr, 1982, vol. 3, p. 505, Ibn Qudamah, *al-Mughni*, vol. 5, p. 128.

45 Sahnun ibn Sa'id, *Al-Mudawwanah al-Kubra*, vol. 12, p. 59.

46 Ibn al-Humam, *Fath al-Qadir,* vol. 6, p. 194.

47 al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 121.

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a debt may not form the capital in a contract of partnership. While the preferred form of capital in shirkah al-'aqd is monetary currency due to the facility of recognizing profit and loss with ease in this instance, other forms of property such as generic goods and commodities are accepted as partnership capital with certain restrictions in specific schools of Islamic law, where the amount of capital is determined based on the value of the commodities invested. Among important rules pertaining to shirkah al-'aqd are that loss in partnership is suffered by each partner necessarily according to the proportion of his capital. With regard to profit, The Maliki and Shafi'i jurists require that the ratio of profit distribution be equal to the ratio of capital participation, as in shirkah al-milk. According to Hanafi and Hanbali jurists, it is permissible to agree on a profit division ratio different from the investment ratio, subject to certain requirements. Every partner is entitled to management by default. Shirkah al-'aqd is revocable by any one of the partners. At termination, if the capital of the partnership is in the form of assets, the partners may agree on distributing the assets or on liquidation. When the contract of partnership becomes invalid, the profits are distributed according to the ratio of capital investment, and each partner is entitled to remuneration from the other for the labour performed in the latter's share. Hanafi jurists do not allow remuneration for each other in this event.

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