ABSTRACT

A careful study of Islamic legal manuals with the aim of identifying the principal legal theories would indicate that a fundamental legal concept has often served as the basis for all the rulings on a specific area of law. The approach of a school Islamic law to detailed issues on a subject is shaped by the individual theoretical foundation developed by the school pertaining to the area of law concerned. In capital based partnerships, rulings of each school have been directly influenced by the distinct postulation adopted by the school with regard to the essence of *shirkah*. The perception of each school regarding the core structure of *shirkah* has dictated the approach of the school to the admissibility of various types of capital, liability of partners, and a multitude of related rulings. In deriving practical solutions to issues of current relevance, it should be ensured that the rulings reflect a uniform underlying theory, without contradiction at any level. This calls for a careful attempt to discover or remodel theoretical foundations of various topics, which could accommodate all related regulations. In safeguarding the theoretical consistency of the Shari'ah, this aspect is of central importance.

Key word: Islam, Law, Partnership, Theory, Murabahah

Introduction

Significant advancement has been achieved in Shari'ah-based research in the field of Islamic banking and finance in the last few decades. Academic research augmented by experience gained on the ground through implementation of various products have concentrated mostly on producing workable solutions to problems encountered in the practice of Islamic banking. Difficulties faced in implementing various Islamic banking products such as murabahah, ijarah, musharakah and mudarabah and their diverse variants have been sought to be removed by fine tuning various aspects in the traditional modes. Hybrid contracts have been developed through juxtaposing diverse traditional contracts together for the purpose of achieving a variety of ends, and for overcoming certain restrictions found in the traditional contracts that are deemed to be counterproductive or to limit the possibility of their implementation in the current banking and commercial environment.

In spite of the above, certain areas where thorough research is yet to be undertaken despite their importance could become evident, when one takes a comprehensive look at the developments in the modern Islamic rulings on banking and finance, without delimiting the purpose to viability and practicability in the short term. One of these pertain to the theoretical basis and foundation of practical rulings that provide the overall framework and core structure which link the detailed rulings together, while another is related to certain universal issues that could directly affect the outcome and practical substance of a large number of Shari'ah rulings. Examples of the latter could be the Shari'ah perspective of the altered nature of money in the modern fiscal environment where credit has become an inalienable supplement to money, and practical means of determining the profit sharing ratio in joint equity ventures without violating the overall objectives of Shari'ah. However, this aspect is not analysed in this paper, which attempts to study the former issue.

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

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

Existence of a core theory:

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

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

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

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

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

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

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

When each potential partner contributes monetary currency for establishing an equity venture, in order to establish a joint capital base as required by the Shāfī’i theory, the monies offered have to be mixed until differentiating the input of each becomes impossible. This is held necessary even in the case of monetary currency, based on the fundamental principle upheld by the Shāfī’i school that units of monetary currency could be specifically distinguished, i.e. particularised. As such, a shirkah may not be formed until the capitals are thoroughly mixed creating a joint stock where the contribution of each partner cannot be separately known. This is because the Shāfī’i theory holds that as long as the capitals are distinguishable, each party shall be individually liable for his own stock, which is not acceptable in shirkah. Thus, common liability for each unit of the capital appears central to the Shāfī’i perception of partnership.

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

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

However, it is evident from a perusal of Shāfī’i legal works that the above represents a strict rehearsal of the theoretical position underlying the Shāfī’i perspective of partnership capital. After delineating the theoretical position, Shāfī’i jurists are noted to invariably point out the hilah prescribed for the creation of a shirkah based on commodity capital through concluding a mutual sale that results in jointly owned capital eligible to become the basis of shirkah. This technique does not involve the process of mingling, thus removing the impediment to forming a partnership between two partners who are away from each other. In fact, Shāfī’i jurists have expressly stated that the bar on non-liquid capital is only applicable when two partners produce specific amounts of capital and intend to form a partnership based on them straight away. Otherwise A partnership could be initiated conveniently on the basis of any type of asset if the appropriate process is adopted. Thus, al-Nawawi categorically declares that the rules prohibiting or allowing partnership based on the nature of capital pertain to a situation where one submits a quantity of assets belonging to him and another his, seeking to form the partnership capital directly. If not, formation of partnership is feasible in a manner other than this in all types of property.
Theory of shirkah in the Hanafi school and their approach to capital:

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

Thus, according to the Hanafi school, shirkah al-ʿaqd 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. This presumption is inextricably related to the concept of shirkah capital in the Hanafi school, which considers it essential that the capital in shirkah al-ʿaqd be of absolute mediums of value, i.e. money, which defies specific identification.

In shirkah al-ʿaqd involving capital, Hanafi theory emphasizes on the possibility of wakālah (agency) of a required nature in the asset concerned. 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 materialize therein, this is sufficient for the valid formation of shirkah. Therefore, Hanafi jurists do not insist on the existence of a jointly owned pool of capital, or on mingling of the capital inputs in order to create such a common pool. This is because a valid mutual agency (i.e. of the required nature), which is the crux of shirkah, could materialize even without such mingling of capitals. Accordingly, the meaning of ‘mingling’ and ‘sharing’ conveyed by the term shirkah is not taken by Hanafi jurists to denote sharing in a common capital necessarily. The common sharing as connote by the term could well mean joint ownership in assets purchased through the shirkah capital, or joint entitlement to the profits of the venture. Such sharing could be found even in the absence of a jointly owned capital pool.

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

As dictated by this line of reasoning, the Hanafi school does not recognize the validity of non-liquid commodities as capital in shirkah al-ʿaqd. 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 (al-Kāsânī, Badāʾi’ al-Sanāʾi’, vol. 6, p. 95). In addition, if the major part of the profits resulted through the sale of the assets of one partner, the other would share in such profits without having borne liability for the former’s assets. (al-Bābartī, al-ʿInāyah) 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 thereafter (Al-Sarkhasi, al-Mabsūṭ, vol. 11, p. 160, 161).

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

Although non-liquid assets are categorically ruled out from forming shirkah capital due to their being completely distinguishable, thus constituting the perfect antithesis of absolute mediums of value, Hanafi jurists have opted to recognize their admissibility as shirkah capital if the contract is formed on a pre-existing joint pool of non-liquid capital. When a shirkah is sought to be established on the basis of non-liquid inputs from
both parties, they propose that each potential partner initially sell an undivided share of his assets against a similar share in the assets of the other, thus creating a shirkah al-milk comprising both capitals, and contract the shirkah thereafter. If the partners wish, the proportion of the shares to be exchanged could be fixed in such a way that the proportionate ownership of the partners’ in the joint capital reflects the proportionate value of the initial capital input (Ibn al-Humām, Fath al-Qudīr, vol. 6, p. 174).

Theory of shirkah in the Hanbali School and their approach to capital:

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

Where a jointly owned pool of assets is existent, resulting through joint inheritance etc, shirkah could be contracted on its basis if the proportion of the partners’ ownership is known. However, Hanbali theory does not require the pre-existence of a jointly-owned pool of capital for the formation of shirkah, and does not prescribe mingling of capitals for the creation of such a pool. This is not because joint ownership of capital is not essential for the validity of shirkah as agency may materialize even without such joint capital, which is the position of the Hanafi school. On the contrary, it is due to a fundamental principle that stands prominent in the Hanbali perception of shirkah. In the context of partnerships involving capital, Hanbali theory maintains that the contract of shirkah results in each partner becoming the owner of half the capital input of the other. Thus, the contract of shirkah, by itself, produces the transfer of ownership of half of each partner’s capital to the other, without the need for any external measure to achieve this end (Ibn Qudāmah, al-Mughni, vol. 5, p. 128). The capital contributed by each becomes commonly owned between them as a result of the shirkah contract, even though no mingling had taken place (al-Bahūti, Kashshāf al-Qinā‘, vol. 3, p. 497). Consequent to this principle, mingling as required by the Shāfi‘i‘iyah for the creation of jointly held capital becomes unnecessary, as this end is realized automatically. Due to the fact that mingling is not required, capital could be contributed in different denominations of currency. Thus, the partners may contribute currency of dissimilar denominations towards the shirkah, which shall become jointly owned immediately upon the finalization of the contract.

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

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

Another report from Imām Ahmad recognizes the permissibility of shirkah as well as mudārābah on the basis of non-liquid capital. After citing Hanbali jurists who have given preference to this report, al-Mardāwī has upheld it as the correct position. This stance is supported by the argument that the objective of shirkah, namely, the right to transact in both capitals and the mutual sharing of profits, is realizable in commodities, similar to monetary currency. As far as distribution is concerned, the value of the assets contributed at the inception could be taken as the basis, as is done in the case of Zakah (al-Mardāwī, al-Insāf, vol. 5, p. 410).
Theory of *shirkah* in the Mālikī School and their approach to capital:

*Shirkah* in essence consists of agency and sale in the approach of the Mālikī school (Al-Khurstāshī, *Hāshiyāh al-Khursashi*, vol. 6, p. 338). Equality in all aspects of partnership is considered as the fundamental principle common to all types of *shirkah*, i.e. in contributions of capital and labour and sharing of profit and loss. Where the capital inputs of the partners are unequal, labour as well as profit and loss should necessarily be proportionate to the capital input ratio. *Shirkah* could exist only on the basis of either capital or labour. However, where capital exists, labour is considered subordinate to capital (Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*). While *shirkah al-ḥabd* is held valid, *shirkah al-wujūd* is rejected, as the labour element is considered imprecise in the latter.

An essential principle that appears unique to the Mālikī perception of *shirkah* is the disapproval of a combination between *shirkah* and *sarf* (monetary exchange). In Mālikī law, a contract of *sarf* is described as an exchange of monetary currencies belonging to different denominations. *Sarf* has not been allowed to take place simultaneously with the contract of *shirkah*. According to Mālikī theory, a valid partnership cannot form when the inputs of the partners consist of different currencies, as here a contract of *sarf* is assumed to accompany the contract of *shirkah*. The reason for this prohibition is the general stipulation of the Mālikī 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 of currency (munājāzah) of the currencies exchanged, which does not materialize in the case of forming a *shirkah* involving monetary capital (Ibn `Abd al-Barr, *al-Kāfī*, vol. 1, p. 390).

Thus, where the partners contribute currency towards the *shirkah*, in order to eliminate the occurrence of *sarf*, Mālikī jurists hold it necessary that the contributions be of identical denomination. It could be argued here that according to the Mālikī perception of *shirkah*, *sarf* (or in Mālikī parlance, *murātālah*) of an imperceptible nature should be deemed to occur even when the inputs are identical in denomination, which could invalidate the contract due to the absence of immediate possession. Ibn Rushd explains that the absence of immediate possession in this instance is tolerated due to the existence of *ilmā*` on the permissibility *shirkah* based on homogeneous monetary currency (Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 273).

This perception ensues from a vital assumption upheld by the Mālikī school pertaining to the reality of *shirkah*. Mālikī 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 Mālikī 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 Mālikī school for the establishment of *shirkah*, although its prior existence is not deemed necessary. Creation of the jointly held assets as required in this regard is achieved through the presumption that the contract of *shirkah* necessarily accompanies an instantaneous sale, a fact that is perceived to constitute the crux of business partnership in Mālikī theory. Consequently, since contribution of different types of monetary currency towards *shirkah* necessarily gives rise to a contract of *sarf* where, in addition to the contract of *sarf* being accompanied by another contract, i.e. *shirkah*, different currencies are sold against each other without ensuring immediate transfer of possession, it is not allowed (Al-`Abdari, *al-Tāj wa al-Iklīl*, vol. 5, p. 123).

The same theoretical assumption that led to the inadmissibility of different types of currency forming *shirkah* capital, namely, that it is a combination of *sarf* and *shirkah* with the absence of immediate possession, has lead to the permissibility *shirkah* based on contribution in kind, i.e. non-liquid capital. Since barter sale involving non-liquid assets is other than *sarf*, there is no bar to capital inputs consisting of commodities on both sides. Similarly, a valid *shirkah* may be formed on the basis of commodities contributed as capital on one side and monetary currency on the other. 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 (Sahnūn ibn Sa`īd, *al-Mudawwanah al-Kubrā*, vol. 12, p. 55). It is noteworthy in this regard that in holding non-liquid capital admissible, Mālikī theory does not differentiate between *mithliyyāt*, i.e. generic commodities sold by weight or measure, and the rest. However, capital consisting of foodstuff is noted to be subject to specific rules, as discussed below.

The two fundamental factors described above, i.e. perception of *shirkah* as a mutual sale involving undivided shares of capital inputs and the resultant rejection of *shirkah* where it involves *sarf* in the Mālikī sense, have lead to another ruling. Imām Mālik holds that a valid *shirkah* may not be formed on capital inputs consisting of foodstuff from both sides. The reason is that similar to monetary currency, foodstuff too falls under the category of items where deferment is impermissible. In exchanges of foodstuff, immediate transfer of possession is mandatory. When capital inputs consist of foodstuff, the contract of *shirkah* would result in a mutual sale of foodstuff where, however, immediate possession would not take place. Even if sharing of liability is achieved through mingling the capitals, this could not be construed as possession. Therefore, *shirkah* based on foodstuff alone is rejected by Imām Mālik in general, which forms the preferred position of the Mālikī school. According to the lesser position, Imām ibn al-Qāsim has recognized *shirkah* as valid when foodstuff contributed
as capital are homogeneous. Ibn Rushd explains that the recognition of ibn al-Qasim is based on equating (i.e. *qiyyās*) *shirkah* based on homogeneous foodstuff to that of homogeneous monetary currency permitted by *ijmāʿ*, while Imam Mālik holds that *qiyyās* may not be resorted to where the original permission is based on a concession upheld by *ijmāʿ* (Ibn Rushd al-Qurtubi, *Bidāyah al-Mujtahid*, vol. 2, p. 274).

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

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

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

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

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

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

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

Importance of ascertaining the core theory:

The analysis above illustrated the fact that the rulings of each school on various aspects of shirkah have been directly influenced by the position adopted by the school with regard to its essence and substance. Each school, as shown above, has perceived the core essence that forms the relationship of shirkah in a distinct manner. This unique perception adopted by each school had dictated its approach to the admissibility of various types of capital, the occasion when capital should be present, and a multitude of related rulings that were all modelled and given shape to by the perceived core theory.

Thus, for the purpose of modern equity financing, the question arises as to which of the above core theories should be adopted in the modern context, or whether an entirely new theory should be formulated. A less scientific approach would be to disregard such core theories totally and to suffice with adopting rulings that are convenient, irrespective of which school they originate from and the theoretical foundations that gave rise to them. However, while this could be less offensive perhaps from a layman’s approach where the purpose could 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 the theoretical foundations of various topics, which could accommodate related regulations.

Conclusion:

In many areas of Islamic law, core theories that serve as the theoretical foundation for whole sets of rulings have been adopted by mujtahids. These reflect the best possible model that could explain and accommodate all the Shari’ah directives relating to a topic in the approach of a mujtahid, and therefore such a fundamental theory is adopted by him as the essence or basis for formulating extended rulings. Using shirkah al-‘aqd as an example, it was analysed above how a unique core theory pertaining to the essential identity of shirkah had acted as the foundation for the application of the ijtihdād process in the major schools of Islamic law, in deriving detailed rulings. It was shown that each school had formulated rules pertaining to various aspects of shirkah based on its distinct perception of the essential foundation of shirkah, that had directly influenced the major regulations of the school on the subject. Consequently, rules of shirkah of an school are all seen to form a single consistent unit, free of contradiction, coming under the general theory of shirkah as perceived in that particular school. This could be considered true of other areas of Shari’ah as well.

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

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

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

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