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ISLAMIC LEGAL THEORY OF JOINT OWNERSHIP OF PROPERTY IN COMMERCIAL AND NON-COMMERCIAL SPHERES

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ABSTRACT

Shirkah al-milk or joint ownership in Islamic law may take place in commercial and non-commercial spheres, where an asset, right or usufruct is jointly claimed by more than one party, such as through the joint ownership of a house, vehicle etc. This form of joint partnership or joint ownership is subject to detailed rules and provisions as discussed in Islamic law, pertaining to the nature and scope of their rights and liabilities, how they may derive benefit from the jointly owned asset or entity through utilization etc., how the asset should be maintained and the role of the joint owners therein, regarding any contract that may take place with regard to the jointly owned entity, through its sale either entirely or partly or through it being offered as a mortgage etc. and a host of related rules. 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 details due to variations in their methodology. The purport of this paper is to provide a comparative analysis of the rules and provisions pertaining to joint proprietorship as found in the authoritative works of the schools of Islamic law with regard to its major areas, while providing a summary of the rules of the type of commercial partnership called 'inan, by way of comparison.

Keywords: joint proprietorship, ownership, partnership, shirkah, Islamic law

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INTRODUCTION

The prevalence of various Islamic banking products termed generally as musharakah or mudarabah has produced a renewed interest in the Islamic legal precepts regarding partnerships and joint ventures. Many of these products are more related to commercial partnership as discussed in Islamic law, which is a partnership initiated between two or more parties on the basis of a contract for generating commercial profits and sharing them. The major class of partnership relevant to this form of joint venture is shirkah al-ʻaqd, or contractual partnership, which has four subcategories called ʻinan, mufawadah, abdan and wujuh. Out of these, the type that is more pertinent to commercial joint ventures based on mutual investment of money and monetary assets is ʻinan, which is partnership based on a contract for mutual investment of capital in commercial undertakings and sharing of profits.

However, Islamic legal sources also discuss under shirkah a relationship between two or several parties based on joint proprietorship alone, without there being any investment of capital for generating profit. This is called shirkah al-milk or shirkah al-amlak, which denotes partnership in ownership or proprietorship. This is a one of the two major classes of shirkah, the other being contract based partnership or shirkah al-ʻaqd, i.e. joint venture, referred to above. Joint proprietorship is included under shirkah, based on the common ingredient of joint sharing found in it, with regard to ownership. Thus, shirkah in general in Islamic law refers to joint entitlement to an entity, and not exclusively to joint ventures. While joint entitlement is found in shirkah al-milk with regard to the joint ownership the entity in the form of ownership rights and ownership related liabilities, it is found in shirkah al- ʻaqd or contractual partnership with regard to rights and liabilities of the partners related to the venture, and with regard to the assets of the partnership. The current paper attempts to analyse the key features of joint proprietorship as laid down in Islamic law, while providing a summary of its major counterpart, the capital based contractual partnership or ʻinan, by way of comparison.

MAJOR VARIETIES OF SHIRKAH ACCORDING TO ISLAMIC JURISTS

Partnership or shirkah, in the sense of joint entitlement as explained above, may be found in various forms, based on different combinations related to property (*mal*), usufruct and rights. In explaining the text of al-Muzani, al-Mawardi has elaborated on a detailed classification of shirkah where he has categorized partnership on the basis of its relationship to diverse combinations involving property, usufructs and rights, also taking into consideration whether it is by choice or otherwise.[1] A summarised version of this classification has been presented Al-Rafiʻi, which is given hereunder. According to it, partnership may relate to other than property, such as partnership in rights and usufructs that are not related to property (e.g. the right of retaliation (*qisas*) and the right of exercising the penalty for calumny (*hadd al-qdhf*), the usufruct of a hunting dog[2] etc., commonly established in the case of two or more people), or may relate to property. Partnerships that relate to property may be found with regard to a combination of property and usufruct, (e.g. when property is commonly acquired by way of spoils, inheritance or purchase), with regard to usufruct only (e.g. when a bondsman is hired in common or when his usufruct alone is bequeathed), with regard to property alone (e.g. when a bondsman whose usufruct is bequeathed elsewhere is jointly inherited) or with regard to a right through which property is attained (e.g. the right of pre-emption jointly held).[3] Hanbali jurists too have mentioned a division of shirkah al-mal that is somewhat close to the classification by al-Rafiʻi. [4]

The summarised version of the classification of shirkah as presented by al-Rafiʻi is illustrated in figure 1.

1 Al-Mawardi, *al-Hawi al-Kabir*, vol. 6, pp. 470-472.

2 A dog is not tradable property (*mal*) according to the Shafiʻi school of Islamic law.

3 Abu al-Qasim al-Rafiʻi, in Abu Zakariyya al-Nawawi, *Rawdah al-Talibin*, vol. 3, p. 507.

4 Abd al-Rahman al-Jaziri, *Kitab al-Fiqh ʻala al-Madhahib al-Arbaʻah,* vol. 3, p. 63.

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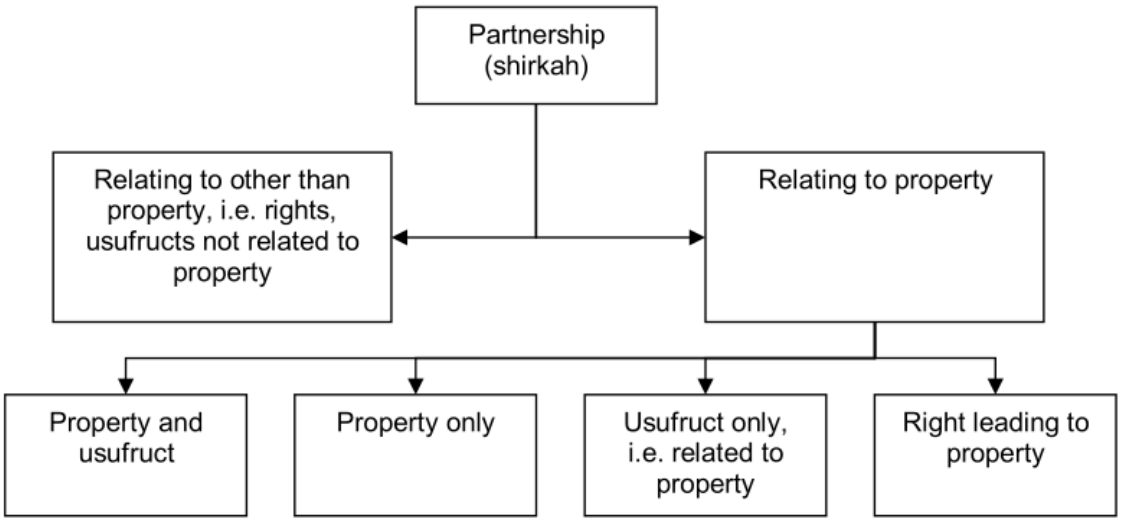

Figure 1. Al-Rāfiʿī's Classification of Partnership According to Its Correlation to Property (*Māl*)

Figure 1. Al-Rāfiʿi's classification of partnership according to its correlation to property (*māl*)

It is clear from this classification that the concept of partnership is not limited to properties in the original sense, but is inclusive of usufructs as well as rights that have nothing in common with property or assets, which could portray the breadth allocated to the concept of partnership by jurists.

After this initial classification, al-Mawardi has classified partnership into those taking place on the basis of contract and option (*'an 'aqd wa ikhtiyar*) and those where contract and option are absent (*'an ghayr 'aqd wa ikhtiyar*). Non-optional partnerships include participation established in assets through means such as joint inheritance, *waqf* etc, while optional partnership arises through means such as joint purchase.[5] Optional partnership is then taken as the main theme under discussion and is dealt with in a way similar to how Hanafi jurists have treated *shirkah al-ʿaqd* (contractual partnership) discussed below, with some additional varieties.

Maliki jurists have described certain types of partnership where assets etc are jointly held, that belong to the category termed shirkah al-milk by Hanafi jurists.[6] According to Maliki jurists, Shirkah is divided into two types, viz. *shirkah a'ammiyyah* (common partnership) and *shirkah akhassiyyah* (specific partnership), which appear similar to the division by Hanafi jurists given below.[7] They define the former as establishment of the ownership alone of a thing having a tradable value (*mutamawwil*) between two owners or more, such as partnership through inheritance or spoils. The second is defined as sale by each sole-owner of a part of what he owns to the other, empowering each to transact in the whole legally, such as partnership in trade.

Shirkah is generally divided into two broad categories by Hanafi and the Hanbali jurists in the main, based on whether it involves a joint contract wilfully entered into for commercial purposes aimed at realising profits, or mere holding of the subject of shirkah in common ownership. The former is termed *shirkah al-ʿaqd* (or *ʿuqud*) while the latter is known as *shirkah al-milk* (or *amlak*) or *shirkah al-ʿain*.[8]

The major difference between shirkah al-ʿaqd and shirkah al-milk is that the former is initiated on the basis of a contract through which each partner is given the power to transact in his share as well as in the share of the other partners, while in the latter, each partner is an 'outsider' (*ajnabi*) with regard to the share of the others due to the absence of a contract

5 Al-Mawardi, *al-Hawi al-Kabir*, vol. 6, p. 472, al-Nawawi, *Rawdah al-Talibin*, vol. 3, p. 507.

6 Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. 3, p. 69.

7 Muhammad ibn Abdillah al-Khurashi, *Hashiyah al-Khurashi*, Bayrut, Dar al-Kotob al-Ilmiyah, 1997, vol. 6, p. 335.

8 ʿAla al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, p. 299; Ibn Qudamah, *al-Mughni*, vol. 5, p. 109. *Sharikah al-milk* is also referred to as *sharikah al-'ain*.

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involving agency, hence may not deal in the share of others except with their permission.[9] The objective of the current discussion is to explore shirkah al-milk or joint proprietorship with regards to its fundamental nature and rules, with brief survey of the ʻinan type of commercial partnership by way of comparison.

Shirkah al-milk

Shirkah al-milk, as stated by Hanafi jurists, refers to a partnership where two or more persons come into ownership of an asset (i.e. ʿ*ain*) without there being a contract.[10] Although this definition only refers to assets, the author of *Tanvir al-Absar* has described shirkah al-milk as "several (parties) owning (i.e. coming into ownership) an asset or a debt by way of inheritance, purchase or otherwise".[11] Ibn al-Humam has endorsed the inclusion of debt in shirkah al-milk, and has observed that a debt could be literally owned jointly, as supported by the fact that an asset that is given in lieu of a debt becomes the common property of the joint creditors. However, the rules pertaining to a partnership in debt could be different from an asset-based partnership.[12] A partnership in the obligation of safekeeping, too, has been included in this category, as illustrated by the instance when a cloth is blown by the wind in to a property held jointly. Some authorities hold the inclusion of a debt in ownership to be metaphorical, as it is an attribute (*wasf shar'i*) that cannot be owned. The possibility of a debt being owned is supported by the fact that a debt could be gifted back to the debtor. This could be contested by the assertion that gift of a debt is a metaphorical term that denotes waiving it. However, Ibn Humam and the author of Shami both, among others, have upheld the position that a debt could literally be owned jointly, and have forwarded the argument above stated.[13]

Types of shirkah al-milk

Shirkah al-milk may come in to existence either at the option of the partners (*shirkah ikhtiyar*, i.e. optional partnership), or without their having any option in the formation thereof (*shirkah jabr*, i.e. compulsory partnership).[14] This is the classification generally adopted by Hanafi jurists.

Compulsory partnership results through means such as joint inheritance and accidental mixing together of assets, where the parties involved do not have any option. Optional partnership comes in to existence when something is purchased jointly, or is gifted or bequeathed to two or more people together. Since the willing consent of the receivers in the form of acceptance is necessary for the validity of the gift and the bequest, these are included in optional partnership. Similarly, this kind of partnership may result when the property of a *harbi* is jointly acquired by overpowering him, or when, after coming into ownership of something, an outsider is turned into a partner by giving him a share. When assets owned by different individuals are intentionally mixed together so that separation is impossible, it results in optional partnership.[15]

Some rules pertaining to shirkah al-milk

Shirkah al-milk, both optional and compulsory, only requires the relevant assets etc. being held in common ownership. It does not involve an agreement of agency between the partners; hence, a partner may transact only in the share belonging to him. He is considered an *ajnabi* or outsider with regard to the shares of others, and is not entitled to the right of transacting in their shares. Hanafi jurists have allowed the partner in shirkah al-milk to undertake certain types of transactions with regard to the share of the other partner, such as using the whole of a house, etc. held in common in the absence of the partner, and cultivating a land jointly owned in the absence of the partner when such cultivation does not damage the land. This provision is subject to details and conditions.[16] However, when a partner is absent, the remaining partner may undertake measures that are beneficial to the share of the absentee, such as cultivation of a land held in

9 ʿAla al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, p. 300.

10 Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah,* vol. 3, p. 63.

11 ʿAla al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, p. 299.

12 Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, p. 300.

13 Ibn al-Humam, *Fath al-Qadir,* vol. 6, p. 153; ʿAla al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, p. 300.

14 The terms optional shirkat and compulsory shirkat have been used by Hamilton in his translation of al-Hidayah (Afzalur Rahman, *Banking and Insurance*, p. 293.)

15 Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, p. 300.

16 See Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, p. 304.

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common which would result in benefit to the land, as the consent of the latter is implied. One is not permitted to take measures that are detrimental.

As far as the right of his own share is concerned, a partner may sell his share (i.e. undivided) to the other partners in all variations of shirkah al-milk.[17] One may sell his undivided share to outsiders, too, without the consent of the other partners, when the sale does not result in harm to the interests of the other partners. Ibn ʿAbidin has discussed at length the permissibility of such sales, as in the case of selling a portion of a commonly held structure or plantation, and has observed that where the sale results in harm to the partner, it is not permissible.[18] However, when the partnership has been an outcome of assets belonging to different entities getting mixed up either due to deliberate mixing together or as a result of an accident, selling one's share to an outsider is permitted only with the consent of other partners. Similarly, while a partner may lease his share to the other partner on ijarah, Hanafi jurists do not allow leasing to an outsider.[19]

On the basis of avoiding harm to co-partners, Hanafi jurists have held that selling one's share in a structure to an outsider impermissible, when the sale is contracted on the structure alone, and does not include the land in which the structure stands. They argue that if the purchaser of the share is required to vacate the land, it would result in harm to the co-partners. If the right of occupying the land has been secured on a long-term basis through some means, and the possibility of being required to vacate the land could not arise, such a sale is permitted by them.[20]

When the partnership had resulted through mixing of the assets, either voluntarily or otherwise, one partner is not entitled to sell his undivided share to an outsider except with the consent of the other partners. In shirkah al-milk resulting from mixing of the assets (i.e. *khalt* or *ikhtilat*), the consent of the other partners is necessary for the validity of the sale. The sale of one's share to outsiders involves the question of pre-emption. However, this does not mean that a partner should obtain the consent of the other partners who hold the right of pre-emption for the validity of its sale to an outsider. Rather, the sale to an outsider is valid even without the permission of the other partners. If the other partners remain silent and do not exercise the right of pre-emption, the ownership of the third-party purchaser will continue unhindered.[21]

This is because what could be sold without the consent of the other partners is an undivided share of a jointly owned asset. However, in the case of merged assets, although the units belonging to one partner are mixed up with the units belonging to the other partners, each particular unit is not owned by all the partners; rather, each unit belongs to a particular partner exclusively, and is not jointly owned. Due to this reason, the sale of an undivided share cannot materialise in this context. Since particular units are owned by a single partner, for the sale to be feasible, he should have the ability to hand them over to the buyer (*taslim*), which, however, could not be done here due to separation of the units being impossible. Therefore, consent of the other partners become necessary so that they agree to the sale of some of their units. It appears that the consent of the other partners indicates their willingness to exchange the units belonging to them that are being sold with the units belonging to the selling partner that are mixed up with the formers' units, tantamount to *Sulh*.

When the commonly owned property is such that it cannot be divided without losing its usufruct, such as a machine or a ship, the partners are required to share in its repair and maintenance. According to Hanafi jurists, if a partner declines, the other can undertake repair only after securing a court order. The declining partner shall be prevented from using the asset until he settles his share of the cost. However, if one partner undertakes the repair prior to obtaining a court order, he may not compel the other to share in the expense. The Maliki ruling is that the declining partner shall be required to sell his share to the other.[22] The shariʿah rulings pertaining to the repair of a commonly held asset that could be divided

17 Muhyi al-Din ibn Sharaf al-Nawawi, *al-Majmuʿ*, Bayrut, Dar al-Fikr, 1996, vol. 9, p. 273.

18 Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, pp. 300 – 304, al-Kasani, *al-Bada'iʿ al-Sana'iʿ*, vol. 5, p. 168. For the permissibility according to Shafiʿi jurists, see Sulayman ibn ʿUmar al-Bujayrami, *Hashiyah al-Bujayrami*, Diyar Bakr Turkiya, al-Makatabah al-Islamiyyah, vol. 3, p. 107.

19 *Al-Majallah*, article 429, vol. 1, p. 83, Abu Ishaq ibn Muflih, *al-Mubdi'*, Bayrut, al-Maktab al-Isami, 1400H, vol. 5, p. 79, al-Mardawi, *al-Insaf*, vol. 6, p. 33, Mansur ibn Yunus al-Bahuti, *Kashshaf al-Qinaʿ*, Bayrut, Dar al-Fikr, 1402H, vol. 3, p. 563.

20 Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, pp. 300 – 304; Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah,* vol. 3, pp. 65, 69.

21 Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, p. 304

22 Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah,* vol. 3, pp. 65, 69.

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without affecting its usufruct are different from this, in that a court order is not required for commencing the repair and other details.

Ibn ʿAbidin has summarised the common ruling that applies to the repair of jointly held assets as follows. When the partner is not compelled to undertake the repair jointly due to the property being divisible, if he spends for the repair himself without the permission of his partner, he is considered to have spent gratuitously (*tabarruʿ*); if he is compelled, and the nature of the partnership is such where the partner could be legally required to join him in the repair costs, it is necessary that repair is only undertaken with the partner's permission or a court order. If this is the case, the partner may be required to share in the amount that was spent by one. However, if the repair was undertaken without the partner's permission or a court order, the partner may not be required to share. If the partner was compelled, but the partnership was such where the partner could not be legally required to join him in the repair costs, if the repair was undertaken with the permission of the partner or with a court order, the partner may be required to share in the amount spent; if the repair was undertaken without either of the two, the partner may be required to pay half of the value of the asset after the repair.[23]

Shirkah al-ʿinan

Shirkah al-ʿinan refers to a type of commercial partnership which does not necessitate equality in capitals, profit or rights of transaction, nor does it require investment of all monetary wealth in one's possession. The partners are free to invest what they wish in the partnership venture, holding back the rest. It may be formed for the purpose of practising a particular line of trade.[24] Out of all types of shirkah al-ʿaqd, ʿinan has been unanimously agreed on by the jurists as permissible, and the difference therein pertains to some of its conditions only. Ibn al-Mundhir has recorded *ijmaʿ* on its permissibility.[25] It is the only form of shirkah al-ʿaqd that is permissible according to the jurists of Shafiʿi school, all other types comprising levels of deception and uncertainty (*gharar* and *jahalah*) that are unacceptable, or other defects such as absence of capital.[26]

Shirkah al-ʿinan has been defined by Shafiʿi jurists as "two (or more) partners sharing in an amount of capital (*mal*) belonging to them for trading purposes, subject to certain conditions".[27] Ibn Qudamah has described it as "two people forming a partnership with their capitals so that both of them work in their capitals themselves while sharing in the profit".[28]

Hanafi jurists who have given credence to mufawadah as the natural complement of ʿinan, have identified ʿinan as a type of partnership by its main differentiating factor, which is that it involves mutual agency of the partners only.[29] This is in comparison with mufawadah, as in the latter, in addition to being agents of each other, the partners mutually guarantee each other. According to them, if the contract of ʿinan stipulates guarantee too, while comprising the other necessary conditions of mufawadah, it would create a mufawadah relationship. However, if the remaining conditions necessary for

23 This principle has been illustrated with numerous examples in Ibn ʿAbidin, *Radd al-Muhtar*, vol. 4, p. 332-338.

24 Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 288-292.

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

26 Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 288-292.

27 Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 288. The nature of capital in partnership ventures is a detailed subject, where the schools of Islamic law have their own criteria. While the existence of joint capital either prior to creating the partnership or as a result of its creation is a requirement for the validity of the partnership in the in the majority of the schools, the Hanafi school does not hold it mandatory. For details, see part 2 of the author's *Essentials of musharakah and mudarabah: Islamic texts on theory of partnership*, Kuala Lumpur: IIUM Press (2009). For details pertaining to issues related to capital and profit and loss division, especially in the context of Islamic banking and finance, see author's *Capital and Profit Sharing in Islamic Equity Financing: Issues and Prospects*, Kuala Lumpur: The Other Press (2012).

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

29 ʿAla al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, p. 311.

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mufawadah are not fully met while the contract stipulates guarantee, the contract would continue to be one of ʿinan, and the clause of guarantee, as held by some Hanafi jurists, becomes void.[30]

The difference between mufawadah and ʿinan according to Hanafi jurists is that while the former necessitates each partner being capable of guarantee, i.e. each being a free adult possessing unimpaired intellect, all partners professing the same faith, and each having the same amount of capital etc. these are not necessary in a partnership of ʿinan. Therefore, ʿinan is permitted between a Muslim and a non-Muslim, and between a minor authorised by his guardian to trade and an adult, as equality in the right of transaction is not necessary in ʿinan. Similarly, equality in capital and profit, too, is not stipulated in ʿinan, each partner being free to invest in the partnership any amount he wishes. The partnership of ʿinan may involve a single type of business such as trading in a particular commodity, or all types of trade.[31]

Shafiʿi jurists hold that ʿinan requires each partner having the capacity to authorise and agent as well as carry out agency with regard to property, as each transacts in his capital by virtue of his ownership and in the capital of the other, under permission. Therefore, each is a principle as well as an agent. However, in a situation where each does not authorise the other, it would be necessary that the one authorising has the capacity to authorise an agent, and the other to carry out agency; thus, the former could be a blind person but not the latter.

The author of al-Mughni states that shirkah al-ʿinan is based on agency and trust (i.e. wakalah and amanah). This is because each partner appoints the other as trustee by handing over his capital to the other, and grants him agency by permitting him to transact. For ʿinan to be valid, it is necessary that each partner authorises the other to transact, either in a particular type of trade or in all types, for the right of transaction is dependent on the authority given. Each may purchase and sell in any mode he deems suitable, as this is the practice of traders. Each may take delivery of goods, accept payment, demand payment of debts, transfer debts, etc. in what is due to him as well as what is due to his partner. Each may hire and lease from the capital of partnership as usufructs take the same course as tangible assets, therefore, it is similar to purchase and sale. Both partners may demand rentals as well as be demanded, for the obligations of the contract are not specific only to the particular individual executing the contract.[32]

CONCLUSION

The scope of the shariʿah concept of partnership is fairly broad, bringing within its ambit various rights and usufructs where partnership could be construed. Among divisions of shirkah by schools of Islamic law on various bases, the division into participation in joint ownership (shirkah al-milk) and partnership through contract (shirkah al-ʿaqd) is representative of the rest in general. In shirkah al-milk or joint proptrietorship, a partner is not entitled normally to operate the share of the other without permission. Sale or lease of one's share to the other partners is allowed, while sale or lease to a third party is subject to restrictions. When the commonly owned asset is indivisible, partners are required to share in its maintenance. Any proceeds through the jointly held entity as well as its liability necessarily accrues to the joint owners proportionate to their share of entitlement or ownership. In comparison, in shirkah al-ʿaqd, by virtue of the partnership contract, each partner is entitled to transact in the other's share, based on the mutual agency rights conferred through the contract.

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31 Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah,* vol. 3, pp. 68.

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