

Conducts of Partners in *al-Sharikah al-Mufawadah*: An Analysis from Hanafi's Classical Sources¹

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Abstract

In the fiqh literature, al-Sharikah is defined as a property or things belongs to several owners or co-proprietors in such a way that every one has ownership of every smallest part of it in proportion to the share allotted to him. What the jurists, therefore, understand primarily by al-sharikah is proprietary partnership (sharikah al-amlak) which arises, for example, through inheritance or gift. Sharikat al-Amlak, the essence of which is common ownership of property, cannot be considered as partnership in a strict sense because it has not come into existence by mutual agreement to share profits and risks. The second kind of al-sharikah as understood by the jurists was not only primarily proprietary partnership, but also commercial partnership (sharikat al-`uqud). Commercial partnership in Islamic transactions (muamalah) is usually divided according to the subject of the partnership; the subject of partnership being capital or labour or credit, into three kinds, namely; sharikah al-amwal (partnership in capital), sharikah al-`amal (partnership in labour) and sharikah al-wujuh (partnership in credit). Sharikah al-amwal is further classified into two types, i.e. sharikah al-mufawadah (unlimited investment partnership) and sharikah al-`inan (limited investment partnership). This working paper will focus on the discussion of sharikah al-mufawadah and analyse the conducts of partners in this type of partnership as explained by Hanafi's earliest sources such as al-Mabsut, Bada'i', Fath al-Qadir, Hidayah, etc.

Introduction

In the fiqh literature, *al-Sharikah* is defined as a property or things belongs to several owners or co-proprietors in such a way that every one has ownership of every smallest part of it in proportion to the share allotted to him. What the jurists, therefore, understand primarily by *al-sharikah* is proprietary partnership (*sharikah al-amlak*) which arises, for example, through inheritance or gift. *Sharikat al-Amlak*, the essence of which is common ownership of property, cannot be considered as partnership in a strict sense because it has not come into existence by mutual agreement to share profits and risks. The second kind of *al-sharikah* as understood by the jurists was not only primarily proprietary partnership, but also commercial partnership (*sharikat al-`uqud*). Commercial partnership in Islamic transactions (*muamalah*) is usually divided according to the subject of the partnership; the subject of partnership being capital or labour or credit, into three kinds, namely; *sharikah al-amwal* (partnership in capital), *sharikah al-`amal* (partnership in labour) and *sharikah al-wujuh* (partnership in credit). *Sharikah al-amwal* is further

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classified into two types, i.e. *sharikah al-mufawadah* (unlimited investment partnership) and *sharikah al-inan* (limited investment partnership). This working paper will focus on the discussion of *sharikah al-mufawadah* and analyse the conducts of partners in this type of partnership as explained by Hanafi's earliest sources such as al-Mabsut, Bada'i, Fath al-Qadir, Hidayah, etc.

Definition of *Sharikat al-Mufawadah* (Universal or Unlimited Investment Partnership)

*Mufawadah*² has a literal meaning of *musawat* (equality).³ The legal term of *mufawadah* is derived from *al-tafwid* (delegation of authority),⁴ for each partner empowers his colleague to act freely with the entire partnership's capital.⁵

Sharikat al-mufawadah may be best translated as a universal or unlimited investment Partnership.⁶ Technically, *mufawadah* partnership is a partnership which is essentially based on three features; complete equality of the partners in all aspects, the inclusion of all trade activities within its scope,

². This type of partnership is strongly disapproved of by al-Shafi'i is mainly because the equality it advocates cannot be implemented in practice. Besides that, there is a possibility that one partner might be able to drive an unjustified and undeserved benefit from the extra partnership income involving, for example, the discovery by the other partners of a treasure trove or their receiving a gift. Both sources of wealth have no connection with the partnership, as such, and should not become part of the social capital, see : Al-Shafi'i, Muhammad b. Idris (d. 204/820), *al-Umm*, Vol. III, Beirut, 1990, p. 306; Al-Khatib, Muhammad al-Sharbini (d. 1560 AD.), *Mughni al-Muhtaj*, Vol. II, Cairo, 1958, p. 215; see also ; Al-Nawawi, Abu Zakariyya Yahya b. Sharaf (d. 676/1277), *Minhaj al-Talibin*, Beirut, n.d., pp. 132 - 133; Al-Shirazi, Ibrahim b. 'Ali (d. 476/1083), *al-Muhadhdhab*, Beirut, 1994, Vol. I, p. 245; It is disowned by Abu Hanifah and recognised by Abu Yusuf, al-Shaybani and Ibn Abi Layla. See : Al-Sarakhsi, Abu Bakr Muhammad b. Ahmad (d. 473 or 483/1090),

Al- Mabsut, Vol. XI, Cairo, 1324 - 1331 AH p. 153; W. Heffening, "Sharika", in Encycloepadia of Islam (EI)(Old Edition), Vol. IV, 1913 - 1934, p. 381.

³. See for example Ibn Manzur, Abu al-Fadl Jamal al-Din Muhammad b. Mukarram al-Ansari (d. 711/1311-12), *Lisan al-'Arab*, Vol. VII, Beirut, n.d., p. 210; *al-Mabsut*, Vol. XI, p. 152; Al-Kasani, 'Ala' al-Din Abu Bakr b. Mas'ud (d. 587/1191), *Kitab Bada'i al-Sana'i fi Tartib al-Shara'i*, Vol. VI, Beirut, 1982, p. 58; Ibn Humam, Kamal al-Din Muhammad b. 'Abd al-Wahid al-Siwasi (d. 861/1457), *Fath al-Qadir*, Vol. VI, Cairo, 1980, p. 156.

⁴. See Ibn al-Humam, Vol. VI, p. 156.

⁵. Lane, E. W., *Arabic-English Lexicon*, Vol. II, Cambridge, 1984, p. 2459; W. Heffening, *op. cit.*, p. 381; Udovitch, Abraham L., *Partnership and Profit in Medieval Islam*, Princeton, 1970, p. 44; Al-Sarakhsi's neat definition of *mufawadah* states that it is derived from *tafwid* (delegation of authority), for each partner empowers his colleague to act freely with the entire partnership's capital. It has also been said that its derivation is from the idea of dispersal, as it is said: "The water overflowed (*fada*)", meaning that it spread out and dispersed or "the bounty is spread out (*yastafidu*)", meaning, it is distributed widely, since this contract is based upon the dispersal of authority for all the transactions. It has also been associated with *fawda*, which means equality of investment and profit, and therefore it is called *mufawadah*. See: *al-Mabsut*, Vol. XI, p. 152; see also: Lane, Vol. II, p. 2459.

⁶. Ibn al-Athir, Majd al-Din al-Mubarak b. Muhammad (d. 606/1210), *al-Nihayah fi Gharib al-Hadith wa al-Athar*, Vol. 3, Cairo, p. 479; Al-Zabidi, al-Sayyid Muhammad Murtada (d. 1145/1791), *Taj al-'Arus*, Vol. XVIII, eds. Mustafá Hijazi, et al., Kuwait, 1965 - 1973. p. 479; Lane, Vol. II, p. 2459; Udovitch, *Partnership*, p. 40; Cf. Haim Gerber, "The Muslim Law of Partnership in Ottoman Court Records", *Studia Islamica*, Vol. 53, pp. 113 - 114.

and the mutual agency and surety of the partners.⁷ Complete equality in all financial matters is an indispensable condition of the unlimited partnership. Any deviation from this value whether in respect of each partner's contribution to the joint capital or to the share of profits and losses is regarded as making this partnership invalid⁸.

In Maliki doctrine, the *mufawadah* is transformed into an entirely different institution. It connotes a general mandate partnership, i. e. an arrangement in which each party confers upon his colleague full authority to dispose of their joint capital in any manner intended to benefit their association. The emphasis is on the *tafwid*, i. e., on the delegation of discretionary authority to conduct trade with each other's capital. Each partner is his colleague's agent and can act in all commercial matters with respect to his own and his colleague's property without the latter's approval. Any obligation incurred on behalf of the partnership toward a third party by one of the partner can be claimed in full from any of the other partners. Each of them is liable for any obligation undertaken by his colleagues in connection with their work.⁹

From the above discussion, it can be said that according to the Maliki concept of *mufawadah* partnership, the implication of the term *mufawadah* for partnership is confined to the nature of the relationship between the partners and does not extend, as it does in Hanafi Law, to any other aspect of the association. Moreover, according to the Maliki concept, there is no requirement for equality in the personal and financial status of the perspective partner; nor does the Maliki *mufawadah* insist on the inclusion of all eligible capital within the partnership.¹⁰

Legitimacy of the *mufawadah* partnership.

The legitimacy of a *mufawadah* partnership is based on modification of strict legal standards by means of the application of juristic preference (*istihsan*).¹¹ The reason given for the exercise of juristic preference is The Prophet's statement: "*Fawidu* (enter into partnership by reciprocity), for it is most conducive to prosperity (*barakah*).¹² Also, men have had transactions together in this manner with no person forbidding them. Moreover, the exercise of juristic preference is followed in

⁷. *Al-Mabsut*, Vol. XI, p. 152; *al-Hidayah*, Vol. III, p. 4; Sahnun, `Abd al-Salam b. Sa`id b. Habib al-Tanukhi (d.240/ 854), *al-Mudawwanah a;-Kubra li al-Imam Malik bin Anas*, Vol. XII, Cairo, 1323 H., p. 70; Ibn Qudamah, Abu Muhammad `Abd Allah b. Ahmad b. Muhammad (d. 620/1223), *al-Mughni*, Cairo and Riyadh, n.d., Vol. V, p. 30; Lane, Vol. II, p. 2459.

⁸. Muhammad al-Shaybani, "*Kitab al-Asl, Kitab al-Sharikah*", fol. 68b. II, pp. 15 - 17; the only dissenting view is that of Ibn Abi Layla who holds that a slight inequality in the investment does not invalidate the *mufawadah* contract. This view is probably due to a difference in construction of the term *mufawadah*. See Abu Yusuf, *Ikhtilaf Abi Hanifah wa Ibn Abi Layla*, Cairo, 1938, p. 93; see also *Fath al-Qadir*, Vol. VI, pp. 156 - 157.

⁹. Sahnun, Vol. XII, p. 68 - 70; Ibn Rushd, Abu Walid Muhammad b. Ahmad (d. 595/1198), *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, Vol. II, Lahore, 1984, pp. 191 - 192; Ibn Juzayy, Abu `Abd Allah Muhammad b. Muhammad b. Ahmad (d. 741/1340), *Kitab al-Qawanin al-Fiqhiyyah*, Beirut, n.d., p. 244; See also `Ali al-Khafif, *Al-Sharikat fi al-Fiqh al-Islami*, 1962, p. 34.

¹⁰. Sahnun, Vol. XII, p. 70; Ibn Rushd, *op. cit.*, Vol. II, pp. 191- 192.

¹¹. It is said that if *mufawadah* partnership is based on analogy (*qiyas*), it would not be permissible. The reason given is that on the basis of analogy (*qiyas*), this form of partnership would comprehend the power of *wakalah* (agency) with respect to unknown subjects and the obligation of *kafalah* (surety) with respect to a thing undefined, and each of this individually is not permissible. See for example *al-Hidayah*, Vol. III, p. 4

¹². *Al-Mabsut*, Vol. XI, p. 153; *al-Hidayah*, Vol. III, p. 4; *Fath al-Qadir*, Vol. VI, p. 157.

permitting the *mufawadah* partnership because of "the custom of the merchants" (*'adat al-tujjar*) or "the need of the merchants for it".¹³ For this reason:

"Each partner has the right to deposit goods belonging to the partnership; for depositing is one of the customary practices of merchants (*'adat al-tujjar*). It is also one of the necessities of trade and one which is indispensable to the merchants. He has need of this transaction in many situations which are likely to occur. Since a partner has the right to pay a fee to have a deposit taken care of, he has this right when no compensation is involved".¹⁴

Equality of the *Mufawadah* Partnership.

i. Equality in person (personal status)

According to Hanafi, jurists equality of person in all respects is one of the prerequisites for a valid *mufawadah* partnership. This applies not only to the amount of each partner's investment and to the division of profits and losses between them, but also to the personal status of the partners. They also hold that a *mufawadah* partnership which is based on the idea of mutual surety is valid only if it is contracted between two free people.¹⁵

In this regard, the slave, the *mukatab* slave and minors even with the permission of their parents or guardian cannot make a *mufawadah* partnership with a freeman, since they do not possess complete freedom of action in commercial matters.¹⁶ Moreover, a slave cannot provide surety for another person, nor is he fully responsible for his own action as the master can circumscribe the rights of his slave.¹⁷ A universal partnership between a freeman and those categories of people would create severe inequality, for the former would be liable for his own and the latter's actions.¹⁸

Abu Yusuf and al-Shaybani, two disciples of Abu Hanifah, however, held that a *mufawadah* partnership contracted between two *mudabbar* slaves (who will automatically attain their freedom upon their master's death) is valid.¹⁹

The demand for equality of person between two partners in a *mufawadah* (universal) Partnership extends to religious affiliation as well. The *mufawadah* partnership, covering as it does, all commercial transactions of the partners, yet, certain business transactions permissible for a non-Muslim,²⁰ may not be so for a Muslim, thus disqualifying the latter from full participation in a "mixed *mufawadah*".²¹

¹³. *Al-Mabsut*, Vol. XI, p. 80. The notion of *'adat al-tujjar* has also been used as an argument to justify some practices in *mufawadah* contracts. Those cases are like the case of pledge (*al-rahm*) which is governed by the same rules as those of deposits, the case of loan whether in form of *'ariyah* (loan for use) or *qard* (loan for fungible commodities), practice of purchase, sale and debt and expenses for execution of *mufawadah* operations. See Udovitch, *Partnership*, pp. 104 - 112.

¹⁴. Al-Kasani, *op.cit.*, Vol. VI, p. 68.

¹⁵. *Al-Mabsut*, Vol. XI, p. 198; *al-Hidayah*, Vol. III, p. 4; *Fath al-Qadir*, Vol. VI, pp. 158 - 159.

¹⁶. *Al-Mabsut*, Vol. XI, p. 198; *al-Hidayah*, Vol. III, p. 4.

¹⁷. *Al-Mabsut*, Vol. XI, p. 198; *Fath al-Qadir*, Vol. VI, p. 159.

¹⁸. *Al-Mabsut*, Vol. XI, p. 198; *Fath al-Qadir*, Vol. VI, pp. 160 - 161.

¹⁹. Al-Shaybani, "*Kitab al-'Asl, Kitab al-Sharikah*", Fol. 68b, II. 12 - 14; See *Idem, Makharij fi al-Hiyal*, Leipzig, 1930 [Reprinted by al-Muthanna, Baghdad, 1967]. p. 59.

²⁰. This includes a Christian, Jew, Zoroastrian and *dhimmi*.

²¹. *Al-Mabsut*, Vol. XI, pp. 196 - 197.

Abu Yusuf permits a *mufawadah* partnership between a Muslim and a *dhimmi*, he considers it a *makruh*²² arrangement, that is, disapproved or reprehensible but not forbidden. He justifies his idea on the basis of the elements of mutual surety and mutual agency, of which a *dhimmi* like a Muslim is capable.²³

On the other hand, Maliki law holds that any legally competent person capable of disposition of property (*tasarruf*) and of conferring a mandate can be a partner in a *mufawadah* partnership contract. This requirement excludes minors, mentally incompetent people and slaves acting without their master's authorization. Slaves upon whom their masters have conferred the right to engage in trade (*al-ma'dhun lahu fi al-tijarah*) are, however, fully eligible to enter into partnership contracts.²⁴

Maliki law also holds the opinion that a partnership between a Muslim and a non-Muslim is valid on condition that the former supervises all the commercial transactions. This requirement is, of course, intended to prevent any usurious transaction or any trading in commodities which are forbidden to a Muslim.²⁵

This means that Maliki law does not demand equality in personal status as a prerequisite for a valid *mufawadah* partnership. In short, *mufawadah* partnerships are, according to Maliki law, permissible between any legally competent Muslim, male or female, as well as slaves who are authorized to engage in trade and under the proper condition of supervision between those and a non-Muslim.

ii. Equality of investment, profit and loss

According to Hanafi law, the partners in a *mufawadah* partnership must share equally in their investment (capital), profit and loss.²⁶ Any deviation from this rule, whether in respect to each partner's contribution to the joint capital or to the share of profits and losses assigned to him, immediately renders the *mufawadah* partnership invalid.²⁷ Thus to constitute a *mufawadah* partnership, each partner must invest an equal amount of joint capital and accept equal distribution of profit and loss in the venture.

In contrast to the above principle, Maliki law does not require complete equality of investment (capital), profits and loss in a *mufawadah* partnership. The distribution of profits and loss is in accordance with the partner's respective capital.²⁸

²². *Makruh* (disapproved) is a demand of the lawgiver which requires the *mukallaf* to avoid something, but not in strictly prohibit terms. Since *makruh* does not constitute a binding law, It is merely said that omitting something which is *makruh* is preferable to committing it. See for example 'Abd al-Wahhab Khallaf, *Ilm Usul al-Fiqh*. Kuwait, 1978, p. 114; Abu Zahrah, *Usul al-Fiqh*. Cairo, 1958, p. 36; Aghnides, Nicolas P., *Mohammedan Theories of Finance*, New York, 1916, p. 89; Coulson, N. J., *A History of Islamic Law*, Edinburgh, 1964, p. 84.

²³. *Al-Mabsut*, Vol. XI, pp. 196 - 197; al-Kasani, . *op.cit.*, Vol. VI, p. 61.

²⁴. Sahnun, Vol. XII, p. 70.

²⁵. *Ibid*.

²⁶. Al-Shaybani, "*Kitab al-Asl, Kitab al-Sharikah*", fol. 68b, II. 15 - 17; *al-Mabsut*, Vol. XI, p. 177.

²⁷. *Al-Mabsut*, Vol. XI, p. 177; the requirement of equality of persons and of investment is best summed up by al-Shaybani himself: "A *mufawadah* partnership can be contracted only by two free Muslims who are either of age, or between two *dhimmis*. It cannot be contracted between a Muslim and a *dhimmi*. A *mufawadah* can be contracted only if the capital of each partner is equal. If one of the partners comes into an inheritance or receives a gift in the form of goods, it belongs exclusively to that partner and it does not invalidate the *mufawadah*. If, however, he inherits or receives *dirhams* or *dinars*, the *mufawadah* is invalidated". *Al-Jami' al-Saghir*, Cairo, 1302/1884, p. 10

²⁸. Sahnun, Vol. XII, p. 45. Malik said: "Loss is in accordance with their respective capital, and profit is in

Investment (Capital)

All Muslim legal authorities are in full agreement concerning the acceptability of gold and silver (*dinar* and *dirham*) currency for partnership investment.²⁹ The legal problems which do arise in this regard are the acceptance of copper coins as capital in the *mufawadah* partnership. The question of a partnership with copper coins (*fulus*)³⁰ as capital in the partnership investment is not treated in Maliki law. For a *mudarabah* partnership, however, investment in copper coins is absolutely disqualified.³¹ The wide margin between the intrinsic and the face value of copper coins and the fact that their value and acceptance varied widely from place to place, caused uneasiness among the jurists and cast doubt on the validity of their use for partnership and other investment.³²

In this regard, Abu Hanifah and Abu Yusuf deny copper coins the status of currency because on the whole they are not completely interchangeable as are standard gold and silver coins, but resemble commodities in that each individual copper coin or type of coin may differ in value and acceptance from time to time and place to place.³³ If they are permitted as capital in *mufawadah* partnership, this will lead to uncertainty as to the amount of each partner's capital at the time of the division of profit.³⁴

Al-Shaybani, however, holds the view that as long as copper coins (*fulus*) are in circulation; they are in the category of an absolute currency. In his view, they are suitable for capital in partnership investment like all other absolute currency, viz. *dinars* (gold) and *dirhams* (silver).³⁵

Maliki law does not permit a cash (*dinar* or *dirham*) partnership which has the element of *sarf* (exchange). This contract does not arise when each partner's investment consists of coins of the same metal, but when they are of varying types or coins of different metals.³⁶ For example, one partner invests only *dinars* and the other only *dirhams*. These two types of coins have a different exchange rate and if they form a partnership dividing the work and profit equally between them, this will mean that the capital of one of them may exceed that of his partner. Further more, a partnership in which the capital of one partner is greater than that of his partner is not permissible unless the profit and work are divided according to their respective shares in the joint capital.³⁷

Of the schools of Islamic law, only the Maliki School recognizes the validity of a partnership investment in the form of goods.³⁸ All licit goods are eligible to become part of the joint capital of a partnership.³⁹ The only goods which Maliki law does not countenance for the formation of a

accordance with their respective capital", *Ibid.*, pp. 59 - 60.

²⁹. Al-Kasani, , *op.cit.*, Vol. VI, pp. 60 - 61; *al-Mabsut*, Vol XI, pp. 159 - 160 and 178; Ibn Rushd, II, p. 190; Sahnun, Vol. XII, pp. 63 - 65; *Minhaj al-Talibin.*, p. 132; *al-Mughni*, Vol. V, pp. 16 - 18; *Fath al-Qadir*, Vol. VI, p. 168; *Hidayah*, Vol. III, p. 6; Al-Qayrawani, `Abd Allah b. Abi Zayd `Abd al-Rahman (d. 389/996), *Risalah*, on the margin of Salih `Abd al-Sami` al-Azhar's *Al-Thamar al-Dani*, Cairo, 1948, p. 476.

³⁰. singular: *fals*. The fals was a token coin and was never recognized as legal tender comparable to gold and silver. See A. L. Udovitch, "Fals", *EI(2)*, Vol. II, 1965, pp. 768 - 769.

³¹. Sahnun, Vol. XII, p. 65; *Fath Q.*, Vol. VI, pp. 168 - 169.

³². Kasani, , *op.cit.*, Vol. VI, pp. 59 - 60; *Mabsut*, Vol. XI, p. 160.

³³. Kasani, , *op.cit.*, Vol. VI, pp. 59 - 60; *Fath Q.*, Vol. VI, p. 168.

³⁴. *Mabsut*, Vol. XI, p. 160; *Fath Q.*, Vol. VI, p. 169.

³⁵. *Ibid*; Kasani, , *op.cit.*, Vol. VI, pp. 59 - 60; see also *Fath al-Qadir*, Vol. VI, p. 168.

³⁶. Sahnun, Vol. XII, pp. 62 - 63; Cf. F. H. Ruxton, *Maliki Law*, London, 1916, p. 159.

³⁷. Sahnun, Vol. XII, pp. 63 - 64; Ibn Rushd, , Vol. II, p. 191.

³⁸. Sahnun, Vol. XII, pp. 54 - 55.

³⁹. *Ibid.*, p. 56.

partnership are foodstuffs that are measurable or weighable.⁴⁰ According to them, this type of partnership is formed on the basis of the value of each partner's contribution (merchandise) and on condition that each of them will share in the work, profit and loss in accordance with his respective capital's value.⁴¹

Maliki refuses to accept the validity of a partnership in which each partner's capital consists of foodstuffs of the same type, quality and quantity.⁴² Ibn Qasim, a disciple of Malik, however, considers this type of arrangement should be allowed if it is formed on the basis of weight of foodstuffs, and not according to their value.⁴³

Concerning the *mufawadah* partners, al-Kasani, the Hanafi jurist, wrote: "They are in reality two persons, but from the standpoint of the principles of commerce, they are like a single person".⁴⁴ This means that all the eligible capital of the partners, as well as all their commercial activities (transactions), is included in the *mufawadah* partnership.⁴⁵ By virtue of this inclusiveness, each partner is fully liable for the actions and commitments of the other in all commercial matters. The claims of third parties are thus actionable against either partner; and conversely, either partner can make a claim against a third party, regardless of whether or not he was actually involved in the transactions which gave rise to that claim. As far as third parties are concerned, dealing with any of the *mufawadah* partners is equivalent to dealing with the partnership firm.⁴⁶

The relationship between the partners themselves and between them and third parties in a *mufawadah* partnership can be summarized as follows: in all partnership, including the *mufawadah*, the liability is unlimited. In *mufawadah* partnership liability toward third parties is both several and joint.⁴⁷ A liability is said to be joint and several when creditors may sue one or more of the parties to such liability, either separately or all together, at his discretion.⁴⁸

Liability in the *Mufawadah*, as well as the rights, privileges and duties of the partners with respect to each other is in accordance to the two fundamental legal principles upon which this partnership is based. The first is mutual agency (*al-wakalah*) which in Hanafi law is the basis of all forms of contractual partnership. This means that, within the scope of their joint undertaking, each partner is considered to be an agent of his colleague.⁴⁹ The second principle and the one which is unique to the *mufawadah* in Hanafi law is that of mutual surety (*kafalah*). According to this principle, a partner is not only his colleague's agent, but also guarantor (*kafil*) for all his colleague's actions connected with the partnership.⁵⁰

⁴⁰ . This applies if the investments are of different types of foodstuffs, even if they are of equal value. In their view, the status of these goods in sale approaches that of *sarf*. *Ibid.*, p. 56.

⁴¹ . *Ibid.*, pp. 54 - 55.

⁴² . *Ibid.*, p. 58; al-Qayrawani, *al-Risalah*, p. 476.

⁴³ . Sahnun, Vol. XII, p. 58.

⁴⁴ . Kasani, , *op.cit.*, Vol. VI, p. 73; *Cf. Mabsut*, Vol. XI, pp. 174 and 190.

⁴⁵ . Kasani, , *op.cit.*, Vol. VI, p. 62.

⁴⁶ . *Ibid.*

⁴⁷ . Kasani, , *op.cit.*, Vol. VI, pp. 60 - 61; Ibn `Abidin, Muhammad Amin b. `Umar (d. 1306/1888), *Hashiyah Ibn `Abidin*, Vol. III, Beirut, 1979, p. 369; W. Heffening, *op. cit.*, p. 181.

⁴⁸ . See Henry Campbell Black, *Black's Dictionary of Law*, St. Paul, 1933, p. 1020.

⁴⁹ . Kasani, , *op.cit.*, Vol. VI, pp. 60 - 61; Ibn `Abidin,, Vol. III, p. 369; *Hidayah*, Vol. III, p. 4 ; *Cf* W. Heffening, *op. cit.*, p. 381.

⁵⁰ . See Footnote no 48 above..

According to Maliki law, however, members of a *mufawadah* partnerships are presumed to have discretionary powers in the administration of their capital. They delegate to each other the authority to transact business with the common capital which is recognized as a usual part of trade.⁵¹ Each partner can act independently in the name of the partnership without exposing himself to any liability greater than that which would normally be his share.⁵²

Conduct of A *Mufawadah* Partnership.

i. Deposits and pledges in a *Mufawadah*

A deposit⁵³ is classified as an *amanah* and involves no payment of a fee or any other compensation to either party.⁵⁴ A partner in a *mufawadah* partnership would place money or goods in the custody or safeguarding of the depository, whose task is to safeguard them. The ownership of property and risks remains with the depositor. Any loss of or damage to deposited partnership property is borne by the partnership, and no individual liability attaches to the partner who arranged for the deposit. Either partner is entitled to retrieve the deposit and either one can bring the suit against the depository in the case of the latter's negligence.⁵⁵

The depository could be held liable only in the case of negligence and all obligations are extinguished with the return of the deposit to the depositor.⁵⁶

The use of pledges⁵⁷ (*rahn*) on behalf of partnership transactions is governed by the same rules as those of deposits. Both partners have the right to give a pledge as guarantee of payment for credit extended to the partnership or take a pledge as security for payment of a debt owed to the partnership.⁵⁸ In short, in either case, both partners are equally bound by the contract.

⁵¹. Sahnun, Vol. XII, p. 75.

⁵². *Ibid.*

⁵³. A deposit (*wadi`ah*) is a contract (fiduciary relationship or trusteeship) (*al-amanah*) whereby a property is remitted to a trustee (depository). The proprietor of the thing (depositor) to be kept, often gratuitously, by the latter, and the latter returns to its owner on demand. The property so remitted is held in trust (*qabd amanah*). A trustee (depository) is liable for the loss or misappropriation in that property only if he commits an act of transgression (*ta`addi*) such as using the property for his own use or negligence (*tafrit*) such as storing the property in an unsafe place from where was stolen. *Mughni*, Vol. VI, p. 382; *Mabsut*, Vol. XI, p. 109; *Mughni al-Muhtaj*, Vol. III, p. 79; al-Ramli, *Nihayah al-Muhtaj*, Vol. V, p. 87; *Fath al-Qadir*, Vol. VIII, p. 485; Ibn `Abidin, Vol. IV, p. 515; *al-Umm*, Vol. IV, p. 142; Ibn Hazm, *Muhalla*, Vol. VIII, ed. Ahmad Muhammad Shakir, Beirut, n.d., p. 277; Al-Ghazali, Abu Hamid Muhammad b. Ahmad (d. 505/1111), *Kitab al-Wajiz Fi Madhhab al-Imam al-Shafi`i*, Vol. I, Beirut, 1979, pp. 84 - 87; al-Shirazi, Vol. I, p. 500; Schacht, *An Introduction to Islamic Law*, Oxford, 1964, p. 157; Lane, Vol. II, p. 3051; Otto Spies, "*Wadia*", *EI(1)*, Vol. IV, 1934, pp. 1079 - 1081.

⁵⁴. *Al-Mabsut*, Vol. XI, p. 109; Ibn Hazm, Vol. VIII, p. 277; *al-Umm*, Vol. IV, p. 142; al-Shirazi, Vol. I, p. 501; al-Nawawi, *Rawdat al-Talibin*, Vol. V, p. 289; Cf. Schacht, *Introduction*, p. 157.

⁵⁵. Al-Shaybani, *op. cit.*, fol. 65b, I. 16 - fol. 66b, I.4.

⁵⁶. Al-Kasani, *op. cit.*, Vol. VI, p. 68.

⁵⁷. Pledge (*rahn*) or security means to pledge or lodge a real or corporate property of material value in accordance with the law as security for a debt, so as to make it possible for the creditor to regain the debt or some portion of the goods or property. (al-Kasani, *op. cit.*, Vol. VI, p. 135; Al-Qurtubi, *Al-Jami` Li Ahkam al-Qur'an*, Vol. III, p. 409; Schacht, *Introduction*, p. 139; J. Schacht, "*Rahn*", *EI(1)*, Vol. III, 1934, p. 1105). The Prophet is reported to have bought some foodstuff on credit for a limited period and to have given his armour as a security for it. (Abu Hanifah, *Musnad*, p. 164; Ibn Hanbal, *Musnad*, III, p. 355; *al-Umm*, III, pp. 141 - 142).

⁵⁸. *Ibid.*

According to Hanafi law, a partner in a *mufawadah* partnership can also entrust money or goods belonging to the partnership as a *bi da`ah*⁵⁹ to another person within the bounds of fidelity (*amanah*).⁶⁰ Should any loss occur, neither partner is responsible for the *ibda`* (the *mubdi`*; neither the owner of the goods) nor the quasi-agent (the *mustabdi`*: the one who receives goods) bears any liability. Such loss is borne by the partnership, as would any other financial loss resulting from transactions personally conducted by either of the partners.⁶¹

On the other hand, Maliki law holds that members of a partnership do not possess the right to deposit any portion of the common property with a third party because deposits are not considered to be a part of trade.⁶² If one partner deposits any portion of the common capital (property), he is fully liable to his partners for the loss unless he can prove that there were compelling circumstances for his action.⁶³

ii. Loans in a *Mufawadah* Partnership

Islamic Law distinguishes between two types of loans. One, the *qard*⁶⁴ (loan of fungible object for consumption), involves the loan of fungible commodities, that is goods, which may be estimated and replaced according to weight, measure and number.⁶⁵ According to Ibn Hazm (d. 456 A.H.), *qard* which also implies future obligation (*dayn*) is a good deed involving the lending of a fungible object such as money, an animal, houses, lands or others, whether movable or immovable properties, by one to another person on condition that the borrower is responsible for returning the equivalent or like of that which he has received, either immediately or at a specified time.⁶⁶ In this case, the borrower takes the same object or the like of what he has borrowed without any premium on the property, which would, of course, be construed as interest.⁶⁷ It is also known as *salaf*.⁶⁸

The second type of loan is the *`ariyah*⁶⁹ (the loan for use) which transfers the usufruct of property gratis to the borrower. The ownership of the object of the loan remains that of the lender, and the

⁵⁹. This practice can be illustrated by the example of a merchant (*the mubdi`*), who is unable personally to attend a business affair, hands over some of his property to another party (*the mustabdi`*: the one who receives it), so that the latter will take care of it for him. Upon completion of his task, the outside party, without receiving any commission, profit or compensation in any other form, returns the proceeds of the transaction to the merchant whose bidding he has done. See *al-Mabsut*, Vol. XI, p. 181; al-Kasani, , *op.cit.*, Vol. VI, p. 68. It might best be described as a type of quasi-agency. S. D. Goiten has described this practice as "informal commercial cooperation". See *A Mediterranean Society, The Jewish Communities of The Arab world as portrayed in the Documents of the Cairo Geniza*, Vol. I, *Economic Foundations*, Berkeley and Los Angeles, 1967, pp. 164 - 169.

⁶⁰. Al-Shaybani, *op. cit.*, fol. 62, li. 20ff.

⁶¹. *Ibid.*

⁶². Sahnun, Vol. XII, p. 77.

⁶³. *Ibid*, pp. 75 - 76.

⁶⁴. Literally, *aqradahu* means, he cuts off for him a portion to be requited or decompensate for it. Legally, it signifies, he granted him a loan (*qard*) or the like. See Lane, Vol. II, p. 2515; *Mughni*, Vol. IV, p. 313; *Mughni al-Muhtaj*, Vol. II, p. 117; Al-Dusuqi, Shaikh Shams al-Din (d. 1230/1814), , *Hashiyah al-Dusuqi `Ala al-Sharh al-Kabir*, , Vol. III, p. 222; Ibn Abidin, , Vol. IV, p. 179.

⁶⁵. *Al-Mughni*, Vol. IV, p. 314; al-Shirazi, Vol. I, p. 303; *Mughni al-Muhtaj*, Vol. II, p. 118; Ibn `Abidin, Vol. IV, pp. 179 - 195.

⁶⁶. Ibn Hazm, *al-Muhalla*, Vol. VIII, pp. 77, 79 and 82; Cf. Schacht, *Introduction*, p. 157.

⁶⁷. *Transaction*, pp. 199 - 200.

⁶⁸. Ibn al-Athir, Vol. II, p. 390; *al-Mughni*, Vol. IV, p. 313.

⁶⁹. Literally, *`ariyah* means what is taken by persons by turn. Legally, *`ariyah* is defined as putting one in possession of the use of a thing without anything given in exchange or putting another temporarily and gratuitously, in possession of the use of a thing, the substance of which is not consumed by its use. See Ibn

borrower is not liable for any destruction of the loaned property or any diminution of its value except in the case of negligence.⁷⁰ The borrower is entitled to make use of the loan without compensation in accordance with the conditions of the contract or of custom.⁷¹ The borrower may lend the borrowed object to a third party, but he must not hire it out or give it as a security and he must meet the maintenance expenses of the property while it is in his possession.⁷² The owner may demand the return of the object at any time or at the termination of the loan, according to the contract.⁷³

Neither partner has the right individually to grant a *qard* loan from the common funds because the bonds of mutual agency and surety between the partners extend only to matters connected with trade. A *qard* loan can be given with the full agreement of both partners.⁷⁴

If a partner, individually, grant a loan for use (*'ariyah*) to a third party such as a pack of animals belonging to the partnership which collapses under the borrower, then by analogy, he is liable for half the value of the animals to his partner.⁷⁵ However, a partner can, individually, grant a loan for use from the partnership property (common funds) which is intended to apply primarily to what al-Sarakhsi calls "The accompaniments of trade (*tawabi` al-tijarah*) from which the merchant (partner) finds no escape"⁷⁶. A partner can also make use of partnership property for loans and other generous purposes conditioned by practice of the merchants (*min sani` al-tujjar*).⁷⁷

By contrast, no liability attaches either to the lender (partner) or borrower if the partnership property is destroyed while in the possession of the borrower, lent out with full agreement of the partners.⁷⁸

However, according to Malik, either partner is allowed to take or grant a loan for use (*'ariyyah*) from the partnership funds in connection with the pursuit of the company's business except for some trivial things⁷⁹ or matters which are intended to benefit the partnership with the permission of his colleague.⁸⁰ If either partner takes or grants a loan for use (*'ariyyah*) without his colleague's permission, he alone is responsible for the full extent of any damage that might befall the borrowed object.⁸¹

Rushd, Vol. II, pp. 235 - 236; *al-Umm*, Vol. IV, p. 37; , Sayyid Sabiq, *Fiqh al-Sunnah*, Vol. III, p. 239; Al-Nawawi, *Rawdat al-Talibin*, Vol. IV, p. 70; Ibn Hazm, *Muhalla*, Vol. VIII, p. 168; Lane, Vol. II, p. 2195; Coulson, *Commercial Law in the Gulf States - The Islamic Legal Tradition*, London, 1984, p. 24.

⁷⁰ *Al-Muhalla*, Vol. VIII, p. 168; *Fiqh al-Sunnah*, Vol. III, p. 239; Coulson, *Commercial Law*, p. 24.

⁷¹ Ibn Rushd, Vol. II, pp. 235 - 236.

⁷² *Al-Umm*, Vol. IV, p. 37; Schacht, *Introduction*, p. 157.

⁷³ *Transaction*, p. 199; Ibn Rushd, Vol. II, p. 235.

⁷⁴ *Al-Mabsut*, Vol. XI, p. 180; al-Kasani, , *op.cit.*, Vol. VI, p. 72.

⁷⁵ . However, on the grounds of *istihsan* (juristic preference), al-Shaybani holds that he (a partner) does not become liable if the animal borrowed died while in the possession of the borrower. Al-Shaybani, *op. cit.*, fol. 62b, li. 1 - 3.

⁷⁶ . For example, if someone with whom he is doing business approaches him, he has no alternative but to lend him, such as a garment to wear, for he who does not grant loans for use to others, will not receive them when he is in need of them. *Al-Mabsut*, Vol. XI, pp. 180 - 181.

⁷⁷ *Ibid*, p. 193.

⁷⁸ Al-Shaybani, *op. cit.*, fol. 62b, II. 1 - 3.

⁷⁹ . For example, ordering a servant to water their partnership's animal so as to benefit their trade.

⁸⁰ . Sahnun, Vol. XII, p. 79.

⁸¹ *Ibid*, pp. 78 - 79.

The argument given by Malik is that, he (a partner) can constitute an injury to his colleague if he borrowed, for example, the pack of animals or the ship whose value is one hundred *dinars*, when he could have hired them at a fee of one *dinar*.⁸²

iii. Purchase, Sale and Debts of the *Mufawadah* Partners

The liability for obligations arising from the commercial activity of the *mufawadah*'s partners is joint and several. In this regard, any business purchase made by either of the partners such as merchandise, houses or whatever, belongs in equal shares to each of them. However, this partnership purchase does not apply equally if either partner purchases cloth, food and other household necessities for the consumption and ownership of the partner's families.⁸³ The *mufawadah* partners are regarded as one individual concerning the rights and obligations arising from any purchase or sale with their joint capital.⁸⁴ The price of a purchase made by one of them can be collected from the other. Either partner may cancel a sale or purchase made by the other, and either one may return any defective merchandise bought by the other.⁸⁵ Similarly, any defective merchandise sold by any one of them can be returned to either of the partners.⁸⁶ Both partners also have the right to sell the *mufawadah* merchandise on credit even if this right is not explicitly stated in the partnership contract.⁸⁷ Moreover, both of them can buy goods on credit provided the amount involved in these purchase is not in excess of the total amount of the joint capital.⁸⁸

The rights and obligations arising from any sale or purchase on credit is also binding on both partners.⁸⁹ In this regard, a distinction should be made between the payment and collection of a debt owed by one partner and debt owed to one of them.⁹⁰ Money owed by one of them can be collected from either, because a commitment made by one partner is binding on the other. This includes all debts except those arising from criminal liability (*jinayah*) or from marital obligation such as the amount due for a dowry (*mahr*) because they are beyond the bounds of the mutual surety comprehended by the *mufawadah* partners.⁹¹

The situation is different in the case of debts owed to one of the partners because not all the debts in this category can be collected by his partner from the debtor.⁹² i. e. the difference would seem to be between debts owed to the partnership (company), and debts owed to the individuals, for example, the proceeds from the sale of property inherited by one of the partners. Consequently this debt is not part of the joint capital and can only be collected by the partner concerned.

Each of the *mufawadah* partners has the right independently to grant a postponement of the payment of the debt owed to the partnership or to offer a discount on goods whose sale has already been negotiated by the partners. However, if either of the partners, motivated only by business considerations, granted a postponement of the debt or discount of sale of goods in order to cultivate good will and attract customers, his partner can raise a complaint against him, and if this was done as

⁸². *Ibid.*

⁸³. Sahnun, Vol. XII, p. 71; Ibn Rushd, Vol. II, p. 193; al-Kasani, , *op.cit.*, Vol. 6, p.74; Al-Shaybani, "*Kitab al-Sharikah*", fols. 73 - 73b; *Fath al-Qadir*, Vol.VI, p. 191; Wahbah al-Zuhayli, *Al-Fqh al-Islami wa Adillatuh*, Vol. IV, Beirut: Dar al-Fikr, 1989, p. 823.

⁸⁴. Sahnun, Vol. XII, p. 69.

⁸⁵. Al-Kasani, , *op.cit.*, Vol. VI, pp. 70 - 71 and 75.

⁸⁶. Sahnun, Vol. XII, p. 81.

⁸⁷. *Ibid.*, p. 71.

⁸⁸. *Ibid.*

⁸⁹. Shaybani, "*Kitab al-Sharikah*", fol. 74, I.2; Ibn `Abidin, , Vol. III, p 369.

⁹⁰. Ibn `Abidin, III, p. 369; ; Wahbah al-Zuhayli, *op. cit.*, , Vol. IV, p. 822.

⁹¹. *Al-Mabsut*, Vol. XI, p. 203; Ibn `Abidin, Vol. III, p. 369; Fath al-Qadir, Vol. VI, p. 101; Wahbah al-Zuhayli, *op. cit.*, Vol. IV, pp. 823 - 824.

⁹². *Fath al-Qadir*, Vol. III, p. 110.

a personal favour, his partner can demand the immediate payment of his share of the debt or the discount.⁹³ In this case, the reason given is that a partner is not entitled to special consideration in the price of any joint property he wishes to purchase or sell exclusively for him.⁹⁴

iv. Expenses of *mufawadah* partners

All business expenses connected with the pursuit of trade are to be covered from partnership capital. These include living expenses while travelling on business, fees to cover the hiring of help and equipment for the transportation and handling of merchandise, taxes and customs expenses and maintenance of company property. All money expended or debts incurred by one of the partners for such activities can be taken out from the joint capital.⁹⁵

All personal and family's regular expenses incurred by one of the partners can also be taken out from the partnership capital.⁹⁶ Personal expenses covered by the partnership account include only food, clothing and any other regular and necessities expenditure bought by either of the *mufawadah* partners for his own and his family's use.⁹⁷ Concerning the purchase by one partner of cloth, if the garments are of the kind that are not used in daily wear such as fine linen and silk brocade garments, this expenditure cannot be taken out from the partnership capital because they are classified as luxury items.⁹⁸

v. Investment with third parties

The *mufawadah* partner may, without the prior consultation of his colleague, invest cash or goods from their common funds in a *mudarah* contract or accept capital from outside parties as a *mudarah*. Any profits or losses resulting from such enterprise are reckoned to the partnership capital and are shared equally by both parties.⁹⁹

Either *mufawadah* partner may also, on his own initiative and without the prior consent and knowledge of his colleague, form an *inan* partnership with a third party, whether in a single venture partnership (*al-inan al-khass*) or a more inclusive type of association (*al-inan al-amm*). In both cases, his partner is bound to the commitment of one *mufawadah* partner of the joint capital.¹⁰⁰

The one type of association which neither partner can contract with a third party unless he has the prior consent and full and express agreement of all his colleagues is a second *mufawadah* partnership. If either partner does so, the contract is considered as null and void, and is treated as an *inan* partnership.¹⁰¹

⁹³. Sahnun, Vol. XII, pp. 73 - 74.

⁹⁴. *Ibid*, p. 75.

⁹⁵. Shaybani, "*Kitab al-Sharikah*", fol. 69 b, I.9; fol. 70, I. 13; fol. 73, I.6; fol. 73b, I.3; Sahnun, Vol XII, p. 68.

⁹⁶. Sahnun, Vol. XII, p. 68.

⁹⁷. *Ibid*, pp. 69 - 70.

⁹⁸. *Ibid*, pp. 69 - 70.

⁹⁹. Al-Shaybani, *op. cit.*, fol. 70b, II. 14ff; Sahnun, Vol. XII, p. 78.

¹⁰⁰. Al-Shaybani, fol. 70, I. 18.

¹⁰¹. *Ibid*, II. 1ff; See also Sahnun, Vol. XII, p. 78.

vi. Limit of mutual surety

The mutual surety existing between the *mufawadah* partners is confined only to their business-connected activities.¹⁰² The limit of their mutual surety is not extended to activities which are not directly related to their trade affairs such as their personal expenses¹⁰³ and criminal acts.¹⁰⁴

The personal expenses include all financial obligation connected with the marriage and family life of the partners such as the payment of the dowry and other mandatory payments which a marriage contract (*`aqd*) might give rise to, and are borne solely by the partners involved¹⁰⁵.

Similarly, if one of the partners commits a crime, in error or by premeditation, whether it was intentional or unintentional or whether or not it took place in the course of some commercial activities, no liability attaches to his partner. Any indemnity for which one of the partners may be liable as a result of any criminal action (*jinayah*) is borne solely by him, and not by his partner.¹⁰⁶

Conclusion

The above discussion has mentioned the one form of partnership in Islamic transactions, i.e. *sharikat al-mufawadah*. In practice, however, the partners may contribute not only capital in the form of finance, but also labour, management and skills, and credit and goodwill, although not necessarily equally. The *`inan* partnership which implies unequal shares seems to be the most popular. In a partnership with mixed contributions (shares) of the partners, the profits accrued would be divided in accordance with a contractually agreed proportion, since Islamic law admits an entitlement to profit arising from a partner's contribution to any one of these three business assets, i. e. capital in the form of finance, labour, management and skills, and credit and goodwill. However, Islamic law makes it absolutely imperative that losses be shared in proportion to the contribution made to capital. This is because losses constitute erosion in capital and must be charged to it.

¹⁰². Al-Kasani, , , *op.cit.*, Vol. VI, p. 73.

¹⁰³. Shaybani, *op. cit.*, fol. 71b, II. 4 - 6; Sahnun, Vol. XII, p. 84.

¹⁰⁴. Al-Shaybani, fol. 70, II. 13 - 17; Sahnun, Vol. XII, p. 84.

¹⁰⁵. Al-Shaybani, fol. 71b, II. 4 - 6; Sahnun, Vol. XII, p. 84; al-Kasani, , *op.cit.*, Vol. VI, p. 73.

¹⁰⁶. Al-Shaybani. fol. 70, II. 13 - 17; Sahnun, Vol. XII, p. 84.