

Imran Ahsan Khan Nyazee
***Islamic Law of Business Organization:
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Reviewed by:

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This book provides the most detailed presentation of partnerships in Islamic law in the English language. It marks the first substantive volume in the series "Islamic Law and jurisprudence" that the Islamic Research Institute has started under the General Editorship of Professor Zafar Ishaq Ansari. Professor Ansari has also written a foreword in which he has spoken strongly about "the author's robust confidence in Islamic law" and the contribution the author has made by addressing challenging issues of business and finance in his area of specialisation. Having read Nyazee's work, I am in no doubt as to his firm grasp and substantive knowledge of the subject, but I have seen many weaknesses in his style of writing, attitude to issues, and presentation. Nyazee has informed his readers in several places about a compendium volume that he is planning to publish in the near future under the title "Islamic Law of Business Organization: Corporations." The author introduces this "second volume" on page 5 and advises that it "should be studied after the first volume has been read." By making this promise, the author has allowed himself, however, to postpone addressing relevant issues and has in several places referred the reader to await the publication of the next volume.

The work is presented in five parts and sub-divided into twenty one chapters. Part one addresses the nature, definition and fundamental concepts of partnership (*sharika*) in *fiqh* and in modern law and explains as to how the *sharikah* differs from a corporation. The author's discussion of modern law refers basically to equivalent provisions in common law and the applied law of Pakistan. The two types of partnership that are explained at the outset are co-ownership (*sharikat al-milk*) which is not of much interest to business and commerce, and contract partnership (*sharikat al-'aqd*) in *fiqh* which is the main theme of this book. This latter is also sub-divided

into two types, namely *mufawadah* and *'inan*. There is also a discussion of parallel concepts in modern law. The whole of chapter five conveys the point that legal or corporate personality, which is recognised in modern law, is not recognised in *fiqh*. The latter only proceeds on a mercantile or accounting notion of the firm. Chapter six expounds contracts that are subsumed by partnership such as trust, agency, surety and hire (*amanah*, *wakalah*, *kafalah*, and *ijarah* respectively). These are peculiar to partnership and do not apply to corporations. Chapter seven explains the bases of entitlement to profit in Islamic law as being either capital (*mal*) labour (*'amal*) or liability for loss (*daman*). Maliki law takes an exception to this last, and Hanafi law does not even recognise land as a basis of legitimate profit, whereas Modern law accepts all these. The last two chapters in Part One address respectively the ownership of the capital of the firm, and liability of partners for debts in *fiqh* and in modern law respectively.

Parts Two and Three which occupy almost one half of the book (pp. 97-241) expound in detail as to how the fundamental concepts of partnership are applied by the various schools of Islamic law. The first three chapters deal with *'inan* and *mufawadah* partnerships in Hanafi law and the bulk of the discussion is preoccupied with identifying specifically as to which of the four underlying contracts, as noted above, are operative within the rubric of *inan*, *mufawadah* and other recognised forms of *sharikah*. This line of discussion is then continued in Part Three, which deals with the doctrines of the Maliki, Shafi'i and Hanbali schools in the succeeding three chapters. Differences in the scholastic doctrines in this part relate once again to the acceptance or otherwise of all or some of the four basic underlying contracts under particular varieties of *sharikah*. The author tends to engage in considerable details, some of which are then reproduced when explaining the doctrine of another school over similar themes in a succeeding chapter. The overall effect of this approach is that the work becomes somewhat atomistic and laborious.

Chapter sixteen bears the title "Comparison Between the Schools" wherein the author compares the doctrines of the various schools that have already been individually addressed in the preceding chapters and concludes that the Hanafi law on partnership is more developed and comprehensive compared to the other three schools. The Maliki and Shafi'i schools have considerably restricted forms of partnership law: "The Shafi'i law of partnership is almost non-existent and barely extends beyond co-ownership. The basic reason for this is the importance given to *jahalalah* (uncertainty)," (p. 231). The Shafi'i law thus hardly recognises *mufawadah*, *sharikat al-abdan* and *sharikat al-wujuh*, and Maliki law is similar to Shafi'i law. The Hanbali law of partnership resembles that of the Hanafi school and is relatively free of the rigidities of the Maliki and Shafi'i schools, yet it too suffers from a certain weakness, which is that it often fails to explain its underlying principles. This may be due to the somewhat arbitrary borrowing of the Hanafi terms which are then interspersed with those of the Shafi'i school.

As already noted, chapter sixteen is preceded by five chapters (i.e. chapters ten to fifteen) and these are all devoted to a descriptive exposition of the partnership law of the various schools: Chapters ten, eleven and twelve deal with the Hanafi law of *'inan* and *mufauwadah*, chapter thirteen treats the Maliki law of partnership, whereas chapter fourteen and fifteen address partnership in the Shafi'i and Hanabali schools respectively. Then follows chapter sixteen where the author basically repeats and summarises the preceding five chapters. A more consolidated approach to these six chapters could be taken by giving a brief description of the law of each school, and then a comparison, all in one part or chapter. This would have disposed of the need for repetition and would have also cut down on technicality. The author is aware of this and keeps justifying here and there the more long-winded approach he has taken to the exposition and comparison of the *fiqh* schools on partnership.

Part Four addresses what the author terms as "the second category of partnership in Islamic law," namely *mudarabah* which takes up about 37 pages, *muzara'ah* (crop-sharing not "share-cropping" as it is rendered in the title on p. 277), and *musaqah* (partnership in the yield of trees) in about six pages each. The author explains in the chapter on *mudarabah* the extent of the liability of the investor (*rabb al-mall*) and of the investment manager (*mudarib*) and their shares in profit, as well as the role of agency (*wakalah*) and of (*istidanah*) or *wilayat al-istidanah* (the power to buy on credit for the partnership) in *mudarabah*. Among the short-comings of *mudarabah* which the author has highlighted is its proneness to change into an active partnership on both sides once profit is made and re-invested by the *mudarib*. The main feature of the discussion on *muzara'ah* and *musaqah* is over the scholastic disagreement on its basic validity. Only the two disciples of Abu Hanifah, namely Abu Yusuf and al-Shaybani, and the Hanbali school have validated these agricultural contracts but the other schools, including Abu Hanifah himself have refused to validate them simply because land is not liable to any loss, whereas business partnership is founded on the notion of profit and loss sharing.

Part five, which is the last part in the book, is entitled "Islamic Forms of Partnership for the Modern World" where the author attempts to identify issues of contemporary concern in corporate law and finance with special reference to Pakistan. The main issues that are highlighted are "Islamization of the modern business corporation" and issues pertaining to partnership, such as the question of a legal or fictitious personality for partnership and the limited partnership in which one or more partners may have limited liability while sharing the profit of the partnership. Three types of issues have thus been mentioned 1) those that are specific to corporations; 2) those that are specific to partnership; and 3) issues that are common to both (p. 298). Having given a fullsome list of the issues concerning corporate governance, accountability, and management, the reader is advised to await the expected solutions from the compendium volume on corporations. Issues of common concern to corporations and partnership that the author has listed are: a) the creation of limited liability in the light of the principles of Islamic law, 2) *riba*-free financing of

corporations and partnerships; 3) *riba*-free capital investments for corporations and partnerships; 4) new securities and securities regulations; 5) derivatives, hedging, speculations and *gharar* (p. 301). The last two issues as the author says will be "taken up in the study on corporate finance" (p. 301) on the same page the author writes:

In addition to the these issues, the modern applications of *mudarabah* should have been analyzed in this study. This analysis, however, is being avoided due to space limitations. A separate monograph will hopefully be devoted to the Pakistani *mudarabah* law in the light of our findings in the present study. (p. 301).

This evidently informs the reader that notwithstanding the 34 page long chapter that has been devoted to *mudarabah* in this book (p.243-277) the author has not been able to pay attention to modern issues on *mudarabah*. The chapter on *mudarabah*, like the rest of this work, consists mainly of a descriptive journey into the works of medieval scholars and series of long quotations, page after page, from al-Sarakhsi, al-Kasani, al-Dasuqi, al-Ramli, al-Nawawi and others. This *taqlid*-oriented approach into the study of Islamic commercial law is totally immersed in medievalism; al-Sarakhsi and his peers of medieval times are eulogised for their ingenuity and brilliance, and scant references that are made to the mortals of the twentieth century are totally insignificant by comparison. Assertiveness on *taqlid* is met by a sense of aversion to those who might have ventured into saying something new. Note, for examples. The author's references to 'Ali al-Khafif's classification of *mudarabah* into 'simple and complex' varieties "adopted by modern scholars has also been adopted by 'Ail al-Khafif'. Nyazee then says that "unfortunately it is a useless classification." (p. 256). What is odd about this manner of treatment is also the fact the author then goes on to quote al-Khafif's classification and builds up on it. He thus writes just a few lines later on the same page: "To add to 'Ali al-Khafif's classification, we may say that the *mudarabah* itself may give rise to an '*inan*' based on wealth after profits have emerged and to a *sharikat al-wujuh* based on a simple '*inan*' after *istidanah* has been granted." This attitude of devotion to a certain image of the past has also led Nyazee to make rather a sweeping comment in his introduction concerning modern scholarship on the subject: "... if one critically examines the literature on Islamic law and finance, one feels that many of the experts working in this field are up in a blind alley.." (pp. 1-2) The work also tends to be over- assertive of scholastic particularity of the *madhahib* in places where a more consolidated approach would have been adequate.

In a discussion of '*inan*' partnership in the Hanafi school the author quotes Tahawi, al-Sarakhsi and al-Kasani and his comment on one of them is: "This is the brilliant Sarakhsi, without the rein if we may, trying to include all the characteristics of this partnership 'into the meaning of the term '*inan*'. (p. 101) On p. 103, the author quotes al-Kasani as follows. "... the '*inan*' contract is valid by the consensus of the jurists of the provinces and the practice of the people in this. [He then quotes a few traditions from the Prophet (peace be on him)] in support and says...". Ten more quoted lines

from al-Kasani follow on p.103, and then a two lines interval, and then another 16 - line quotation from al-Kasani follows on p. 104.

The author rarely, if ever, quotes the Qur'an, or the traditions of the Prophet. The author's brevity in treating evidence from the Qur'an and Sunna is such that one can literally count with one's fingers the total number of references to these sources in the whole of this book. As noted just now, traditions of the Prophet that occur in the midst of al-Kasani's statement are omitted, but this sense of economy is hardly in sight when Nyazee quotes the medieval jurists. Note also that Nyazee's light-handed treatment of the source materials occurs twice on the same page (i.e. 103): Just before quoting al-Kasani, Nyazee opens his section under the heading "Legal Justification of '*Inan*'" as follows:

The jurists cite the general approval for the contract of *sharikah* granted by the Prophet (peace be upon him) as justification for this type of ownership. In addition to this, they cite the *ijma'*.... (p. 103)

Nyazee thus referred to the Prophet's approval without actually quoting him in more specific terms. This is all the more remarkable in view of what Nyazee writes on the previous page that the purpose of his study "is basically a search for legal principles" (p. 102). The importance of adequate citation of the source evidence of the Qur'an and Sunnah should thus be self-evident to his purpose, yet these have been glossed over and referred to only in passing. There is too much quoted matter in this book. It is hardly an exaggeration to say that about one-third of the work consists of long quotations, some of which are unnecessary and could be cut short or summarised. Note for example pp. 134, and 135 which contain a single quotation running into 27 lines. Pages 250 and 251 contain 38 lines, and p. 269 contains 26 lines of straight quotations. The single long quotation of 37 lines on p. 148 that occupies the whole page is unnecessarily lengthy, and there is a 20-line long quotation on page 147. It is not just the frequency of quotations, but the enormous length in which they occur. The 23 lines quotation from *Fath al-Qadir* of Ibn al-Humam on page 111 basically conveys a single point, which is that "*inan* does not subsume *kafalah*. This weakness is exacerbated by the fact that the quotations are sometimes out of line with contemporary reality. On pages 165, 269 and 273, for example, the author quotes passages which make references to slaves and gives detailed illustrations on the sale of slave girls and making profits over them in *mudarabah* - related transactions.

Weaknesses in presentation also include the use of too many Arabic expressions in the running text some of which have English equivalents and are therefore unnecessary. Note the use of words *sabi*, and *baligh* (p. 165) and of *waklah*, *kafalah*, *mufawadah*, *dhimmi*, *khamr*, *khinzir*, '*inan*, *hiyal* and also the whole "*matruk al-tasmiyah 'amdan*" on page 166. Technical Arabic terms appear throughout the book without English translation. Although the author has provided a glossary of terms at

the end of his book, this manner of liberal reliance on Arabic expressions in a technical text such as this is oblivious of the reader convenience. The work is clearly loaded with technical data and in view of this, it comes rather unexpected to read Nyazee's own description of it that "... a simple approach was adopted in this study." (p. 298). Still on the presentation side, the author tends to open too many headings, sometimes, three, four or five on a single page, which tends to have the overall effect of disrupting continuity and atomises or breaks up a logically inter-related theme. Note for example the "Conditions, of *Muzara'ah*", on pages 283-285 which is basically a single theme but it is sub-divided, within the space of two pages, into no less than nine sub-heading. And then again '*musaqat*' is discussed under thirteen sub-headings all in about five pages (pp. 286-291). Some of these sub-headings also run into two or two and a half lines (cf pp. 266, 269, 271).

Some instances of careless writing

On page 182, the author quotes Ibn Rushd to the effect that *sharikah* is of four types, but then only three types are given, not four. On page 291 the author explains the "Recission of *Musaqah*" in three lines. The first two lines are : "The rules are the same as those for *muzara'ah*, and the reason for this could be that the worker is a thief and so on". This sentence is not self-evident and the reference to thief does not occur in the preceding section on *muzara'ah* either.

On page 166 Nyazee quotes al-Sarakhsi on the conditions of *mufawadah* even to the extent as to say that "*mufawadah* is based upon absolute equality and there is no equality between a *Dhimmi* and a Muslim, neither in transactions nor in the subject-matter of transactions." This discussion is discontinued and a new heading immediately follows. Nyazee thus seem to condone the rather exaggerated statement of al-Sarakhsi concerning the absence of equality between *dhimmi*s and Muslims in business transactions. For Nyazee should know, and should also say it perhaps, that the norm of Shari'ah in the sphere of financial transactions is equality between Muslims and non-Muslims.

Two issues that the author has highlighted with regard to partnerships are concerned with legal personality, and limited liability, these have not been recognised, as the author maintains, in Islamic law and the author attempts to make proposals as to how they can be developed. To do this, Nyazee discusses in detail the provisions of the partnership Act 1932 of Pakistan, and specifies the points where it differs with Islamic law, and also where the Islamic law of partnership can borrow from the partnership Act in places where a certain gap can be gainfully filled in the former. The author has thus applied the detailed data of *fiqh* he has expounded in his work to current issues that he has raised. Nyazee thus manages to come out of the descriptive expositions of the scholastic doctrine and address issues in his own language and style. The last two chapters in part Five are respectively entitled "Partnership without Legal personality" and "Partnership with Legal personality: New Proposals". The former is devoted

mainly to a commentary on the Partnership Act, and the latter to the task of designing an Islamic limited partnership that possesses legal personality. This is partly motivated by what the author has said of *mudarabah*: Although *mudarabah* offers a form of limited partnership, "it may not be ideal for modern times due to its inherent problems and its somewhat temporary nature. As compared to this, the limited partnership adapted to suit the requirements of Islamic law may be a better alternative" (p. 319). Nyazee has identified the issues well and is effective in addressing them in the final chapter of his book.

Notwithstanding the dominantly critical tone of this review, it needs to be said clearly that much of this critique is concerned with matters of presentation, and I have had little to say on the substantive merit of Nyazee's work. The work has generally accomplished its stated purpose, which is an exposition of the principles of partnership in Islamic law. Notwithstanding the weaknesses I have noted in Nyazee's work, the work is nevertheless most welcome as it fills a gap that has long been felt in this field and what Nyazee has presented is also generally good and reliable.