

## **Shariah Parameters of Musharkah Contract and Their Applications: An Analysis with Respect to Prevailing Practices**

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### **Abstract**

This research paper explores the concept of Shirkat (partnership) in Islam, emphasizing its significance and relevance in contemporary business practices. It highlights the establishment of partnership through evidence from the Quran, Hadith, consensus of Muslim scholars (ijma), and analogical reasoning (qiyas). The article reflects on the popularity of partnership businesses during the era of Prophet Muhammad (peace be upon him) and how he upheld and retained this practice. The essence of partnership lies in achieving financial benefits and mutual cooperation for growth and prosperity by leveraging each other's experiences. The importance of comprehending the principles of partnership is underscored, given the prevalence of business transactions involving collaboration. Islamic jurists have extensively elaborated on these principles, and the article aims to shed light on their application in the modern context through qualitative and analytical research. The researcher emphasizes that adherence to Islamic guidelines is crucial for establishing businesses in accordance with these principles. However, the contemporary era presents challenges in dealing with partnerships when strictly adhering to a single school of jurisprudence. Thus, the article advocates for the incorporation of insights from all schools of thought to gain a comprehensive understanding of partnership matters and overcome these difficulties.

**Keywords:** Shirkat, Rules of partnership, Profit and loss

### **Introduction**

In the light of Islamic teachings, "Musharkah" refers to a form of business in which two or more individuals combine their capital or efforts for business. They share profit according to the pre-agreed ratio. In case of loss, each partner bears the losses in proportion to their capital contribution. The fundamental principles of the aforementioned partnership are outlined below:

#### **Rules relating to musharkah capital**

In partnerships or ventures where two or more parties come together to conduct business based on profits and losses, capital is required. So Capital is essential part to start the business.

It can be of two types: cash, such as coins, banknotes, and currency in the form of rupees, dollars, etc., or non-cash, such as goods in the form of merchandise used for trade.

From a Shariah perspective, both forms of capital are permissible? or it should be in the form of cash or non-cash, i.e., goods used for trade.

Furthermore Is it permissible to obtain capital from a third party through mutual consultation between the partners? Answers to these questions can be sought from the opinions of Islamic jurists (*Imam-e-Fuqaha*). Efforts will be made to reach a conclusion based on their views, which are in line with the present time. Regarding the nature of capital, the statements of the scholars are as follows:

#### **Hanfi and Hanbali Viewpoint:**

According to the Hanfi and Hanbali schools of thought, it is essential for the capital in a partnership contract to be in the form of cash. If the capital is in the form of goods for trade, livestock, or clothing, then it is not considered valid. Their reasoning is that at any time, the partnership may end, and at that time, it becomes necessary to return the capital to the partners so that the actual profit or loss can be determined. If the capital is in the form of goods for trade, its market value will be applied during the return, which is estimated and may not represent the actual value. This estimation will affect the profit and loss, and there is also a concern about disputes arising in the matter. Therefore, to avoid such complications, according to the Hanfi and Hanbali schools, the capital should be in the form of cash.<sup>(1)</sup>

Another reasoning is that if the capital of partners is in the form of goods (non-cash) instead of cash, The possible scenario could be such that at the end of the partnership:

If the brought or invested goods have already been sold during the partnership, it will not be possible to return the goods. In this situation, the market value of the goods will be considered, which might have increased since the beginning. In such a case, one partner will take all the profit, while the other will not get anything.<sup>(2)</sup>

#### **Shafi'i Perspective:**

In the Shafi'i school of thought, when the capital comes to partnership, if it is in the form of goods for trade, it is observed. whether the goods are of *Mithli* or of *Qeemti*. If the goods are *mithli*, such as wheat, barley, rice, etc., and they become mixed with each other, and it becomes indistinguishable as to which goods belong to which partner, then the partnership contract is valid, just like it would be in the case of cash.

However, if the goods are of different valuable nature and their mixing is not possible, then the partnership contract will not be valid.

The reasoning behind this is that when goods of identical nature become mixed, their distinct identity is lost, and it becomes impossible to determine which goods belonged to which partner. In such a case, the partnership contract is established, and it is treated as if it were a cash partnership. However, in the case of goods of different valuable nature, mixing is not possible, and therefore, the partnership contract cannot be established.<sup>(3)</sup>

**Maliki viewpoint:**

The Maliki school of thought holds that the partnership contract is permissible not only with cash but also with goods. The partnership is valid if one party contributes cash, and the other party contributes goods, or if both parties contribute goods, whether they are of the same type or of different types.

The Maliki school's reasoning is that whether the capital is in the form of cash or goods, both partners have the right to be assumed as capital. To avoid any disputes related to the form of capital, the determination of the value of goods should be done on the day of the commencement of business or partnership. Then, when the partnership comes to an end, the initial capital should be returned based on the determined market value of the goods. By doing so, any possible dispute is resolved.

On the day of the contract, determining the market value of the partners' assets will also reveal their relative share in the business. For example, if one person brought goods worth ten lakh (one million) rupees, and another person's goods are worth twenty lakh (two million) rupees, the first person's share in the business will be one-third, while the second person's share will be two-thirds.<sup>(4)</sup>

Determining the market value of goods is not a complex issue since, in contemporary era, there are various organizations that can estimate the value of any business goods accurately. Moreover receipts of goods, market prices of commodities are also be helpful to determinate the actual vaue of assets .If, for any reason, determining the market value becomes difficult, mutual consent can be sought, and the opinions of market experts and businesspeople can be considered to reach a fair final price.

**Preference of Malkiah's opinion:**

The central point of maliki jurist is that the day on which the partners bring their assets, they should determine the actual value of capital or assets by applying the market price of the goods. At the desolution of the partnership, the same value will be used for settlement and adjustment of capital and profits or losses. If the formula,proposed by the malkiah is

taken, then the objections of the opponents, which are mentioned in their evidence, can also be best resolved by determining the market value of the goods not at the end of the partnership but at the beginning of the partnership. The most significant advantage is that it provides a broad framework for partnership business that includes both cash and non-cash assets.

### Investment in Ongoing Business:

There are various ways to acquire capital for an ongoing business, and one of them is to join a new party in the business. It is obvious that when the new partner enters into a partnership, he will also bring his capital. The question arises whether it is permissible for one partner to join a new person in the business without the consent of the other partner. In this regard, the consensus of the jurists is that doing so without the consent of the other partners is not permissible. It means that if the partners are willing, a new person can be enter in the partnership. AlKasani states:

"وَلَيْسَ لَهُ أَنْ يُشَارِكَ إِلَّا أَنْ يُؤْذَنَ لَهُ بِذَلِكَ؛" (5)

"It is not permissible for one partner to involve a third partner in the partnership, except with their permission.."

Ibn Qudamah states:

"وَلَيْسَ لَهُ أَنْ يُشَارِكَ بِمَالِ الشَّرَكَةِ، وَلَا يَدْفَعُهُ مُضَارَبَةً؛ لِأَنَّ ذَلِكَ يُثَبِّتُ فِي الْمَالِ حُقُوقًا، وَيُسْتَحَقُّ رِجْهُ لغيره" (6)

it is not permissible for one partner to enter into a partnership contract with a new person based on the capital of the partnership. This is because doing so establishes rights in the property for the new partner, and he becomes entitled to get share of profit.

Thus, based on the mentioned statements, it becomes apparent that according to the Hanbali, school of thought, Entering a new person in an ongoing business without the consent of the existing partners is not permissible. However, after discussing the details of the partnership, Ibn Qudamah also mentions that if the other partners openly agree, then new partner can join the business.<sup>(7)</sup>

### Loan:

Obtaining capital through loans is one of the ways to expand a business and fulfill its financial needs. Involving new partner in the business can bring both benefits and risks. Some scholars, including Ibn Qudamah, have expressed that the distribution of profits among several partners may lead to reduced individual gains, so an alternative approach could be obtaining a loan. If the partners agree that the profit should only be shared

between themselves and the capital requirement is fulfilled, then they can obtain a loan for business purposes. However, it is essential to determine whether taking a loan for a partnership-based business is permissible according to Islamic jurisprudence.

The first reason for permissibility is based on analogy (qiyas). Scholars have allowed partners to purchase goods on credit within certain limits. This limitation means that a partner can only purchase goods up to the amount available for payment, and they are not allowed to make additional purchases on credit, as it would be against the agreement of the partners. The intention is to use the joint capital for the business and not to burden it with further debts.<sup>(8)</sup>

Regarding this issue, it is necessary to examine the concept of loan carefully. Both purchasing on credit and taking a loan involve a specific period for the repayment of the amount. Therefore, when purchasing on credit is permissible, taking a loan should also be permissible. However, it should be clear that the permissibility is limited to the above mentioned certain amount ; anything beyond that would not be allowed, but following discussion makes it clear that higher amounts is also permissible.

Al-Kasani has firmly restricted partners from giving loans to others, but if there is explicit permission to do so, then it is permissible.<sup>(9)</sup> Hence, when partners are allowed to lend to others(as it is a non-profitable endeavor and does not bring any benefit to the business(however possibility of incurring loss exists),taking a loan for business purposes would also be permissible.

Another reason for the permissibility of a loan is based on the following statements of the jurists. Alkasani states that If a partner is granted general authority over the business, such that you have the freedom to make decisions based on their own judgment, wisdom, and knowledge to improve the business, then he has the right to obtain a loan. This is because he is authorized to utilize all means that are necessary for the success of the business.<sup>(10)</sup>

In daily transactions, traders often require loans to manage various business aspects, such as employee salaries, payment of bills, procurement of raw materials, and expanding the business operations. Once the need is fulfilled, they repay the loan. Therefore, to get the loan for business purposes should be permissible in partnership.

#### **Determination of Capital:**

In a partnership, it is essential that the capital of the partners is clearly acknowledged. If the capital is in the form of currency (e.g., rupees), its amount should be known. On the other hand, if the capital is in the form of goods or other assets, the quantity and value of those assets should be known. If the capital amount is unknown, it can lead to disputes in the

transaction. Similarly, the capital should be present, because in a partnership, partners must have control over their capital, and this is only possible when the capital is in their possession. Otherwise, the commencement of business activities becomes impossible.<sup>(11)</sup>

### **Distribution of Profit:**

There is a difference of opinion among the scholars regarding the distribution of profit among partners. Hanbali and Hanafi schools hold one view, while Maliki and Shafi'i schools hold another view. Below, I will briefly describe the positions of each school and their supporting evidence:

#### **Hanafi and Hanbali aspect:**

Both Hanbali and Hanafi schools agree on the method of dividing the profit. According to their view, the division of profit is a mutual agreement between the partners, and they can decide the ratio of profit they desire to allocate to each other, regardless of whether their capital is equal or not. It is not necessary that equal capital results in equal rights to profit.

Ibn Qudamah states:

(وَالرَّابِحُ عَلَى مَا اضْطَلَحَا عَلَيْهِ) يَعْنِي فِي جَمِيعِ أَقْسَامِ الشَّرِكَةِ ... فَيَجُوزُ أَنْ يَجْعَلَا  
الرَّابِحَ عَلَى قَدْرِ الْمَالَيْنِ، وَيَجُوزُ أَنْ يَتَسَاوَيَا مَعَ تَفَاضُلِهِمَا فِي الْمَالِ، وَأَنْ يَتَفَاضَلَا  
فِيهِ مَعَ تَسَاوِيهِمَا فِي الْمَالِ. " (12)

"Profit-sharing according to what they have agreed upon." This means that in all types of partnership, partners are free to mutually decide on the profit-sharing ratio. They can make it proportional to their capital, or they can agree to share the profit unequally, even if their capital is equal.

Ibn Qudamah says that in our view, the basis for distributing profit is based on working and participation of partners. When both partners contribute to the business through their work, participation and management, they can determine the ratio of profit they desire to receive. This ratio may vary depending on the difference in their contributions. For example, if one partner actively participates in the business while the other does not, it is permissible to allocate a higher share of profit to the actively contributing partner.<sup>(13)</sup>

Prominent Hanfi scholars *Mergheenani* states:

"ويصح أن يتساويا في المال ويتضا ضلافي الربح" (14)

*Kasani* also explains that the three foundations for distributing profit are capital, participation, and guarantee. Therefore, if a partner is contributing to the business actively and a specific higher ratio of profit is agreed upon for them, it is permissible. The ratio of profit can be proportionate to the capital

invested by one partner, and the additional share can be based on the value of his participation in supporting and managing the business. However, the share of profit for a non-contributing or sleeping partners cannot exceed the capital they invested. For example, if someone has invested 40% of the capital in the business and it is agreed upon that he will not actively participate, his share of profit cannot exceed 40%.<sup>(15)</sup>

The primary evidence for the Hanafi and Hanbali schools is the natural variation in abilities among individuals. It is possible that one partner brings more beneficial results due to his competence, while another partner may not possess the same level of skills. Therefore, even with equal capital, the partners may not be satisfy with equal profit-sharing, as they believe that the reward should be proportionate to their efforts and abilities.

Another supporting argument is that the connection of profit is not solely linked to capital; it is also tied to effort and actions. Based on this reasoning, it is argued that profit-sharing can be determined based on the combination of capital and participation.<sup>(16)</sup>

In summary, both the Hanafi and Hanbali schools agree that profit-sharing can be determined based on participation, and the ratio of profit may vary depending on the contributions and efforts of the partners. This approach is considered just and fair as it accounts for the differences in contributions and promotes a sense of motivation and reward for active participation in the business.

#### **Maliki and Shafi'i point of view:**

According to the Maliki and Shafi'i schools of thought, the distribution of profit among partners is determined based on their respective capital contributions. For example, if two partners have invested an equal amount of capital, their share of profit will also be equal, regardless of any additional conditions they might try to impose.

Ibn Rushd, a prominent Maliki scholar, explains :

Jurist agree that, the distribution of profit should be in proportion to the capital contributions. He states that if the capital of two partners is equal, the profit should be divided equally between them.<sup>(17)</sup>

Similarly, according to the Shafi'i school, the distribution of profit should be proportional to the capital contributions. If partners have equal contributions, their share of profit should also be equal. If there is any deviation from this proportion based on participation, the contract would be invalidated.<sup>(18)</sup>

The reasons given by these scholars are that if any of the parties impose an additional condition regarding the compensation for damages or losses, it would be unjust. For example, if someone says that his loss will be calculated not based on the actual value of his capital but only half of it, such

a condition would be invalid because the compensation for damages should always be proportionate to the actual value of the capital. Similarly, if an extra condition is added that one of the partner will be entitle for higher share of profit than his capital, that would also be unjust.<sup>(19)</sup>

The evidence provided by these scholars indicates that if any partner attempts to impose additional conditions concerning profit distribution, it would be considered invalid and against the principles of sound business agreements. Profit-sharing is directly related to the proportion of capital invested, and any additional conditions or deviations from this proportion are not permissible.

Upon studying the doctrines and evidence of the four major schools of thought (Hanafi, Maliki, Shafi'i, and Hanbali) in the light of the current circumstances, it becomes apparent that the Hanbali and Hanafi schools have more valid arguments compared to the other schools. These arguments are weighed in such a way that it is evident that human capabilities vary, and some individuals possess stronger physical attributes. Such individuals can work more efficiently in a shorter period without any issue. Moreover, some individuals have such high intellectual capacities that their decisions significantly impact business matters, and their considerations outweigh the opinions of others. People rightfully demand higher compensation.

The responses to the arguments of Maliki and Shafi'i school of thought are as follows:

1. It is not appropriate to equate benefits with losses because benefits are the result of successful efforts and hard work, whereas losses are not the result of any successful effort.
2. Restricting benefits solely to capital and neglecting the role of working and participation is not suitable because capital alone does not produce anything until it is invested through effort. Therefore, benefits are the collective result of capital and the labor put into the work.
3. The relationship of losses is purely linked with the capital, and the evidence for this is that in a Mudarba business transaction, if there is no profit, the working partner (*Mudarib*) does not get anything, but if there are losses, they are borne by the investor's capital (*Rabbul Mal*), not the personal assets of the working partner.

#### **Fixed Profit and shariah view**

According to the principles of Shariah, none of the partners in a business can specify a fixed amount of profit for themselves. For example, one cannot say, "I will receive ten thousand rupees as profit every month in the business." Instead, the business partners are required to agree on a specific ratio or proportion for profit distribution among themselves. For



example, they can agree on one-fourth or half of the profit, and so on. Similarly, they can specify 20%, 30%, or 40% as their share of the profit. (20)

### **Principle of Sharing Loss:**

In Islamic jurisprudence, there is a consensus among scholars that each partner in a business will bear the loss according to the proportion of his investment. For example, if someone's investment is 40% of the total, he will also bear 40% of the loss. Alkasani states:

"والو ضيعة على قدر المالين متساويا ومتفاضلا، لأن الوضيعة اسم لجزء هالك  
من المال فيتقدر بالمال" (21)

And the loss will be proportional to capital. Whether the capital is equal or unequal because loss is referred to the portion of wealth, capital that comes to end. Therefore, it will be as much as the capital.

### **Administrative Matters in Shariah:**

In the fundamental structure of Shariah, administrative matters hold significant importance. They include participation in business affairs, authority to buy and sell, entrusting the capital to a third party for business purposes, and employee appointments for the improvement and expansion of the business.

### **Participation in Business:**

In Islamic jurisprudence, all partners in a partnership can participate in the business, and it can also be agreed upon that certain individuals will participate while others will not. In short, it depends on the mutual consent of the partners, and they can decide as they wish. (22)

### **Buying and Selling:**

Each partner in a business is allowed to buy or sell goods for business purposes, whether the transaction is conducted in cash or on credit. Merchants engage in both cash and credit transactions. Partners also have the right to determine the selling price of goods, whether they sell them at a higher or lower price. However, it is essential to avoid deception (ghaban) in any business dealings. (23)

### **Providing the Capital of *Shirkah* on *Mudarbah*:**

Imam Muhammad narrated from Imam Abu Hanifah that the capital of the *Shirka* can be provided on *Mudarbah* for the business. The reason behind this allowance is that partners are permitted to hire someone for the needs of the business. When a person is hired as an employee, he must be

paid his salary, whether the business generates profit or loss. Therefore, the capital of the *Shirka* can also be provided for *mudarbah* because the *mudarib* is entitled to profit only when there is a gain in the business, and he doesn't receive anything in case of a loss.<sup>(24)</sup>

#### **Hiring an Agent for Business:**

In a business of partnership (*Shirka*), it is permissible for all partners to appoint an agent on their behalf. However, it is generally considered undesirable because it is agreed upon in the partnership that each partner fulfills his business obligations personally and not through agents or representatives. Nevertheless, it is recognized that appointing an agent is a common practice in the market and trade, and in situations where tasks cannot be managed individually, a person may need a representative who can act on their behalf.<sup>(25)</sup>

#### **Providing Capital as a Trust(Amanah):**

Each partner in a business has the right to entrust his capital to someone as amanah. There are two different opinions among the Hanbali scholars regarding this matter: one opinion considers it permissible,<sup>(26)</sup> while the other deems it impermissible.<sup>(27)</sup>

#### **Pledging or Collecting Collateral:**

Partners also have the authority to pledge their goods as collateral or collect collateral from others. This is because pledging serves as a form of security ensuring that the creditor holds something valuable as a guarantee until the debt is paid off.

#### **Traveling for Business Purposes:**

According to the Hanafi, Maliki, and Hanbali schools of thought, partners are allowed to travel for business purposes. However, according to the opinions of Imam Abu Yusuf and Imam Shafi'i, traveling for business may not be permissible due to the possible risks and losses involved. The permissibility of traveling for business is subject to the consent of other partners; otherwise, it may not be allowed.<sup>(28)</sup>

#### **Termination of the Shirka Contract:**

1. The *Shirka* is a contract based on mutual consent between the parties. Islamic jurists consider it a non-compulsory contract, and partners have the right to terminate it if they wish. However, before the termination, it is necessary to inform the other partners so that they are aware of the intention to end the partnership, either in their presence or through notification in their absence. Without the knowledge of other partners, the termination of the *Shirka* contract is not valid.<sup>(29)</sup>

The question is that if some partners agree to terminate the 'Shirkat' (partnership contract), then the termination of the contract is not an issue. However, when one party's termination affects the business of other partners, causing them irrecoverable losses, will they still have the right to freely terminate the 'Shirkat' whenever they want?

Taking the current situation as an example, where several individuals come together and invest capital, not just millions but even billions of rupees, only in the preparation of the business before it even starts, the solution is to put a time restriction on the Shirkat (partnership contract). For instance, it could be specified that the contract is valid for five years, and a condition is included that no partner can terminate it before a certain period.

This can be analogized to an issue, and that is Islamic jurists (Fuqaha) have prohibited placing a time restriction on *Mudarba* contract and allowing partners the freedom to terminate the contract (Fasakh).<sup>(30)</sup> However, the Hanafi school of thought has granted permission for timing restrictions on *Mudarba* contract, and their argument is that *Mudarbah* is, in a way, a type of agency contract (*Wakalah*), and agency contracts can have time restrictions<sup>(31)</sup> (according to Hanafi jurisprudence). For example, it can be agreed that you will be my agent for one year, so if timing restrictions are allowed in agency contracts, then they should also be allowed in *Mudarbah*.

In our opinion, the mentioned reasoning is also applicable to *Shirkat* (partnership) because in a partnership, each person acts as an agent for the other. Therefore, a partnership can also have a time restriction. A condition in the contract can be set that no party can terminate the partnership before a specified duration. The analogous issues are the *Muzarah* and *Ijara* (leasing), where after entering into the contract, one party does not have the right to unilaterally terminate the contract to avoid causing harm to the other party. This same reasoning is relevant in the present era for partnerships as well.<sup>(32)</sup>

2. When a partner withdraws from the *Shirkat* (partnership), the termination of the Shirkat will only be applicable to the rights of the withdrawing partner.

If the number of partners is three or more, and any one of them declares withdrawal from the partnership, the partnership will be dissolved only concerning the withdrawing partner's share, while the rights of the remaining partners will still be intact. This is analogous to the situation where there are two partners, and if one of them dies or becomes senseless, the partnership will be terminated only regarding the affected partner's share, while the share of the remaining partner will remain unaffected.

Therefore, if a partner wishes to separate from the contract, he can be separated, and a new partner can be entered in the contract so that the capital he withdrew can be brought back into the partnership.<sup>(33)</sup>

### Conclusion:

1. Capital for partnership can be both in cash and non-cash forms.
2. No single partner can become part of the business without the consent of other partners, but this can be done with the consent of them.
3. Partners' consent will be obtained to secure a loan for running the business.
4. The specific amount of profit cannot be determined, but partners can agree on the proportion of profit through mutual consent.
5. The proportion of profit can be determined according to the ratio of capital and it can be set at a higher rate for a working partner.
6. The proportion of loss will always be according to the capital.
7. Each partner can participate in the business and engage in buying and selling, as well as borrowing for the business with mutual consent.
8. Partnership agreement cannot be terminated without informing the other partner, but after notifying, it can be terminated.
9. In the present era, partnership can be conditioned in such a way that no partner can terminate the partnership, for example, for three years.

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