THE RELEVANCE OF JOINT CONTRIBUTION OF CAPITAL TO THE FORMATION OF PARTNERSHIP IN ISLAMIC COMMERCIAL LAW: AN ANALYSIS

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ABSTRACT

The Islamic legal theory pertaining to partnership venture provides an interesting example of the complex yet logical reasoning behind the formation of rules. An analysis of the rules regarding partnership capital is undertaken in the present study, with a view to understanding their relation to rules on other areas of partnership as well as on commercial transactions in general. The study indicates that each major school of Islamic law had a distinct concept regarding the essential nature of contractual partnership, based on its approach to the relevance of joint capital and liability thereof. This concept is seen to have dictated the rules on all relevant aspects of partnership, in a coherent and logical manner. Understanding such essential concepts is vital for extending the relevance of the rules to situations newly arisen, so that the regularity and consistency of Shari'ah rules can be maintained.

Keywords: Islamic Law, theory, capital, partnership

Introduction

The current paper explores how each major school of Islamic Law had formulated rules pertaining to various aspects of partnership based on its distinct perception regarding the essential nature of partnership. It is shown that rules of partnership of a school are all seen to arise from a consistent theory, free of conflict. Such 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 modern developments taking place in Islamic Law related to the areas of banking and economics, these fundamental theories appear not to have 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 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. In the following study, the nature of capital in *sharikah al-'aqd* or commercial partnership in the schools of Islamic Law is analysed, with a view to understanding how the Islamic schools of Law had perceived the essential nature of partnership.

What is recognized as capital in the schools of Islamic Law

The schools of Islamic Law have provided a detailed scheme regarding what is admissible as capital in a partnership venture. In order to comprehend how each school has perceived the essential core structure of *sharikah*, it is necessary to analyse the treatment of *sharikah* capital in the texts of each school. Concerning the nature of capital in *sharikah*, the preferred position of the Hanafi and Hanbali schools recognizes *sharikah al-mal* only on the basis of monetary currency, while the Shafi'i school has extended the permissibility to include other *mithliyyat* (i.e. fungibles that are sold be weight or measure or consist of equal units) such as grains. The Maliki school also accepts non-liquid commodities other than *mithliyyat*. Another report narrated from Imam Ahmad indicates acceptability of non-liquid assets as partnership capital. In the case of *mudarabah*, 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 Imam Ahmad, that allows *sharikah* as well as *mudarabah* on the basis of commodities as capital.[1]

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 *mithliyyat*. A school that allows

[1] References are given in the subsequent discussion. For additional clarification, see Muhammad Abdurrahman Sadique, *Essentials of Musharakah and Mudarabah,* Kuala Lumpur, IIUM Press, 2009, and *Capital and Profit Sharing in Islamic Equity Financing: Issues and Prospects*, Kuala Lumpur, The Other Press, 2012.

commodities could be found to impose restrictions on currency or some types of *mithliyyat*. For instance, the Maliki school that allows commodities as capital, does not recognise the possibility of *sharikah* on currency of different denominations such as gold and silver, or according to Imam Malik, on foodstuff.[2] Each school is noted to have recognized the assets eligible to form the capital in *sharikah al-mal* 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 *sharikah*. This structure, as will be shown, is woven principally around the approach to the partners' ownership and liability of capital. Therefore, a partial analysis of the theoretical concept of *sharikah* in each school and its effect on defining the nature of capital is attempted below.

Shafiʿi approach to ownership of capital

In the Shafiʿi school, prior existence of jointly-owned property is of paramount importance for the establishment of *sharikah al-ʿaqd*. 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 *sharikah* is complete. Based on this position, when jointly owned property is not available at the inception, the Shafiʿi 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 Shafiʿi 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 Shafiʿi school that units of monetary currency could be specifically distinguished, i.e. particularised.[3] As such, a *sharikah* 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 Shafiʿi 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 *sharikah*. Thus, common liability for each unit of the capital appears central to the Shafiʿi 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 *mithliyyat* 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, Shafiʿi 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. In the absence of a jointly owned pool, the logical result of the above theory is that non-liquid commodities be excluded from forming *sharikah* capital. This is because such assets, by their nature, could be identified as the property of their owners. 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 *sharikah* according to the Shafiʿi school.[4]

Nevertheless, Shafiʿi jurists are noted to have pointed out a method for the creation of a *sharikah* based on commodity capital. This is through concluding a mutual sale where the parties who own commodities partly exchange the ownership of their respective commodities, which process would result in jointly owned capital eligible to become the basis of *sharikah*. In fact, Shafiʿi 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.[5]

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[2] Sahnun ibn Saʿid, *al-Mudawwanah al-Kubra*, Bayrut, Dar Sadir, vol. 12, p. 59, al-Khurashi, *Hashiyah al-Khurashi*, vol. 6, p. 343.

[3] The Shafiʿi school holds that units of monetary currency could be specifically identified by distinctively indicating a particular unit/units. When specific units are particularised in a transaction, the legal effects thereof will confine to the units thus indicated. See al-Nawawi, *al-Majmu' Sharh al-Muhadhdhab*, Bayrut, Dar al-Fikr, 1996, vol. 9, p. 256.

[4] Al-Ghazali, *al-Wasit*, vol. 3, p. 261, Abu al-Hasan ʿAli ibn Muhammad al-Mawardi, *al-Hawi al-Kabir*, Bayrut, Dar al-Kotob al-Ilmiyah, 1999, vol. 6, p. 473, al-Nawawi, *Rawdah al-Talibin*, vol. 3, p. 509, Muhammad al-Sharbini al-Khatib, *al-Iqnaʿ*, Bayrut, Dar al-Fikr, 1415H, vol. 2, p. 317, Sulayman ibn 'Umar al-Bujayrami, *Hashiyah al-Bujayrami*, Diyar Bakr, al-Maktabah al-Islamiyyah, vol.3, p. 42.

[5] al-Nawawi, *Rawdah al-Talibin*, vol. 3, p. 509.

Hanafi approach to ownership of capital

According to the Hanafi school, *sharikah 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.[6] This presumption is inextricably related to the concept of *sharikah* capital in the Hanafi school, which considers it essential that the capital in *sharikah al-'aqd* be of absolute mediums of value, i.e. money, which defies specific identification.

In *sharikah al-'aqd* involving capital, Hanafi theory emphasises on the possibility of *wakalah* (agency) of a required nature in the asset concerned.[7] 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 *sharikah*. 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 *sharikah*, could materialize even without such mingling of capitals.[8]

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 *sharikah 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, *sharikah al-'aqd* is held valid in this situation.[9]

The Hanafi school does not recognize the validity of non-liquid commodities as capital in *sharikah 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.[10] Therefore, Hanafi jurists reason that the involvement of non-liquid assets as capital entails profit without bearing liability, prohibited in Hadith. Consequently, non-liquid capital is disallowed due to inadmissibility of agency in the necessary manner therein.[11] The Hanafi theory does not recognize the validity of *mithliyyat,* i.e. fungible items sold by weight or measure and commodities consisting of identical units, as *sharikah* capital due to the fact that *mithliyyat*, being subject to particularization, are similar to non-liquid commodities in this respect.

Although non-liquid assets are categorically ruled out from forming *sharikah* 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 *sharikah* capital if the contract is formed on a pre-existing joint pool of non-liquid capital. When a *sharikah* 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 *sharikah al-milk* comprising both capitals, and contract the *sharikah* 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.[12]

Hanbali approach to ownership of capital

When *sharikah* involves capital, Hanbali school insists that it be of monetary currency, which serves as the medium of evaluation and payment.[13] Where a jointly owned pool of assets is existent, resulting through joint inheritance etc, *sharikah* 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 *sharikah*, 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 *sharikah* as agency

[6] Muhammad ibn Ahmad al-Samarqandi, *Tuhfah al-Fuqaha'*, Bayrut, Dar al-Kutub al-ʽIlmiyyah, 1405H, vol. 2, p. 38. This means that in transactions of exchange, particular units of currency cannot not be specified as the counter value.

[7] i.e. agency where the liability of settlement could primarily relate to the agent.

[8] Al-Sarkhasi, *al-Mabsut*, 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.

[9] Al-Sarkhasi, *al-Mabsut*, vol. 11, p. 153.

[10] al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 95.

[11] Al-Sarkhasi, *al-Mabsut*, vol. 11, p. 160, 161, al-Kasani, *Bada'i' al-Sana'i'*, vol. 6, p. 95,

[12] Ibn al-Humam, *Fath al-Qadir*, vol. 6, p. 174, al-Haskafi, *al-Durr al-Mukhtar* and Ibn ʽAbidin, *Radd al-Muhtar*, vol. 4, p. 310.

[13] Mansur ibn Yunus al-Bahuti, *Kashshaf al-Qinaʽ*, Bayrut, Dar al-Fikr, 1402H, vol. 3, p. 497, Ibn Qudamah, *al-Mughni*, vol. 5, pp. 115, 129.

may materialize even without such joint capital, which is the position of the Hanafi school. On the contrary, it is due to a fundamental principle that stands prominent in the Hanbali perception of *sharikah*. In the context of partnerships involving capital, Hanbali theory maintains that the contract of *sharikah* results in each partner becoming the owner of half the capital input of the other. Thus, the contract of *sharikah*, 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.[14] The capital contributed by each becomes commonly owned between them as a result of the *sharikah* contract, even though no mingling had taken place.[15] Consequent to this principle, mingling as required by the Shafiʿiyyah 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 *sharikah*, 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 *sharikah* 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 *sharikah* 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.[16] Non-liquid assets, inclusive of *mithliyyat*, are not admissible as capital of *sharikah* in the Hanbali school according to one of two reports from Imam Ahmad, due to the fact that co sharing or partnership as dictated by *sharikah* may not materialize in commodities. This is held to be the stronger position of the Hanbali school.[17]

Another report from Imam Ahmad recognizes the permissibility of *sharikah* as well as *mudarabah* on the basis of non-liquid capital. After citing Hanbali jurists who have given preference to this report, al-Mardawi has upheld it as the correct position.[18] This stance is supported by the argument that the objective of *sharikah*, 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.[19]

Maliki approach to ownership of capital

Maliki 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 Maliki 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 Maliki school for the establishment of *sharikah*, although its prior existence is not deemed necessary. Consequently, since contribution of different types of monetary currency towards *sharikah* necessarily gives rise to a contract of *sarf* where, in addition to the contract of *sarf* being accompanied by another contract, i.e. *sharikah*, different currencies are sold against each other without ensuring immediate transfer of possession, it is not allowed.[20]

An essential principle that appears unique to the Maliki perception of *sharikah* is the disapproval of a combination between *sharikah* and *sarf* (monetary exchange). In Maliki law, a contract of *sarf* is described as an exchange of monetary currencies belonging to different denominations.[21] *Sarf* has not been allowed to take place simultaneously with the contract of *sharikah*. According to Maliki 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 *sharikah*. The reason for this prohibition is the general stipulation of the Maliki 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 (*munajazah*) of the currencies exchanged, which does not materialize in the case of forming a *sharikah* involving monetary capital.[22]

Thus, where the partners contribute currency towards the *sharikah*, in order to eliminate the occurrence of *sarf*, Maliki jurists hold it necessary that the contributions be of identical denomination.[23] Similarly, they uphold the permissibility of *sharikah* based on contribution in kind, i.e. non-liquid capital. Since barter sale involving non-liquid assets is other than *sarf*, there is no

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[14] Ibn Qudamah, *al-Mughni*, vol. 5, p. 128.

[15] Ibn Qudamah, *al-Mughni*, vol. 5, p. 128, al-Bahuti, *Kashshaf al-Qinaʿ*, vol. 3, p. 497.

[16] Ibn Qudamah, *ibid*, al-Bahuti, *Kashshaf al-Qinaʿ*, vol. 3, p. 499.

[17] al-Bahuti, *Kashshaf al-Qinaʿ*, vol. 3, p. 498.

[18] ʿAli ibn Sulayman al-Mardawi, *al-Insaf*, Bayrut, Dar Ihya al-Turath al-ʿArabi, vol. 5, p. 410.

[19] al-Mardawi, *al-Insaf*, vol. 5, p. 410, Abu Ishaq Ibrahim ibn Muhammad Ibn Muflih, *al-Mubdiʿ*, Bayrut, al-Maktab al-Islami, 1400H, vol. 5, p. 5.

[20] Al-ʿAbdari, *al-Taj wa al-Iklil*, vol. 5, p. 123.

[21] Maliki school restricts the application of the term *sarf* to exchange of currencies belonging to different denominations. See Muhammad ʿArfah al-Dasuqi, *Hashiyah al-Dasuqi*, Bayrut, Dar al-Fikr, vol. 3, p. 2.

[22] Ibn ʿAbd al-Barr, *al-Kafi*, vol. 1, p. 390, Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 273.

[23] Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 273.

bar to capital inputs consisting of commodities on both sides. Similarly, a valid *sharikah* may be formed on the basis of commodities contributed as capital on one side and monetary currency on the other.[24] 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.[25] It is noteworthy in this regard that in holding non-liquid capital admissible, Maliki theory does not differentiate between *mithliyyat*, 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 *sharikah* as a mutual sale involving undivided shares of capital inputs and the resultant rejection of *sharikah* where it involves *sarf* in the Maliki sense, have led to another ruling. Imam Malik holds that a valid *sharikah* 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. Therefore, *sharikah* based on foodstuff alone is rejected by Imam Malik in general, which forms the preferred position of the Maliki school. According to the lesser position, Imam ibn al-Qasim has recognized *sharikah* as valid when foodstuff contributed as capital are homogeneous.[26]

Analysing the approaches of the schools to capital and the resultant theory of *sharikah*[27]

The above discussion would reveal that the fundamental issues lying at the base of the above discussion could perhaps be reduced to two factors. These are the relationship of *sharikah* to joint ownership in capital, and joint liability thereof. Although in most instances, these two are intrinsically related to each other, some schools have occasionally allowed them to function separately. In addition to these, certain ancillary issues such as particularizability (*ta'yin*) of money, possibility of gain devoid of liability and occurrence of exchange of money (*sarf*), appear to have played a role.

The significance awarded by schools of Islamic law to joint ownership of *sharikah* capital is twofold. The majority of the schools hold joint ownership of capital important for the continuation, if not existence, of *sharikah* based on property. The Hanafi school, although allowing that *sharikah* 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 *sharikah*.

According to Shafiʿi jurists, a *sharikah* may not form except on the basis of pre-existent joint capital. Joint ownership in capital should be established before finalising the *sharikah* 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 *sharikah* 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 *sharikah*. Thus, joint liability for the whole capital is central to *sharikah* in the Shafiʿi school, which regards the partners being separately liable for their respective capitals unacceptable. When joint ownership is ensured beforehand, a *sharikah* could be created on any type of capital such as different denominations of money, different commodities etc without restriction.

Similar to the Shafiʿi school, Maliki and Hanbali schools, too, have considered joint ownership significant for the acceptance of *sharikah*. However, these schools do not require prior establishment of such joint ownership necessary, because the process of forming a *sharikah* itself is deemed to result in joint ownership. As far as the Maliki school is concerned, the contract of *sharikah* 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 *sharikah*. The *sharikah* 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 capital is formed of commodities, together with joint ownership, joint liability too results through the mutual sale. Possession is irrelevant here in the Maliki school.

The Hanbali approach to formation of *sharikah* is in essence similar to that of Maliki jurists, with a significant difference. It is that, while the Hanbali theory also holds that *sharikah* 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 *sharikah* contract. The mutual establishment of ownership over proportionate shares of each other's capital takes place as a necessary legal consequence of *sharikah*, and not due to a mutual sale understood to take place along with the *sharikah* contract. Along with joint ownership, the contract of *sharikah* also results in the joint liability of partners for the whole capital. Therefore, joint ownership and joint

[24] The validity of *shirkah* in these instances is recognized by Imam Malik and endorsed by Imam Ibn al-Qasim. Ibn Rushd has referred to an unconfirmed report from Imam Malik that disapproves of *shirkah* in these instances. See Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 273.

[25] Muhammad ibn ʿAbd al-Rahman al-Maghribi al-Hattab, *Mawahib al-Jalil*, Bayrut, Dar al-Fikr, vol. 5, p. 123, 124, Sahnun ibn Saʿid, *al-Mudawwanah al-Kubra*, vol. 12, p. 55.

[26] Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 274.

[27] For a complete discussion on the positions of the schools of Islamic Law on capital in partnership, see Muhammad Abdurrahman Sadique, *Essentials of Musharakah and Mudarabah,* Kuala Lumpur, IIUM Press, 2009, Part 2.

liability both result automatically consequent to the contract of *sharikah*. Hanbali theory also recognises that *sharikah* could also be formed based on capital jointly owned by the partners before the *sharikah*.

In comparison with the above, the Hanafi approach to joint ownership and joint liability in the context of *sharikah* 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 Shafi'i school or considering it an immediate outcome of a valid *sharikah* contract, the Hanafi school considers the formation of a valid *sharikah* unrelated to joint ownership of capital. Neither is joint ownership a prerequisite for *sharikah*, 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 *sharikah*, to bear any loss befalling his capital alone, until his capital is utilised in purchases. Since joint ownership is not sought in *sharikah*, 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 *sharikah* 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 *sharikah 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 *sharikah al-'aqd* to consist of the component contracts of agency and sale in an implicit manner. Thus, the contract of *sharikah* 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 *sharikah* 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 *sharikah* 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. The theoretical approach to ownership in these instances is intrinsically related to liability of the partners as well.

The effect of the concept of *sharikah* on formulation of rules

The analysis above illustrated the fact that the rulings on various aspects of *sharikah* have been directly influenced by the perception of its essence nature, comprising the key elements of ownership and liability. Each school, as shown above, has perceived the this essence that forms the contract of *sharikah* 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.

In 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 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. It is of paramount importance to assess the conformity of new 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 practical rulings. 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. Thus, such rulings should be monitored and studied for ensuring their being in harmony with the general theories.

Conclusion

Using *sharikah al-'aqd* or commercial partnership as an example, it was analysed above how a unique theory pertaining to the essential identity of *sharikah* revolving on ownership of capital and liability of the partners had acted as the foundation in deriving detailed rulings. As necessitated by the nature of the study which pertained to the essential concepts of Shari'ah as perceived and formulated by recognized jurists of the schools of Islamic law, the study was doctoral, i.e. based on the well-known legal texts of Islamic law. Despite of the scholarly work in the field of Islamic legal provisions on partnership and other contracts, little progress seems to have been achieved in the area of fundamental theories of Shari'ah in the recent past, as the primary efforts of contemporary scholars are mainly directed towards developing applications that may suit the demands of Islamic financial institutions. Such recent efforts do not seem to be particularly related to or based on the context of the essential theories that exist in Islamic law, as had been illustrated above using rules on partnership capital as an example. It was shown that each school had formulated rules pertaining to various aspects of *sharikah* based on its distinct perception of the essential foundation of *sharikah*, that had directly influenced the major regulations of the school on the subject. Consequently, rules of *sharikah* of an school are all seen to form a single consistent unit, free of contradiction, coming under the general theory of *sharikah* as perceived in that particular school. This could be considered true of other areas of Shari'ah as well.

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. Thus, policy makers and those involved in the field should pay especial attention to ensuring the proper implementation of such a verification process. Due to the fact that Islamic law is of global relevance, formation of an international scholarly body for the purpose should be encouraged. The existing general theories upheld by the Islamic schools of law should be subjected to meticulous scrutiny; those that are most conducive to current requirements and possess the capacity to accommodate further amplification of Shari'ah regulations in the light of unfolding situations, could be adopted as the basic theories for the purpose of developing new rules, especially in fields such as Islamic banking. Similarly, new rules developed should be meticulously examined for ensuring their being in harmony with the general theories. This could result in bringing the current developments in Shari'ah regulations on banking and finance within an overall framework, in a manner that could ensure the general congruency and consistency of Shari'ah.

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