

Progression of Modarabah Rules in the Formative Period of Sunni's Legal Text

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Introduction:

This fact is above board that our ancestors and the great jurists and well known scholars of early ages provided gigantic works and literature on each and every vista of knowledge. Special attention was paid to trade activities to boost the economic and financial matters in early period. Modaraba a form of partnership was much common among the ancient Arabs even at present age it is the only solution to run a purified Riba free economic system. In Modarabah form of partnership money is given by one partner to another for investment in a business venture. Investor is termed as "Rabb-ul-mal" whereas the other partner who manages the work is termed as "Mudarib".

The rules of Modarabah have been elaborated in great detail in the text of classical fiqh (Islamic jurisprudence). Separate chapters or sections have been devoted for the subject of Modarabah in all most all the the earliest texts of the four Sunni schools of law although in their scope of discussion they are varying to each other. The earliest Hanafi rules on Modarabah are found in the works of al-Shaybani (d.189/205) namely his al-Jami al-Saghir and al-Jami al-kabir. In the other schools al-Muwatta of Malik (d. 179/795), Kitab al-Umm of al-Shafi'i (d.204/820) and Masayil Imam Ahmad of Ahmad ibn Hanbal (d.241/855) serve as the main source of text to find the earliest rules of Modarabah.

Progression of Modarabah rules in Hanfi's Legal text:

The Hanafi school of law is the creation of juristic rules and regulations as educated by Abu Hanifa. It is famed for pioneering more stress on Qiyas (Analogy) and Raa'y (personal opinion) than stress on adoptions and deductions from Hadith. The spread of Hanafi School was placed round the personality of Abu Hanifa and his two disciples, Abu Yusuf and Muhammad al-Shaybani. After Abu Hanifa his notable pupils played a key figure role in the propagation of Abu Hanifa's rulings; eventually it results towards the formation of a distinct school of law. Muhammad al-Shaybani got fame because of his distinct role towards the compilation of Hanafi's legal texts.

Al-Jami al-kabir and Al-Jami al-Saghir of Muhammad al-Shaybani

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are the primary texts of Hanafi's legal doctrine. A review of both texts reveals that it contains the basic elements of Modarabah as laid by Abu Hanifa and his disciples. The later progress on Modarabah rules were based on the views of Abu Hanifa that have been expressed in *Al-Jami al-saghir* by al-Shaybani. Various issues have been recorded in *Al-Jami al-saghir* such as daily allowances of agent manager (*nafaqah*), invalid Modarabah, recursive Modarabah, nature of capital and its acceptability, relation of contracting parties, termination of the contract in case of dispute etc.

The method has been adopted by Al-Shybbani in recording the view of Abu Hanifa is relatively comprehensive. Although in *Al-Jami al-saghir* rulings have been compiled without the description of the legal reasoning behind them. Al-Shybbani expressed Abu Hanifah's opinion on the issue of daily allowance (*nafaqah*) that an agent manager cannot claim daily allowance for his routine expenses in case business is being conducted in his locality(1). He can be entitled for daily allowances only when he travels outside the city for business purpose. Routine expenses are expressed as food, drinks, transportation and cloths of the agent manager.

In addition to the share of profit none of the contracting parties can be entitled to receive a fixed amount of money, if such a condition is stipulated in the contract, it will be rendered as invalid. In case of invalid contract the practice of hired wages will be adopted by the investor and he will have to pay wages (*ujr mithil*) to Modarib.

The practice of recursive Modarabah and its validity has also been acknowledged by Abu Hanifa and he permits an agent manager to serve as a middle man, receive capital from the investor as a Mudarib and act in other parallel Modarabah as *Rabb ul mall* (capital provider). In such a case, the methodology for profit distribution has also been expressed by Abu Hanifah between three parties of the contract. Profit distribution will be made as per agreed ratio between the parties. An example has been illustrated by him where investor and agent manager agreed on equal basis of profit ratio 50:50. Similar ratios are decided between the first and second agent-manager in parallel Modarabah. On the realization of profit, the agent manager in parallel Modarabah will receive 50% profit and remaining 50% will be divided between the parties of the initial contract which will be a quarter of the total amount of profit realized from a parallel Modarabah contract(2).

The nature of Modarabah capital has been expressed and he ruled that it must be in the form of currency. Any form of capital other than monetary currency is not acceptable as investment in Modarabah contract(3). Regarding the Investor's rights and control over his investment Abu Hanifa allows the investor to specify a place for Modarib to conduct

the business activities. Agent manager is bound to follow such instructions of the investor in case of non-compliance of the instructions agent manager will be held responsible for the loss if any incurred to the investment(4).

Abu Hanifa also laid rules to resolve disputes between the contracting parties, rules regarding the determination of capital amount and the amount of profit, type of the contract either it is bida'ah (where agent manager involves in trade for free) or Modarabah. Abu Hanifa recognizes such disputes and ruled to resolves issues between investor and agent manager.

As we have mentioned earlier that al-shybbani's work in form of Al-Jami al-saghir is the compilation of the legal rulings of Abu Hanifa. On the footsteps of al-shybbani, another Hanafi jurist **Abu layth al-Samarqandi** worked during the third/ninth centuries. Abu Layth al-Samarqandi compiled a book Khizanat al-Fiqh on the basis of the legal rulings of Hanafi jurists of his time. The book was written basically to help out the students to learn and understand the legal doctrine of Hanafi's(5). In addition to Al-Jami al-saghir Abu Layth ruled activities permitted for an agent manager such as to borrow for business, to acquire warehouses on rent, to hire employees or vehicles for transportation of business goods, make credit purchases, appointment of an agent to carry on the business of Modarabah, collateral issue and travel with the capital. An agent manager is prohibited to use the Modarabah revenues to give loans, charity, donations to set free the slaves and to accept credit letters (safataj). On investor's side, Samarqandi empowers an investor to monitor his investment. A part from place of the business as mentioned by al-shybbani, investor can specify type of business, time period, price and type of products. An agent manager is bound to comply with the instructions of the investor in order to avoid future discrepancies. Abu Layth al-Samarqandi's work in form of Khizanat al-Fiqh demonstrates that Hanafi jurists have developed Modarabah rulings during 3rd Hijri. Hanafi jurists have determined the boundaries of investor and agent manager relationship as it is obvious from the work of al-Samarqandi. The definition of Modarabah was also set by al-Samarqandi as he mentions it a contract of partnership in which one party provides the capital and other party contribute efforts(6).

Al-Shybbani and al-Samarqandi's work were based on the compilation of the legal rulings of the Hanafi jurists without throwing light on the legal reasons behind these rulings. At the end of the 4th century hijri this gap was filled by **Al-Sarakhsi**. Al-Mabsut of al-Sarakhsi is considered as the most comprehensive text with in the domain of all sunni schools. Al-Sarakhsi covered the topic of Modarabah in a comprehensive way and discussed the rules of Modarabah in 26 chapters. All the topics of

Modarabah such as scope of the activities of the agent manager, recursive Modarabah, the guaranty of agent-manager, disputes between the parties, distribution of profit, loss of capital and Modarabah contract with the people of diverse faith have been discussed comprehensively. The entitlement of daily allowance for agent manager has been discussed in detail along with legal reasons describing why an agent manager is entitled for daily allowances when he is conducting business activities outside the locality. Al-Sarakhsi convinced the readers why agent manager is not entitled for daily allowance other than his share in profit when he is conducting business in his locality however he did not through ample light on the extent of agent manager's claim of daily allowance. His recommendations in this regard determine that the claim should be filed in a responsible and reasonable way; perhaps as per the common practice of traders. Later on in fifth Hijri Al-Sarakhsi's footsteps were followed by Ali al-Marghinani in producing Al-Hidayah a comparatively concise but comprehensive legal doctrine of Hanafi's. It contains all the topics of Modarabah in a concise way without indulging in lengthy discussions of legal problems.

Progression of Modarabah rules in Maliki's legal text:

Malik bin Anas's (d.179AH/795AD) a jurist of Madina, established the doctrine of Maliki School of law. The birth of Malik was in the Holy city of Madina in 93 AH. Nafi (d.117/735) who had been freed from slavery by Abdallah Ibn Umar bin Al-khatib (d.73/692) who was an older successor was the teacher of Malik. Ibn Shihab al-Zuhri (d.124/742), Rabbiah ibn Abd al-Rahman (d.136/753-4), Yahya ibn Saeed (d. 143/760) and Abu al-Zinad studied under the renowned seven jurists of Madina (Al-Fuqaha al-Saba) so they transmitted directly from them, all were the principle teachers of Malik. Rabbiah ibn Abd al-Rahman, commonly known as Rabbiah al-ra'y was the teacher of Malik in the field of Fiqh also. On the influence of Rabbiah al-ra'y, in developing fiqh doctrine ra'y was incorporated by Malik. The elements of masalih al-mursalah (public interest) and sadd al-dharai (blocking pretenses) were applied by Malik in developing his fiqh doctrine along with reliance on Hadith and the contemporary practices of jurists of Madina.

Like all other schools a great contribution was made by the pupils of Malik towards the propagation of Maliki School. Maliki School was cultured vastly in Spain and North-western Africa. Uthman bin Kinanah (d.185/801), Ibn Nafi (d.186/802), Abdul Malik bin al-Majishun (d.214/829) and Matraf bin Abdullah (d.220/835) was among the prominent personalities of Malik students who sustained the doctrine of Maliki's in Madina. Abd al-Malik Ibn Habib (d. 238/853) a jurist of Andalusia learned

the Maliki's doctrine from al- Majishun and Matraf and thus caused to spread Maliki School in Andalusia.

Abdul Rahman Ibn al-Qasim (d.191/807) and Ibn Abd al-Hakam (d.214/829) were among the prominent Malik's students who spread the doctrine of Maliki in Egypt. In spread of Maliki School, the position of Ibn al-Qasim was same as of al-Shaybani of Hanifi's. Muwatta's transmission of Ibn al-Qasim and his replies to the inquiries of Sahnun's in al-Mudawwanah are obliged as the soundest and the most comprehensive collections of Maliki's doctrine(7). It is of Ibn al-Qasim that Maliki School was acknowledged contiguous to the Maliki of Maddina in following the methodology and principles of Malik's. Re-emergence of Maliki School in Egypt was advanced by Abu Bakr al-Turtushi (d.520/1126). He was the student of Al-Baji. The Great jurists Ibn al-Hajib (d.646/1248), al-Qarafi and Khalil bin Ishaq were the product of Maliki School.

Since the formation of Maliki legal law, al-Muwatta and al-Mudawwanah al-Kubra are obliged as a primary source of Maliki's legal doctrine. Al-Muwatta is a compilation of narrations whereas al-Mudawwanah al-Kubra was written in a style of legal reasoning based on the legal rulings of Maliki School of law. The topic of Modarabah is enlisted in al-Muwatta with the title of 'Qirad' and consists of 15 sub topics/issues of Modarabah.

al-Muwatta contains various issues regarding the topic of Modarabah however the Modarabah doctrine of Maliki's have not been covered in it as we find in the text of al-Mudawwanah that contains a lot of cases and covers all the aspects of Modarabah doctrine of Maliki's school of law although these cases have been extended from the rulings in al-Muwatta; Sahnun enhanced the rulings of Modarabah found in al-Muwatta.

Al-Mudawwanah(8) addresses on the issues such as, nature of capital, merchandises as a form of capital, rules of currencies like molten gold and silver nuggets, wheat, barley, debt and receivables (al-wadi'ah) as capital in the contract of Modarabah. Rules regarding the distribution of profit has been elaborated in detail as in former al-Muwatta profit distribution has not been addressed clearly.

With the inauguration of third Hijri, Maliki jurists focused on the formation of Mukhtasar of primary texts of Maliki. In the formation of Mukhtasar, an approach to form a text book was adopted by the jurists, perhaps this approach was adopted to facilitate public to learn the rulings of Maliki doctrine. Usually the text of Mukhtasar is merely a record of rulings narrated in al-Muwatta and in al-Mudawwanah.

A worthy model of Mukhtasar by the Maliki jurists is Kitab al-Kafi fi fiqh ahl al-Madinah of Ibn Abd al-Barr. The rulings of Malik and his

prominent disciples were recorded by Ibn Abd al-Barr without making any addition of new rulings. There is merely a difference of style as compared to al-Muwatta and al-Mudawwanah as al-Kafi was written in a style of text book. In al-Kafi the topic of Modarabah has been divided in five classes with a little description of their reasoning; like permitted and prohibited activities in Modarabah, combination of Modarabah, rules of void Modarabah, Zakah of Modarabah and negligence in Modarabah(9).

Bidayah al-Mujtahid of Ibn Rushd enlightens the disagreement among earliest jurists in Islamic law. Ibn Rushd expresses that jurists are agreed in concern to the basic elements of Modarabah however they differ in further details of the contract. Ibn Rushd not only state rules of Modarabah but also provides reasoning and justification of it(10).

Al-Dhakhirah of al-Qarafi is a product of 7th Hijri Maliki jurist. Al-Qarafi not only expresses the rulings of Maliki's doctrine but also linked them with principles of fiqh commonly known as Usul al-fiqh. He presents the rulings of earlier Maliki jurists on the topic of Modarabah and begins the topic of Qirad with its literal and legal definition by mentioning evidence of its permissibility(11).

Progression of Modarabah rules in Shafi'I's legal text:

Muhammad ib Idrees al-Shafi'i (d.204AH/820AD) was born on the Mediterranean coast in the town Ghazzah. He travelled to Madina to study Hadith and Fiqh from Imaam Malik. After the demise of Malik in 179 Hijri, al-Shafi'i left Madina and went to Iraq. There he attended the circles of well famed jurists and have a chance to debate on the Fiqh matters. He also attended the circle of famed Hanafi jurist Hassan al-Shaybani in Iraq. After that Shafi'i returned to Mecca to form his own circle. From Mecca Shafi'i migrated to Fustat, Egypt in 199 A.H and till his death he remained settled there.

Legal rulings of Shafi'i's doctrine are divided in to two phases. The first phase is termed as the old doctrine (al-madhab al-qadim) and the second phase is termed as new doctrine (al-madhab al-jadid). The first phase contains on the rulings given during the period he got settled in Iraq whereas the second phase (al-madhab al-jadid) contains on his legal rulings in Egypt. The validity of old doctrine is considered by the Shafi'i jurists when it is in accordance to the new doctrine; in case there is a contradiction in both, the new doctrine will override the old one.

Likewise other school of law, the spread of Shafi'i School was by his pupils. In Egypt Yoosuf ibn Yahyaa al-Buwayti (d.231/846), Ismaa'eel ibn Yahyaa al-Muzanee (d.264/878) and Rabi ibn Sulaiman al-Muradi (270/884) were the prominent figures in spreading the Shafi'i School of law. In Shafi'i school amongst the three prominent figures al-Buwayti is on

top ranking. In Baghdad, he was confined to prison and subjugated to severe torture which resulted in his death as he declined to accept the officially sanctioned Mu'tazilite philosophy on the creation of the Qur'an(12).

Al-Muzanee compiled a book titled al-Mukhtasar based on the legal rulings of Shafi'i's and his own exertions(13). The Mukhtasar is considered as the most important early text of Shafi'i's legal doctrine. Kitab al-umm, the most famous book of al-Shafi'i was primarily transmitted by Rabi ibn Sulaiman al-Muradi. All the Muslim scholars acknowledged him as the primary compiler of al-Shafi'i's writings.

In Iraq al-Karabasi (d.248/862) was the earliest student of al-Shafi'i. The old doctrine of al-Shafi'i was transmitted by him whereas the Anmati (288/902) transmitted this new doctrine. Shafi'i's jurisprudence was learned by Al-Anmati from al-Rabi and al-Muzani in Egypt.

In Khurasan Muhammad ibn Nasr al-Marwazi (d. 294/907) and Ibn Khuzaymah (d.311/924) were among the prominent jurists of Shafi'i's. Followings are the major texts of al-Shafi'i's doctrine and our discussion for the development of Modarabah rulings will also be examined around them.

- Al-Umm of al-Shafi'i's
- Muhadhdhab of Abu Ishaq al-Shirazi
- Al-Wajiz of al-Ghazali
- Minhaj al-Talibin of al-Nawawi

The majority of the followers of the Shafi'i School of thought is now founded in Egypt, Southern Arabia, (Yemen, Hadramout), Sri Lanka, Indonesia, Malaysia, and East Africa (Kenya, Tanzania) and Surinam in South America(14).

Kitab al-Umm of al-Shafi'i is obliged as an authoritative guide of Shafi'i school of law. The founder of the Shafi'i school, Imam al-Shafi'i (767-820 A.D) composed the book. The topic of Modarabah has been discussed in Kitab al-Umm with the title al-Qirad. The chapter has been divided in four sub sections as under:

1. The merchandise (al-urud) as capital not permitted
2. Conditions of Modarabah
3. Credit (al-salaf) in Modarabah
4. Accounting treatment of Modarabah business

According to al-Shafi'i merchandise (al-urud) cannot be acknowledged as capital in Modarabah, if merchandises are acknowledged as capital in Modarabah it will render the contract as invalid. Nevertheless, no legal reason of this prohibition has been expressed by al-Shafi'i.

With regards to the conditions of Modarabah, al-Shafi'i is of the view that if the amount of capital is unknown whereas the duration of contract is fixed i.e. one year, it will render the contract as invalid. Expressing the legal reason of the rule against the fixed duration of Modarabah al-Shafi'i takes it as a preventive measure to avoid unknown amount of capital.

As per our observations, Al-Shafi'i's opine demonstrates that Modarabah contract goes to end with the completion of a single business transaction, at the end of each business transaction a new contract of business should be arranged. In justification of the rule against the fixed duration of Modarabah al-Shafi'i illustrate an example(15):

“if I pay to you one thousand dirham to work on it for a year, then you buy and sell (trading) during the first month and make a profit of one thousand dirham, later for the next trading you will use the one thousands of profit which belongs to me and you; in which I might not agree to participate in the trading. Thus you will use capital which is unknown to me...”

The illustration quoted by al-Shafi'i demonstrates that according to him Modarabah is to be carried out on a job basis, where completion of each transaction ends the job of agent manager.

Kitab al-Muhadhdhab (16) of Abu Ishaq al-Shirazi (393-476) Hijri, is a significant development in organizing the discussion on the topic of Modarabah in Shafi'i school of law. Al-Shirazi organized his discussion on Modarabah in topics and sub topics.

The work of al-Shirazi covers almost all of the topics of Modarabah. Kitab al-Muhadhdhab gave an appropriate expansion to the legal doctrine of al-Shafi'i as compared to the earliest text Kitab al-Umm.

Al-Wajiz(17) of al-Ghazali is another comprehensive text of Shafi'i legal doctrine. In al-Wajiz, Ghazali have summarized all the rulings of the earliest jurists and arrange all the topics in a systematic way. A structural discussion on the topic of Modarabah has been presented in this text.

Minhaj al-Talibin of al-Nawawi(18) is a text of seventh century. Al-Nawawi's work in form of Minhaj al-Talibin gave a new and tremendous expansion to Shafi'i legal doctrine. Al-Nawawi improves the discussion on the topic of Modarabah as compared to the earliest jurists. In his other work, al-Majmu sharh al-Muhaddhab, divergence of thoughts (ikhtilaf) among the Shafi'i's jurists i.e. Shirazi, Ghazali etc. have been emphasized by al-Nawawi.

Progression of Modarabah rules in Hanbali's legal text:

Ahmad bin Muhammad bin Hanbal Abu Abd Allah al-Shaybani (d. 241AH/855AD) was born in Baghdad in an Arab family. Hanbali School of law gets attributed to him. He was the utmost memorizers and narrators of

Hadith of his time. Ahmad gets the knowledge of Fiqh and Hadith from Abu Yousaf and al-Shafi'i. Legal reasoning taught to him by Hanafi master could not develop his interest and was attracted towards the science of Hadith. He travelled between the city of Kufah, Basrah, Macca, Madina, Yemen and Syria for the collection and preservation of Hadith text. Abd al-Razzaq in Yemen and Sufyan ibn Uyaynah in Macca were the prominent personalities contributed to quench his thrust in science of Hadith. He was one of the prominent personalities of Asshab al-hadith. Collection and narration of Hadith was the utmost concern of Ahmad. Al-Musnad of Ahmad is a vast collection of Hadith comprises of more than thirty thousand Hadith.

Beyond the regions of Iraq and Syria the Hanbali school of thought did not expand and Baghdad was the main center of Hanbalis from the middle of the second to the end of the fifth century Hijri. The followers of Hanbali school of thought are in small number as compared to other three Sunni Schools of law.

The prominent students of Ahmad were his two sons Saalih (d.266/879) and Abdullah (d.290/903), other than this Abu Bakr al-Athram (d.260/873-4), Hanbal bin Ishaq (d.273/886), Abu Daud al-Sijastani (d.275/887) and Abu Bakr al-Marwazi (d.275/887) were among the prominent pupils of Ahmad. Besides this, Bukhaaree and Muslim the great scholars of Hadith were also the students of Ahmad(19).

Abu Bakr al-Khallal (d.311/923) organized efforts for the collection of Hanbal's legal doctrine were of much importance and appreciated by the later Hanbali's jurists as the fullest possible sources of Hanbali's fiqh. In order to collect Hanbal's legal doctrine, he travelled far and wide, met with the students of Ahmad and compiled a text titled al-Jami. Mukhtasar of Al-Khiraqi was another effort from Abu al-Qasim al-Khiraqi (d.334/945) in this regard. Besides of these the most significance commentaries were of Qadi Abu Yala and al-Mughni of Ibn Qudamah. Ibn Qudamah added discussions of new positive legal rulings along with the inclusion of the rules of other sunni jurists who contradicted with the Hanbalis, this contradiction with Hanbalis has also been discussed in al-Mughni which resulted in making its volumes more comprehensive as compared to the commentary of Abu Yala(20). Besides al-Mughni Ibn Qudamah organized his efforts to compose three other texts of hanbalis titled as al- Umdah, al-Muqni and al-Kafi.

In Hanbali School of law Masail Ibn Hanbal, Mukhtasar al-Khiraqi, Al-Mughni of Ibn Qudamah are the major texts of Hanbali's legal doctrine. So far it concerned to the recording of the Modarabah rules, there are only two responses by Ibn Hanbal with regards to Modarabah expressed in

Masail. First response is about the Misdemeanor of agent manager whereas the second response addresses the form of capital 'weather merchandises can be accepted as capital in Modarabah contract or not. Other than these two issues no other issue on the topic of Modarabah has been presented in it. Thus Masail Ibn Hanbal cannot be regarded as the main source of Hanbali doctrine for the development of Modarabah rules.

Mukhtasar of al-Khiraqi was emerged a century later to Masail Ibn Hanbal. Mukhtasar contains fundamental elements of Modarabah under the chapter of shirkah (partnership) contract; about 9 cases of Modarabah have been expressed by al-Khiraqi.

Al-Mughni of Ibn Qudamah is another text of Hanbali's legal doctrine. Ibn Qudamah expands the previous discussions on Modarabah (Al-Khiraqi's text) and managed all the important topics of Modarabah contract. Ibn Qudamah discussion on Modarabah comprises on 41 subtopics, almost all the topics of Modarabah has been expressed in well manner.

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