

THE CONCEPT OF COMPLETE EQUALITY IN *MUFAWADAH* PARTNERSHIP: ITS RECOGNITION AND RATIONALE IN ISLAMIC LAW

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ABSTRACT

The emphasis in mufawadah partnership is on realising complete equality in all relevant aspects of the venture where sharing is possible. This has theoretically necessitated, among other things, total equality of capital possessed and invested by each partner in the venture, equality in transactional powers, and each partner being a guarantor for the liabilities of the other, in addition to bearing mutual agency. With the extraordinary nature of this contract, it is exceedingly questionable that such a partnership is feasible, if not at its inception, at least in continuation. Thus, the purpose in the detailed analysis of mufawadah in works of Islamic law appears to be highlighting the differences between mufawadah and 'inan, complementing the study of the latter, which is the most common form of contractual partnership.

Keywords: *mufawadah*, partnership, Islamic Law, equality

Introduction

As a legal system that has the felicity of mankind in the short term as well as the long term as its primary objective, Islamic Law has provided a regulatory structure based on justice and fair play in all areas of human interaction. The impartial nature of this system becomes evident upon contemplation of the rules pertaining to the area of contracts among human beings, particularly those that involve property. A comprehensive scheme involving detailed guidelines on the formation and operation of various contracts that regulate transactions pertaining to property and rights is provided in Islamic law, which has been derived by Muslim jurists from the principles found in the Qur'anic revelations and the prophetic guidance. Among the several major classes of contracts, which include contracts of gratuitous transfer such as gift and contracts of exchange such as sale and lease, the class of contracts for mutual participation includes *shirkah/sharikah* (partnership) and *mudarabah* (fund management). The types of contract that fall under *shirkah al-'aqd* (i.e. contractual partnership, as against *shirkah al-milk* or joint participation in ownership etc. without an express contract), are based on facilitating joint contribution from multiple parties for common sharing of proceeds and liability. Being the primary Islamic mode proposed as an alternative for interest-based financing of commercial ventures as prevalent today, it is of especial importance that all aspects pertaining to contractual partnership be studied thoroughly, so as to comprehend the Islamic scheme for joint participation in commercial gains and liabilities.

Shirkah al-mufawadah, which could be translated as partnership based on equality, is one of the four basic models of contractual partnership (*shirkah al-'aqd*) that have been thoroughly discussed in Islamic law, the other three being *'inan*, *a'mal* and *wujuh*. Of all these four types (to which some have added *mudarabah*, classifying it as the fifth type of contractual partnership) *mufawadah* has been the most controversial. The proofs cited for its acceptability and the conditions deemed necessary for its validity have been the subject of a lively discourse among Muslim jurists. Indeed, the possibility of its existence in operational form has not been established. The current paper explores the concept of *shirkah al-mufawadah* and its position vis-à-vis other types of contractual partnership as put forward by Islamic jurists, while attempting to identify the rationale behind its recognition as a type of partnership.

The concept of sharing/partnership

As a prelude to grasping the nature of the discussion surrounding recognition of *shirkah al-mufawadah* as a legitimate form of partnership, it is vital to understand the essential nature of partnership in Islamic law. While the nature of partnership in Islamic law is a worthy of a detailed analysis on its own, for the sake of the current discussion, we shall suffice with shedding light on the elementary aspects only. Thus, an outline of the concept of partnership or *shirkah*, its fundamental principle referred to in Arabic as *shuyu'*, and the division of partnership into the two basic forms of non-contractual and contract based are discussed at some length below.

Literally, *shirkah* or *sharikah* denotes intermingling or merging (*mukhala'ah*).¹ Jurists have cited its meaning as merging together (*ikhtilal*).² This is explained to mean "blending one of two properties (*mal*) with the other in a way that the two cannot

¹ *Lisan al-'Arab*, vol. 10, 448.

² Al-Khalib al-Sharibini, *Mughni al-Muhtaj*, Bayrut, Dar al-Fikr, 1998, vol. 2, 287.

be differentiated one from the other”.³ “Merging of two portions” (i.e. *nasibayn*), without reference to *mal* or otherwise, as given by the Hanafi jurist Ibn al-Humam, appears to be broader in scope. Thereafter, the term was applied to indicate a contract for this purpose, even when the blending together of assets did not occur in reality, as the contract leads to some form of blending.⁴ Generally, it may be taken to convey the meaning of sharing or holding in common an asset or any other entity.

Thus, *shirkah* in its usual context is firmly related to sharing in common, be it in business or otherwise. For understanding the fundamental nature of partnership, it is necessary to consider some of the definitions given by jurists to the original *shirkah*, before analysing its different types. Shafi’i jurists distinguish *shirkah* as “every right established between two or more (parties) in common (*‘ala al-shuyu’*)”.⁵ *Shuyu’* indicates the indistinguishable nature of the portion of one from that of the other, i.e. common entitlement is established with regard to each part of the subject matter. The use of the term ‘right’ (*haqq*) here is not meant to exclude assets; rather, it is for the sake of including various forms of rights that could be held in common, in addition to entitlement to assets; thus common ownership of assets is included in the reference to ‘right’. Others have referred to ‘establishment of the right to a thing (*shay’*) in common’.⁶ The Hanbali jurist Ibn Qudamah has defined it as “joining together in the right of ownership (*istihqaq*) or the right of transaction (*tasarruf*),” which is a reference to its two major forms.⁷ According to the Maliki jurists, *shirkah* refers to “permission (granted) to each other to transact while retaining the right with each.”⁸ Among Hanafi jurists, the author of *al-Durr al-Mukhtar* has described *shirkah* as “an expression of a contract between two partners in the capital (*asl*) as well as the profit (*ribh*)”.⁹

It is evident that some of the above definitions are more reflective of the features of *shirkah al-‘aqd* or contractual partnership than those of other types, while some are in need of interpretation in order to suit *shirkah* pertaining to commonly held rights. The reference to profit (*ribh*) as in the definition given by al-Haskafi above could be more pertinent to *shirkah al-‘aqd*. Moreover, some definitions do not bear express reference to the factor of *shuyu’* or being indistinguishable—an important characteristic indicating sharing in common of each unit of the subject of partnership—leaving it to be interpreted. The Hanafi school does not consider common ownership mandatory for the formation of *shirkah al-‘aqd*, which could be validly formed even while the capitals contributed by the partners remain in their individual ownership. However, assets purchased for the *shirkah* and profits realized are jointly owned, due to which reference to joint ownership could be relevant. Considering the fact that the purpose here is to define partnership in a way applicable to all of its various forms, the definition given by al-Rafi’i and others that highlights the establishment of a right or entitlement between two or more parties in common appears to be more reflective of the essence of *shirkah* in general.

Types of *shirkah*

Partnership 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.¹⁰

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.

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 willfully entered into for commercial purposes aimed at realising profits, or mere holding of the subject of

³ ‘Abd al-Rahman al-Jaziri, *Kitab al-Fiqh ‘ala al-Madhab al-Arba‘ah*, Bayrut, Dar al-Kutub al-‘Ilmiyyah, 1986, vol. 3, 63. It has also been translated as, “the conjunction of two or more estates, in such a manner that one of them is not distinguishable from the other.” Al-Marghinani, *Al-Hidayah*, translation by Hamilton, 217-31 (Afzalur Rahman, *Banking and Insurance*, London, The Muslim Schools Trust, 1979, 293)

⁴ Kamal al-Din ibn al-Humam, *Fath al-Qadir*, Bayrut, Dar al-Fikr, n.d., vol. 6, 152; Akmal al-Din al-Babarti, *al-‘Inayah*, printed with *Fath al-Qadir*, vol. 6, 152; Muhammad Amin Ibn ‘Abidin, *Radd al-Muhtar*, Bayrut, Dar al-Fikr, 1979, 299. This explanation is more in keeping with the Hanafi theory, which does not uphold joint ownership of the capital or joint liability thereof as legal consequences of partnership, i.e. contractual. These aspects materialize only in the assets purchased with partnership capital and the profits realized. See Part two of Muhammad Abdurrahman Sadique, *Essentials of Musharakah and Mudarabah*, Kuala Lumpur, IIUM Press, 2009.

⁵ Abu al-Qasim al-Rafi’i, in Abu Zakariyya al-Nawawi (d.676 AH), *Rawdah al-Ualibin*, Bayrut, Dar al-Kutub al-‘Ilmiyyah, vol. 3, 507.

⁶ See al-Sharbini, *Mughni al-Muhtaj*, vol.2, 211.

⁷ Muwaffaq al-Din ibn Qudamah, *al-Mughni*, Bayrut, Dar al-Fikr, 1992, vol. 5, 109.

⁸ Sayyidi Ahmad al-Dardir, *al-Sharh al-Kabir*, Bayrut, Dar al-Fikr, vol. 3, 348.

⁹ ‘Ala al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, Bayrut, Dar al-Fikr, 1979, vol. 4, 299. Ibn ‘Abidin has opined that possibly this definition is meant to refer to *shirkah al-‘aqd* only.

¹⁰ Al-Mawardi, *al-Hawi al-Kabir*, vol. 6, 470-472. A classification close to this has also been mentioned by the Shafi’i jurist al-‘Imrani. See Abu al-Hasan Yahya ibn Abi al-Khayr al-‘Imrani al-Yamani, *al-Bayan*, al-Qahirah, Dar al-Minhaj, (n.d.), vol. 6, 362.

shirkah in common ownership. The former is termed *shirkah al-'aqd* (or *'uqud*) while the latter is known as *shirkah al-milk* (or *amlak*) or *shirkah al-'ain*.¹¹ We shall proceed to discuss the types of partnership based on this classification.

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. *'ain*) without there being a contract.¹² 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".¹³ 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.¹⁴ However, the rules pertaining to a partnership in debt could be different from an asset-based partnership.¹⁵ 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.

Sharikah al-'aqd refers to a partnership that comes into existence consequent to a mutual contract between two or more parties.¹⁶ The *Majallah* defines *shirkah al-'aqd* as a contract of partnership between two or more parties on the basis of joint participation in capital and profit.¹⁷ Hanbali jurists define it as joint participation in transacting through sale etc.¹⁸ While *shirkah al-milk* may come into existence even through inadvertent merging of assets, a contract, even with an acceptance taking place only through conduct, is necessary for the formation of *shirkah al-'aqd*.¹⁹ Through the contract, the partners become agents of each other, empowered to utilize the capital specified by the other in purchasing.²⁰ The legal consequence of such a contract is that the subject matter of the contract, i.e. the fruits of the contract, becomes jointly owned by them.²¹ The contract in this instance relates to joint ventures entered into for commercial purposes that usually involve joint investment with a view to realizing profits, in the approach adopted by Hanafi and Hanbali jurists.

It is pertinent to note here that according to some Shafi'i jurists, *shirkah*, or more appropriately *shirkah al-'aqd*, is not a contract in itself, as verified by al-Ghazali. It is essentially an agency, coupled with each partner permitting the other to transact in the jointly owned property.²² This standpoint appears to be in keeping with the Shafi'i position regarding issues such as profit division. According to the Shafi'i school, profit and loss both are necessarily shared by the partners according to the capital ratio, and a partnership is not in need of an express agreement for laying down these basic terms. In fact, any agreement to the contrary is invalid.²³ However, other Shafi'i jurists have considered *shirkah*, i.e. optional, to be a contract.²⁴ As mentioned earlier, al-Mawardi had divided *shirkah* into those taking place based on contract and otherwise.

Sharikah al-'aqd, which we may refer to as contractual partnership, may come into existence only when the parties involved are capable of transaction, as discussed by jurists in relation to its different types. Being a relationship established by the parties through a mutual contract, it goes without saying that all the other necessary ingredients of a valid contract must be present here such as the contract taking place with the free consent of the parties without any duress, fraud or misrepresentation.²⁵ In its original form, *shirkah al-'aqd* is a non-binding contract (*ghayr lazim*) where every partner is entitled to terminate the contract whenever he wishes.²⁶

¹¹ 'Ala al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, 299; Ibn Qudamah, *al-Mughni*, vol. 5, 109. *Sharikah al-milk* is also referred to as *sharikah al-'ain*.

¹² Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-Arba'ah*, vol. 3, 63.

¹³ As in 'Ala al-Din al-Haskafi, *al-Durr al-Mukhtar*, printed with *Radd al-Muhtar*, vol. 4, 299.

¹⁴ Ibn al-Humam, *Fath al-Qadir*, vol. 6, 153

¹⁵ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, 300.

¹⁶ Al-Haskafi, *al-Durr al-Mukhtar*, vol. 4, 305.

¹⁷ *Al-Majallah*, vol. 1, 254.

¹⁸ Mansur ibn Yunus al-Bahuti, *al-Rawd al-Murbi'*, Maktabah al-Riyad al-Hadithah, al-Riyad, 1390H, vol. 2, 260.

¹⁹ Ibn al-Humam, *Fath al-Qadir*, vol. 6, 152.

²⁰ Al-Sarkhasi, *al-Mabsu'*, Bayrut, Dar al-Ma'rifah, 1406AH, vol. 11, 152.

²¹ Zayn ibn Ibrahim ibn Muhammad, *al-Bahr al-Ra'q*, Bayrut, Dar al-Ma'rifah, n.d., vol. 5, 180. This based on the Hanafi position aforementioned that *shirkah* here involves only partnership in the outcome of the venture, in the form of assets purchased and profits realized. According to the other schools, joint partnership is established even in capital.

²² Abu Hamid al-Ghazali, *al-Wasi'*, al-Qahirah, Dar al-Salam, 1417AH, vol. 3, 260; 'Abdul Hamid al-Sharwani, *Hawashi al-Sharwani*, Bayrut, Dar al-Fikr, vol. 5, 281.

²³ For details on this issue together with its relevance and application in Islamic modes of financing, see Muhammad Abdurrahman Sadique, *Profit and Loss Sharing in Islamic Equity Financing: Issues and Prospects*, Kuala Lumpur, The Other Press, 2012.

²⁴ Muhammad al-Sharbini al-Khalib, *al-Iqna'*, Bayrut, Dar al-Fikr, 1415AH, vol. 2, 316.

²⁵ Muhammad Taqi Usmani, *An Introduction to Islamic Finance*, 35.

²⁶ The measures that could be taken to curb the apparent instability that may possibly result through this provision shall be outlined under termination of *shirkah*.

It is necessary that the type of transaction envisaged in contractual partnership be of a nature that accepts agency. This is because all forms of contractual partnership involve agency (*wakalah*) where a partner is empowered to transact in the share belonging to the other partners on the basis of the underlying power of attorney he holds on their behalf. As such, each partner acts as principal as far his own share is concerned, and is an agent of the other with regard to the latter's share. It is on this basis that the proceeds realised through the enterprise become mutually owned, so that the purpose of contracting the partnership is achieved, which is sharing in the profit. If not for this, each would have owned what was purchased in his share himself, to the exclusion of other partners.²⁷

Due to the above reason, according to Hanafi jurists, a contract of partnership cannot be formed with regard to actions where agency is not feasible, such as acquiring of freely available natural resources, since the latter become the property of only the one who undertakes the action resulting in ownership, to the exclusion of others. Therefore, a partnership venture is not possible in hunting, gathering of firewood in the wild etc., and acquiring these does not result in common ownership.²⁸ However, Hanbali jurists have allowed a partnership on the basis of *shirkah al-abdan* for the purpose of acquiring free resources (*al-mubahat*) such as firewood, wild grass, minerals etc. According to them, agency is permissible with regard to free resources, therefore, one may appoint another as his agent for acquiring these against a fee, or even without a fee when the other is willing to work without remuneration.²⁹

Shirkah al-'aqd is generally divided into four categories by most jurists, viz. *'inan*, *mufawadah*, *abdan* and *wujuh*, although there exists some difference among them as to which of these can be held permissible and the conditions thereof, with the exception of *shirkah al-'inan*, which is universally agreed on.³⁰ Hanbali jurists consider *mudarabah* as a type of partnership, thus dividing contractual partnership into five categories.³¹ Al-Mawardi has referred to six types of *shirkah*, considering partnership in commodities (*shirkah al-'urud*) and partnership with disproportionate division of profits (*shirkah al-mufadalah*) as individual categories.³² Maliki jurists have initially classified *shirkah* into three categories, viz. *amwal*, *abdan*, and *wujuh*. Thereafter they divide *shirkah al-amwal* into *mufawadah* and *'inan*, to which some have added *mudarabah* as well.³³ The division by Hanafi jurists is similar, except that they divide *amwal*, *abdan* and *wujuh* each into *'inan* and *mufawadah*, which results in six types of contractual partnership. However, Ibn 'Abidin has clarified that the conditions of *mufawadah* with regard to each of the three principle types are different, and that the application of *mufawadah* with regard to the last two types, i.e. *a'mal* and *wujuh*, is apparently metaphorical, which is an important observation.³⁴

Nature of *shirkah al-mufawadah* as defined by jurists

After the above survey on the nature of *shirkah* and its types, we may now consider *mufawadah* and discuss its nature as debated by the jurists. We may first look at the meaning of the term *mufawadah*. The term *mufawadah* literally means equality in sharing, i.e. to share equally in everything. It is derived from the root *fawd* that suggests becoming common, as in the case of a river overflowing, or from the infinitive *tafwid*, i.e. to assign. The technical meaning is narrower in application than the literal, as the term *mufawadah* when used to denote a partnership does not entail equality of the partners in all aspects, such as in fixed assets and merchandise.³⁵ According to Shafi'i jurists, the name is derived from a similar term that means commencing a conversation together, or from the term *fawda*, used to describe people who are equal.³⁶

Ibn Rushd has defined the nature of the contract of *mufawadah* that has been held permissible by the Maliki jurists as "each partner authorising the other to transact in the former's capital in the presence as well as the absence of the former". It may take place in all types of property.³⁷ It appears from the Maliki definition of *mufawadah* that it involves only mutual agency, whereby a partner is authorised to transact in the capital of the other.³⁸ It does not incorporate universal guarantee or inclusion of all ones monetary assets in the partnership as envisaged by the Hanafi jurists, as described below.

After stating the permissible form of *mufawadah* as mentioned above, Ibn Qudamah has described the second type held impermissible by the Hanbali jurists as a partnership contract that stipulates common sharing of everything received by the partners, even by way of inheritance or locating a treasure or lost property, where each partner is responsible for the liabilities

²⁷ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, 305; Ibn al-Humam, *Fath al-Qadir*, vol. 6, 155.

²⁸ *ibid.*

²⁹ Ibn Qudamah, *al-Mughni*, vol. 5, 111, 113.

³⁰ Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, al-Qahirah, Maktabah al-Kulliyat al-Azhariyyah, 1969, vol. 2, 273; Ibn Qudamah, *al-Mughni*, vol. 5, 124.

³¹ Ibn Qudamah, *al-Mughni*, vol. 5, 109.

³² Al-Mawardi, *al-Hawi al-Kabir*, vol. 6, p. 473. These two types are usually included under *'inan* by the majority of jurists.

³³ Abu 'Abdillah al-'Abdari, *al-Taj wa al-Iklil*, Bayrut, Dar al-Fikr, 1398H, vol. 5, 126; Muhammad ibn Ahmad Ibn Juzayy al-Kalbi al-Gharnati, *al-Qawanin al-Fiqhiyyah*. (n.p.), (n.d.) vol. 1, 187.

³⁴ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, 306.

³⁵ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 306.

³⁶ Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 287.

³⁷ Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 276.

³⁸ This is closer to *'inan* as envisaged by other jurists, than to the *mufawadah* of Hanafi jurists.

incurred by the other by way of compensation for physical assault, confiscation or destruction, payment for guarantee etc.³⁹ The Shafi'i jurists have defined *mufawadah* as a partnership on the basis of "sharing between them (i.e. the partners) what they earn and realise as profit, the liabilities they incur and the gains they attain".⁴⁰ Thus, what the partners earn through their capitals and effort is shared between them. Liabilities, even by way of confiscation (*ghasb*), destruction (*itlaf*) or an invalid sale entail both of them.⁴¹

Mufawadah is defined by the Hanafi jurists as "a partnership between two persons where they are equal in their capitals, right of transaction and faith". As dictated by the term *mufawadah*, they emphasise on realising complete equality. This necessitates each partner being a guarantor for the other with regard to the liabilities incurred by the latter, so that equality may be ensured in demand of payment. Each partner is an agent for the other so that common sharing of the capital and the profit could result.⁴² Debts payable by one of the partners arising from liabilities that could be held in common such as purchase, sale and hire can be demanded from the other.

Formation of *mufawadah*

Mufawadah may come into being only by the mention of the term *mufawadah*, or with mention of all its ingredients. This would necessitate one of the partners telling the other, while they happen to be free adults who are Muslims or *dhimmi*s (non-Muslim residents of an Islamic country): I have made you a partner in all what I possess in cash (and specify the amount) by way of general authority given by each of us to the other in trading on cash basis as well as on credit, and that each of us takes responsibility for the liabilities incurred by the other in matters pertaining to every type of sale.⁴³

It is termed a general partnership (*shirkah 'ammah*) where each partner authorises the other in general to trade and transact, thus requiring equality in everything where sharing is possible.⁴⁴ Equality is also required in the right of transaction (*tasarruf*). Therefore, *mufawadah* is not valid between a freeman and a slave, a child and an adult, or between a Muslim and a non-Muslim, although some Hanafi jurists have allowed difference in faith with reprehension.⁴⁵ It is important to note in this context that according to the explanation of the Hanafi jurists, a slave may not transact or guarantee except with the permission of his master, as against a freeman, who may do both; a child may not guarantee at all, but may transact with the consent of his guardian, as against an adult who may do both; a non-Muslim may own as well as transfer ownership of *khamr* (i.e. wine), as against a Muslim who may not do either.⁴⁶

Mufawadah necessitates equality of capitals at the time of contract as well as throughout its tenure. This is because, being a non-binding contract as is the case with all contractual partnerships, *mufawadah* is open to termination by any partner at any moment, therefore, the requirements that existed at the time of commencement remain necessary throughout its term.

Disparity in capital that precludes the inception of *mufawadah* prohibits its continuation. Equality of capital involves only the types of assets that could become capital in a partnership venture according to Hanafi jurists, i.e. gold and silver currency, as well as metallic coins in the view of *Sahibayn*. Therefore, for the validity of *mufawadah*, the total value of such assets in the possession of each partner should be equal, from the inception of the contract and throughout its tenure.⁴⁷

If one of the partners inherits such assets or receives by way of gift, or owns a deposit of cash entrusted to safe custody (*wadi'ah*) the *mufawadah* is invalidated. Although owning a debt does not invalidate the *mufawadah* due to a debt being not acceptable as capital in a partnership, if it is recovered, *mufawadah* becomes invalid. If the value of the capital of one partner goes up before it is utilised for purchase, the contract of *mufawadah* becomes invalid. Similarly, if one of the partners comes to possess a right of transaction not owned by the other, *mufawadah* is invalidated. When *mufawadah* becomes invalid due to such reasons, it transfers automatically into a contract of, when the conditions for the latter are fulfilled.⁴⁸

Disparity in assets that may not become capital in a partnership does not impede the validity of *mufawadah*. As such, disparity in merchandise or real estate owned by the partners, debts due to them, etc. do not invalidate *mufawadah*.⁴⁹

³⁹ Ibn Qudamah, *al-Mughni*, Beirut, Darul Fikr, 1992, vol. 5, p. 139.

⁴⁰ al-Rafi'i, *Rawdah al-Talibin*, vol. 3, p. 513.

⁴¹ Al-Sharibini, *Mughni al-Muhtaj*, vol. 2, p. 287.

⁴² Ibn Humam, *Fath al-Qadir*, vol. 6, p. 156, 160.

⁴³ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 307.

⁴⁴ Ibn Humam, *Fath al-Qadir*, vol. 6, p. 156.

⁴⁵ According to Imam Abu Yusuf, the additional transactional power enjoyed by a non-Muslim is not relevant as he is equal to a Muslim in the basic power of transaction, agency and guarantee. The reason for reprehension (*karahah*) is that a non-Muslim being not knowledgeable about which contracts are lawful. Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 306.

⁴⁶ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 306

⁴⁷ Ibn Humam, *Fath al-Qadir*, vol. 6, p. 157.

⁴⁸ Ibn Humam, *Fath al-Qadir*, vol. 6, p. 157. However, if the value of the capital changes after the commencement of trading, it does not invalidate the *mufawadah*, according to details discussed by Hanafi jurists. (Ibid. p. 156)

⁴⁹ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 306.

Analyzing the recognition of *mufawadah* in the Islamic legal schools

Shirkah al-mufawadah has been recognised as a valid partnership by the Hanafi and the Maliki jurists, although there are significant differences among them as to the nature of the contract of *mufawadah*. The jurists al-Thauri and al-Awza'i have allowed it. The Hanbali and Shafi'i jurists hold a contract of *Mufawadah* to be void. However, Hanbali jurists have allowed a partnership that they have designated as a type of *mufawadah* in their terminology, which is to embark on a partnership that comprises all other types of partnership, i.e. which combines partnerships based on *'inan*, *wujuh* and *abdan*. They argue that since these partnerships are allowed individually, they could be allowed in conjunction with others too.⁵⁰ The Shafi'i jurists have recognised the usage of the term *mufawadah* when the underlying contract is devoid of its peculiar characteristics. According to them, when a partnership of the nature of is meant even though the term *mufawadah* is used to describe it, it is permissible.⁵¹

Hanafi jurists have permitted *mufawadah* on the basis of *istihsan*, although the requirement of *qiyas* is that it be ruled impermissible. Imam Malik is reported to have stated that he does not know what *mufawadah* is. This means that he does not recognise the validity of *mufawadah* as perceived by the Hanafi jurists. However, the Maliki jurists have allowed a type of partnership they termed *mufawadah* as described by Ibn Rushd in *Bidayah al-Mujtahid*.⁵²

The reason *qiyas* dictates the invalidity of *mufawadah* is that *mufawadah* involves agency in selling what is undefined and guaranteeing what is undefined (*majhul*) for an undefined creditor. Each of these by itself is invalid, as an agency for the sale of an unidentified cloth or a guarantee before a debt is incurred. The agency here cannot be held valid by comparing it to the case of general agency, because the agency in *mufawadah* is not general. This is clear from the fact that the agency here does not involve purchasing food and clothing for the family of the other partner, for instance.⁵³

Hanafi jurists contend that *mufawadah* has been allowed on the basis of *istihsan*, as supported by some narrations ascribed to the Holy Prophet (*Sal.*) one of which states: Share equally (*fawidu*); surely, (doing so) is greater in prosperity. However, Ibn Humam states that these narrations are not recorded in the known compilations of Hadith, therefore, cannot serve as proof. Nevertheless, mention of *mufawadah* has been traced to a variant narration recorded in an accepted compilation, viz. that of Ibn Majah. The hadith in question states: There are three things where there is prosperity; sale on credit, *muqaradah* (i.e. *mudarabah*) and mixing wheat with barley for consumption, not for sale. Some versions of this hadith mention *mufawadah* or *mu'aradah* (bartering of merchandise) instead of *muqaradah*.⁵⁴ Another narration cited in support mentions: When you engage in *mufawadah*, do so in a goodly way.⁵⁵ These narrations have been understood to bear reference to *mufawadah* partnership.

Another basis for the application of *istihsan* is that such partnership has allegedly been practised by the people without an objection being raised.⁵⁶ The *qiyas* has been overruled on this basis. The uncertainty (*jahalalah*) in *mufawadah* is considered condonable, as it happens to be of a consequential nature and is not original. In support, Hanafi jurists have cited the presence of uncertainty in *Mudarabah*, which involves the sale of what is unknown, and argue that *sharikah al-'inan*, too, involve a degree of uncertainty that is overlooked at the time of contract.⁵⁷

Ibn 'Abidin has observed that although according to some a guarantee is legal even without the acceptance of the guaranteed, a doubt is raised in the case of *mufawadah* due to the guaranteed (i.e. the beneficiary of the guarantee) being unidentified (*majhul*), as there is no difference regarding the fact that his identity is necessary.⁵⁸

Imam al-Shafi'i has categorically rejected the permissibility of *mufawadah*. He is reported to have observed that if the contract of *mufawadah* is not null and void (*batil*), then he is not aware of anything that is null and void in this world.⁵⁹ Ibn Rushd has summarised Imam al-Shafi'i's argument as follows: Partnership only applies to merging of capitals, as profits, which are the results, may not be shared in except when the original capitals are commonly merged. When each partner assigns a profit to the other in what is solely in the ownership of the former this involves deception (*gharar*), which is not permissible, and this is what takes place in *mufawadah*. Imam Malik, who allows *mufawadah*, understands that each partner has sold a portion of his capital against a portion of his partner's capital, and each has then appointed the other an agent in what remains in the former's

⁵⁰ Ibn Qudamah, *al-Mughni*, vol. 5, p. 139.

⁵¹ al-Rafi'i, *Rawdah al-Talibin*, vol. 3, p. 512

⁵² Ibn Humam, *Fath al-Qadir*, vol. 6, p. 157.

⁵³ *Ibid.*

⁵⁴ Ibn Humam, *Fath al-Qadir*, vol. 6, p. 157.

⁵⁵ Ibn Qudamah, *al-Mughni*, Beirut, Darul Fikr, 1992, vol. 5, p. 139.

⁵⁶ Ibn Humam has made the interesting observation that even though widespread practice of *mufawadah* with the conditions required such as equality in the cash owned and general authorization could be refuted, possibility thereof is existent. (Ibn Humam, *Fath al-Qadir*, vol. 6, p. 158)

⁵⁷ Ibn Humam, *Fath al-Qadir*, vol. 6, p. 158.

⁵⁸ Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 306.

⁵⁹ By this he intended to indicate the profusion of deception and uncertainty (*gharar* and *jahalalah*) in the contract of *mufawadah*. (al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 288)

possession. Imam al-Shafi'i does not recognise partnership to be a sale and agency. As far as Imam Abu Hanifah is concerned, according to his standard principle, he admits only currency (i.e. coins of gold and silver) in *sharikah al-'inan*.⁶⁰

Imam Malik and Imam Abu Hanifah have differed in *mufawadah* with regard to stipulating equality in capitals; while it is a condition with Imam Abu Hanifah, Imam Malik does not regard equality in capitals to be a condition in *mufawadah*, comparing it with *'inan*. Imam Abu Hanifah also requires that nothing should remain with the partners in *mufawadah* (i.e. which is of the same kind as the capital) without their involving it in the partnership. According to the Hanafi jurists, the name *mufawadah* necessitates equality in capitals and common ownership of everything (*ta'mim al-milk*).⁶¹

Observations and conclusion

The description of the nature and conditions as stated by the Hanafi jurists poses serious doubts as to whether a partnership enterprise was ever carried out in this form. A few instances where the possibility of a *mufawadah* contract being in operation was present although a verbal contract to the effect was not entered into, such as the practice prevalent among members of farmer families where the children involve in trading and working jointly in the estate of a deceased father without resorting to its division, or where brothers live together and work together each authorising the others in all transactions, have not been recognised by Hanafi jurists as belonging to *mufawadah*.⁶²

Indeed, it is exceedingly questionable that such a partnership is feasible, if not at its inception, at least in continuation, considering the many factors which would abruptly change it into an *'inan*, such as receiving an amount of cash, even small, from an external source, or recovery of a debt lent prior to the formation of the partnership. In fact, the inception itself appears remote if not improbable, a necessary condition for which is each partner having in possession exactly the same amount of cash in the relevant form.

Considering these facts, could it be said that the amount of space allocated by the jurists for discussing this topic and deriving rulings pertaining to it was more of an academic exercise than with a view to practical application? In answering this question, one should keep in mind that jurists of Islamic law had always sought to discuss and delineate the rules of not only the issues that were prevalent and in practice, but also of all possible forms that could arise in the future, or even theoretically possible. It is due to this that one finds in the legal manuals of Islamic law discussions on all possible aspects and variations imaginable of an issue, that provide valuable insight on vital legal principles relevant to current issues. Thus, since *mufawadah* was held to be a valid form of partnership, it was imperative for the jurists to analyse and expound all relevant aspects pertaining to it so that no facet remains unexamined, despite of the issues not having materialized yet in practice.

In the view of the writer, the necessity for this could also have been that the possibility of *mufawadah* presented a logical theoretical counterpart for the partnership of *'inan*, and thus had to be fully explored and analysed. Dwelling on the details of *mufawadah* served the purpose of highlighting the differences between *mufawadah* and *'inan*, thus complementing the study of *'inan* and contributing towards a fuller appreciation of the latter. This could be a clear example of the amount of meticulousness and thoroughness exercised by the jurists in developing all possibilities pertaining to a topic so that the relevant rulings of Shari'ah are fully expounded.

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⁶⁰ Ibn Rushd al-Qurtubi, *Bidayah al-Mujtahid*, vol. 2, p. 276.

⁶¹ *ibid*.

⁶² Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 307

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