THE EARLY DEVELOPMENT OF SHAFI'IS RULES ON *MUDARABAH*

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ABSTRACT

This paper investigates the development of Shafi'is rules on *mudarabah* from the second until the sixth century Hijri. The investigation is carried out based on the analysis of *Kitab al-Umm* of al-Shafi'i (d.204), *al-Muhadhdhab* of al-Shirazi (d.472), *al-Wajiz* of al-Ghazali (d.505) and *al-Minhaj* of al-Nawawi (d.676). It is found that the *mudarabah* rules were in preliminary stage during the time of al-Shafi'i and had been developed gradually in the later centuries. As evident in the text of al-Shirazi, the rules most probably finalised during the fourth century. The findings confirm the majority of Western scholars opinion in which argue that the institution of *madhhab* did not emerged during the lifetime of the eponyms but sometimes after their death.

Keywords: Mudarabah, Shafi'is and Madhhab

INTRODUCTION

Muslim and Western scholars differ in determining the period in which the institution of *madhhab* emerged in the history of Islamic law. According to majority of Muslim scholars, the *madhhab* emerged during or soon after the lifetime of Abu Hanifa (d.150), Malik (d.179), al-Shafi'i (d.204) and Ahmad ibn Hanbal (d.241). In contrast, most Western scholars contend that the *madhhab* emerged some time after the lifetime of the eponyms. Melchert, the most cited view on this subject, suggested that the formation of the Shafi'is, Hanafis and Hanbalis took place between the late 200's/800's and the late 300's/900's, which happened during the lifetime of Ibn Surayj (d.306/918), al-Karkhi (d.340/952) and al-Khallal (d.311/923) respectively (Melcehert, 1997). Besides Melchert, another Western scholar Hallaq argues that the emergence of the *madhhab* occurred during the middle of fourth /tenth centuries, though he ties it to the attribution of doctrine to a founder, rather than the composition of *mukhtasars* and *tabaqat* works (Hallaq, 2001).

The divergence of opinion on this subject arises as a result of different interpretation or understanding of the term *madhhab*. The Muslim scholars define *madhhab* as a distinctive legal methodology employed by the great jurists in discovering new legal rulings. For them, what makes a *madhhab* different to one another is due to its distinctive legal methodology. For example, Abu Hanifa was known for his legal methods such as the principles of *qiyas* (analogy), *istihsan* (juristic preference) and *hiyal* (legal device). On the other hand, Malik adapted widely the legal method of Medinan jurists practice and public interest (*masalih al-mursalah*). Applying the legal methods, the later generation of jurists developed the substantive rulings (*al-furu'*) (Sulayman al-Ashqar, 2007). Thus, based on this contribution, Abu Hanifa, Malik, al-Shafi'i and Ahmad ibn Hanbal were regarded as the founders of their *madhhahib*. However, the Western scholars view *madhhab* as a collection of juridical opinions of the so-called founders and their great followers. They claim a *madhhab* is formed when a body of legal opinions are collected and ascribed to a particular jurist. Hence, they strongly believe that the *madhhab* is later jurists' creation.

The present paper tries to examine both theories by investigating the development of the Shafi'is rules on *mudarabah*. Considering the Muslim scholars' point of view, al-Shafi'i would be expected to have established the fundamental principles of *mudarabah*. In this paper, we will explain whether there is sufficient evidence

to justify such claim. On the other hand, based on the Western scholars' theory, it is presumed that the *mudarabah* rulings were in preliminary stage during the time of al-Shafi'i and had been developed gradually in the later centuries by his followers. In this respect, we try to examine in which period the *mudarabah* rulings were finalised. The paper studies the development of *mudarabah* from the time of al-Shafi'i in the second/eighth centuries until the period of al-Nawawi (d.676/1277) in sixth/twelve centuries.

The article is organised into four main sections. After the introductory section, the article describes the history of the Shafi'is school. It highlights the authority of several great Shafi'is jurists and the series of their important *fiqh* books. Then, the discussion continues with the analysis of the development of mudarabah rulings based on four main Shafi'is texts. The texts represent the Shafi'is madhhab in the second, fourth, fifth and sixth century Hijri. Finally, the last section concludes the preceding discussions.

The History of The Shafi'is School

In Islamic law history, al-Shafi'is was known as the first jurist who attempted to produce a compromise doctrine between the traditionalists (ashab al-hadith) and rationalists (ashab al-ray') schools. He tried to mediate between the strict rejections of all human reasoning propounded by the traditionalists and the unrestricted use of personal opinion adapted by the rationalists. Al-Shafi'i began his fiqh study with jurists in Medina. One of his teachers in Medina was Malik, with whom he studied for nearly 16 years beginning from 163 until 179 Hijri. After Malik's death, al-Shafi'i travelled to Iraq to learn the fiqh of the rationalists. He attended circles of many rationalist jurists and debated with them concerning the fiqh problems. This included the circle of al-Shaybani, one of the two great followers of Abu Hanifa. After staying for considerable of time in Iraq, al-Shafi'i returned to Mecca to start his circle in masjid al-haram. In year 199 Hijri, al-Shafi'i migrated to Fustat, Egypt and settled down there until his death. It should be noted however, between the year 195 to 199 Hijri, al-Shafi'i made two visits to Iraq (Ali Jum'ah, 2007).

Based on his life journey, al-Shafi'i's legal rulings were divided into two groups. The first group was known as the old doctrine (al-madhhab al-qadim) which indicates his rulings in Iraq while the second, called the new doctrine

(al-madhhab al-jadid) was his legal rulings in Egypt. The Shafi'is jurists ruled that the old doctrine was valid when it does not contradict the new doctrine. However, when both doctrines seem contradict to each other, the new doctrine will overrule the old one.

Al-Shafi'i had many students coming from various regions such as Egypt, Iraq and Khurasan. His most famous Egyptian students were al-Buwayti (d.d.231/846), al-Muzani (d.264/878) and Rabi' ibn Sulaiman al-Muradi (270/884). Based on the *Tabaqat al-Fuqaha' al-Shafi'iyyah* of Ibn Qadi Shubah, Kevin Jaques (2006) has produced an excellent analysis regarding the position of the three jurists within the Shafi'is school. According to Ibn Qadi Shubah, al-Buwayti was posited as the first rank amongst the three (Kevin Jaques, 2006). He was described as the closest, most loyal and the most pious student of al-Shafi'i. Al-Buwayti succeeded al-Shafi'i as leader of his circle after his death.

After al-Buwayti, the leadership of Shafi'is was led by al-Muzani. Distinct from al-Buwayti, al-Muzani was described as a controversial student of al-Shafi'i. This is because many of his rulings appeared to contradict his teacher's legal rulings. Therefore, it was not surprising that some scholars regarded him as an independent jurist (*mujtahid mutlaq*). However, despite the doubt over al-Muzani's affiliation to the Shafi'i school, his contribution to the development of the school was the most significant. He wrote *al-Mukhtasar* ("the legal manual") which was a compilation of al-Shafi'i's legal rulings and his own *ijtihad* (Sulayman al-Ashqar, 2007). The *Mukhatasar* was considered as the most important early text of divergent opinion (*ikhtilaf*) in the school in which the later Shafi'is jurists developed their legal doctrine. The third important student of al-Shafi'i was Rabi' ibn Sulaiman al-Muradi. He was known as the primary transmitter of *Kitab al-umm*, the most important al-Shafi'i *fiqh* book. The Muslim scholars unanimously believed that al-Shafi'i was the original author of the book. Rabi' ibn Sulaiman al-Muradi was acknowledged as the compiler of al-Shafi'i's writings and named the book according to al-Shafi'i's idea.

One of the earliest of al-Shafi'i's students in Iraq was al-Karabisi (d.248/862). He was known for his role in transmitting the old doctrine of al-Shafi'i. The new doctrine however was transmitted by al-Anmati (d. 288/902), who was said to have learnt the jurisprudence of al-Shafi'i from al-Rabi' and al-Muzani in Egypt. The transmission of the new doctrine in Iraq enhanced further during the time of Abu al-'Abbas ibn Surayj (d. 306/918), al-Anmati's student. Ibn

Surayj was the first jurist who was described as having the chieftaincy within the Shafi'is school in Iraq. He initiated a normal course of advanced study which required his students to produce a *ta'liqah*, a sort of doctoral dissertation describing Shafi'is doctrine. As graduates from Ibn Surayj's circle begun to carry the title "Shafi'is", the dissemination of the *madhhab* became more obvious. One of Ibn Surayj's great students was Abu Ishaq al-Marwazi (d.340/951). He succeeded his teacher as the chief of the Shafi'is in Iraq. Then, the order of the chieftaincy went to al-Daraki (375/986) and Abu Hamid al-Isfarayini (406/. 1017) (Melchert, 1997).

Apart from Iraq, the doctrine of al-Shafi'i was transmitted largely in Khurasan. According to al-Nawawi, the school of Shafi'is used to categorise into the "jurists of Iraq" and the "jurists of Khurasan". Based on the principles laid down by al-Shafi'i, both groups developed their specific method (*tariqah*) in expanding Shafi'is legal doctrine. Al-Nawawi described the *tariqah* of both groups as follows:

> 'The narration of our Iraqi jurists pertaining to the text (*nusus*) of al-Shafi'i, his *madhhab* principles and the opinions (*wujuh*) of his early followers is more accurate (*atqan*) and valid (*athbat*) comparing to the narration of Khurasan jurists in general, the Khurasani is better in terms of *tasarrufan*, research (*bahthan*), expansion (*tafri'an*) and systematise (*tartiban*)' (Ali Jum'ah, 2007).

Muhammad ibn Nasr al-Marwazi (d. 294/907) and Ibn Khuzaymah (d.311/924) were among the earliest Shafi'is in Khurasan. They were reported to have travelled to Egypt to learn from al-Shafi'is students. After that, the Shafi'is in Khurasan were led by their student namely Abu Ali al-Thaqafi (d.328/941). Then the sequence of chieftaincy went to Abu Ishaq al-Marwazi, the student of Ibn Surayj of Iraqi group. This suggests that the teachings of Ibn Surayj had influenced the Shafi'is in both regions. After that, the chieftaincy of Shafi'is in Khurasan continued with Abu Bakr al-Qaffal al-Marwazi (d.418/1031).

However, according al-Subki (d.756/1357), beginning with the period of Abu 'Ali al-Sanji, the *tariqah* of Iraqi and Khurasani had been faltering. Being the student of Abu Bakr al-Qaffal al-Marwazi and Abu Hamid al-Isfarayini, the leader of Khurasanis and Iraqis respectively, Abu 'Ali al-Sanji begun to merge the two *tariqah*. His efforts were continued by Imam al-Haramayn

(d.478/1091) who wrote *Nihayat al-matlab fi 'ilm al-madhhab*. In this book, Imam al-Haramayn compiled the legal rulings of both *tariqahs* and made *tarjih* between the conflicting opinions. Al-Ghazali (d.505/ 1118), the student of Imam al-Haramayn, developed further his teacher's work and since then Shafi'i jurisprudence was no longer divided.

In this study, the development of Shafi'i rulings on *mudarabah* is examined based on the four main Shafi'i texts. The texts are *al-Umm* of al-Shafi'i, *al-Muhadhdhab* of Abu Ishaq al-Shirazi (d.472/1085), *al-Wajiz* of al-Ghazali and *Minhaj al-Talibin* of al-Nawawi. These texts represent the Shafi'i *madhhab* written in the second (*al-Umm*), fourth (*al-Muhadhdhab*), fifth (*al-Wajiz*) and sixth (*Minhaj al-Talibin*) century Hijri. Undoubtedly, for the majority of Muslim scholars, *Kitab al-Umm* is regarded as al-Shafi'is most important text in *fiqh*. They believed that al-Shafi'i was the original author of the text. The transmitter of the text, Rabi' ibn Sulayman al-Muradi had been described as faithful and truthful who transmitted al-Shafi'i legal rulings without interpretation or manipulation (Kevin Jaques, 2006). However, Calder has raised doubts over the actual authorship of *Kitab al-Umm*. He argued that the book might be written after the period of Rabi' ibn Sulayman al-Muradi. For the purpose of this study however, we will assume that *Kitab al-Umm* represents the legal rulings of al-Shafi'i.

Based on al-Shafi'i's text, Abu Ishaq al-Shirazi wrote *al-Muhadhdhab*. Abu Ishaq al-Shirazi was known for his loyalty to the principles laid down by al-Shafi'i. He had added new legal rulings in his book but they did not diverge from what would have been al-Shafi'i's opinion because they are based on his method. Besides *al-Muhadhdhab,* Abu Ishaq al-Shirazi also wrote another important book in *fiqh* namely *al-Tanbih*. On the other hand, *Kitab al-Wajiz* represented al-Ghazali's continuing effort in narrowing the range of divergent opinions within the Shafi'is school. The main reference of the book was *Kitab al-Nihayat al-Matlab fi 'Ilm al-Madhhab* of Imam al-Haramayn, who was al-Ghazali's teacher. Before writing *al-Wajiz,* al-Ghazali wrote *al-Basit fi al-Madhhab* and *al-Wasit.* In fact, *al-Wajiz* is a condensation of *al-Wasit*, which in turn, is an abridgment of *al-Basit al-madhhab* (Kevin Jaques, 2006).

Kitab Minhaj al-Talibin of al-Nawawi has been regarded almost as the law book par excellence within the Shafi'is school. The book is a commentary on the *Muharrar* by al-Rafi'i (d. 623/1224). Al-Nawawi made improvements from the

earlier book by mentioning the divergent opinions not pointed out by al-Rafi'i. Furthermore al-Nawawi presented the evidence used by each of the diverging parties and made *tarjih* to indicate which opinion is the most correct (Kevin Jaques, 2006). The Shafi'is books after the seventh/thirteen centuries were mostly based on the commentaries of *Minhaj al-Talibin*. Among the famous commentaries were *Tuhfah al-Muhtaj* of Ibn Hajar al-Haytami and *Nihayah al-Muhtaj* of al-Ramli (d.1004).

The Development of *Mudarabah* Rules in The Shafi'is Main Texts

In *Kitab al-Umm,* the discussion of *mudarabah* is entitled as *bab al-qirad.* It is further divided into four sub-topics; (1) the impermissibility of merchandise (*al-urud*) as capital (2) the stipulated conditions (*al-shurut*) of *mudarabah* (3) loan (*al-salaf*) in *mudarabah* and (4) the accounting of *mudarabah* business.

Al-Shafi'i ruled that the merchandise can not be accepted as *mudarabah* capital. This rule contradicts that of Malik who was reported to have permitted certain types of merchandise as capital. However, al-Shafi'i did not explain the reason behind such prohibition. He only indicated that the *mudarabah* contract would be render invalid (*fasid*) if merchandise was capital. According to him, in an invalid *mudarabah* the investor would receive the capital and profit if any. However, the investor was obliged to pay current hire wages (*ujr al-mithil*) to the agent-manager for the work had been done.

With regard to the stipulated conditions (*al-shurut*) of *mudarabah*, al-Shafi'i ruled that the contract would be rendered invalid if the amount of capital was unknown and the duration of the contract was fixed i.e. one year. He explained that the rule against the fixed duration of *mudarabah* is made to prevent an unknown amount of capital. In his justification al-Shafi'i gave an example '*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 thousand 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...*(al-Shafi'i, 1973)'. From the example, perhaps we could conclude that the *mudarabah* from al-Shafi'i point of view is carried out on a job basis. It means the contract commences and ends when a single trade (buying and selling) is completed. When both parties

wish to continue with other trading activity, another *mudarabah* arrangement should be agreed. Al-Shafi'i also ruled that it was discouraged (*makruh*) for the agent-manager who initially took money as *mudarabah* capital, to ask the investor to amend the contract into a loan contract. Al-Shafi'i claimed that he agreed with all Malik's rulings concerning the accounting of *mudarabah*. This however excludes his ruling to permit the absence of the capital during the profit distribution if the agent-manager was deemed as a truthful person.

In our opinion, the discussion of a *mudarabah* contract in *Kitab al-Umm* was preliminary in nature. Al-Shafi'i can not be regarded as establishing distinctive principles of *mudarabah* since many of his rulings were found to be similar to the earlier jurists. For example, the ruling on the impermissibility of merchandises as capital contradicts Malik but was similar to the opinion of Abu Hanifa and Ibn Abi Layla. Two centuries after the time of al-Shafi'i, the *mudarabah* rulings experienced a significant growth. This development was evident in the *Kitab al-Muhadhdhahb* of Abu Ishaq al-Shirazi who organised the discussion of *mudarabah* into 32 sections. Table 2 below shows the additional topics/issues as compared to the earlier text of al-Shafi'i.

Table 2: Additional topics/issues in *Kitab al-Muhadhdhab*

No.	Topics/Issues
1	The terms of the contract; *qirad, mudarabah* and any other terms that indicate similar meaning
2	The conditions of *mudarabah* a. The share of the profit must be agreed in proportion b. All contracting parties must share the profit. c. The share can not be agreed on a fixed amount of money d. The contract can not accept any unknown forthcoming conditions (*shart al-mustaqbal*)
3	The scope of activity for *mudarabah* is limited to trading activities
4	The agent-manager is expected to perform the ordinary business tasks himself
5	Restriction to agent-manager from entrusting the capital to others in another *mudarabah* contract without investor's permission
6	The agent-manager should trade with goods that had been specified by the investor
7	Restriction to agent-manager from purchasing goods worth more than the capital
8	Restriction to agent-manager from selling good below the market price and selling in credit without investor's permission
9	Restriction to agent-manager from purchasing slave using the *mudarabah* capital without investor's permission
10	Restriction to agent-manager from travelling with *mudarabah* capital without investor's permission
11	The disagreement on the issue 'when' the contracting parties have the right to utilise the profit

12	The distribution of the profit can not be executed before the liquidation of the business in case where only one party agreed to do so.
13	The agent-manager was considered liable to the damage of the capital if it was due to his negligence.
14	Both parties have the rights to terminate the contract
15	The contract will be terminated automatically when one of the contracting parties dies or becomes mad
16	Commercial transactions carried out by the agent-manager in an invalid *mudarabah* were legally binding. However, the agent-manager had no right of the profit generated from the transactions.
17	Disputes between the investor and agent-manager a. Dispute on the damage of the capital b. Dispute on the negligence of the agent-manager c. Dispute on the returning of the capital d. Dispute on the agreed proportion of profit share e. Dispute on the amount of the capital f. Dispute on the aim of purchasing slave g. Dispute on the prohibition to purchase slave h. Dispute on the mistake in announcing the mudarabah profit

As indicated in table 2, the *mudarabah* rules were improved mainly in three topics: (1) the stipulated conditions of *mudarabah* (2) the empowerment of agent-manager and (3) the dispute between the investor and agent-manager. The rules regarding the conditions of *mudarabah* were mostly related to the profit share. It was stipulated that the profit share should be agreed in proportion i.e. one-third. If the contracting parties agreed on a fixed amount of profit i.e. 100 dirham, the contract would be invalid. This condition was forbidden because the total profit probably would be only 100 dirham, leaving only the investor receiving the profit. Furthermore, it was ruled that the profit in *mudarabah* contract must be shared by all the contracting parties. Similar to the sale (*bay'*) and hire (*ijarah*) contracts, the *mudarabah* can not accept any unknown forthcoming conditions (*shart al-mustaqbal*).

The text of al-Shirazi also elaborated the extend to which the agent-manager was empowered. The text clearly demonstrated that the empowerment was not absolute but restricted. Al-Shirazi ruled four restrictions to be placed upon on the agent-manager in managing the capital. The rules asserted that without having explicit permission from the investor, the agent manager was not allowed to (1) entrust capital to others in another *mudarabah* arrangement (2) purchase goods worth more than the capital (3) sell things below the market price and (4) travel with the capital.

Another important development of *mudarabah* rulings found in al-Shirazi's text was the discussion regarding the dispute between the investor and the agent-manager. Perhaps, the inclusion of this topic indicates that the *mudarabah* had been practised widely and many cases of dispute had been brought to the court. The dispute could occur when both parties conflicted over the issues of (1) the damage of the capital (2) the negligence of agent-manager (3) the returning of capital (4) the agreed proportion of profit share (5) the amount of capital (6) the aim in purchasing slaves (7) the prohibition to purchase slaves and (8) the mistake in declaring profit. Apart from the development of the rulings, al-Shirazi was the first who demonstrated the evidence of *mudarabah* based on the *athar* of 'Umar al-Khatab.

Undoubtedly, al-Shirazi had made significant improvements on the *mudarabah* rulings. Perhaps, al-Shirazi had covered all main topics in the *mudarabah* practices. This fact became more obvious when we compare al-Shirazi's text with the text of *al-Wajiz* of al-Ghazali. It was found that al-Ghazali just added a few rulings from what were found in the text of al-Shirazi. However, *al-Wajiz* was different from *al-Muhadhdhahb* in terms of the structural discussion of the *mudarabah* topic. In other words, al-Ghazali summarised all rulings made by the previous generations of jurists and organised the topic in a systematic way. The presentation of *mudarabah* contract in *Kitab al-Wajiz* is shown in the Table 3.

Table 3: *Mudarabah* contract in *Kitab al-Wajiz*

No.	Section One: The Essential Element (*rukn*)
1.	The Capital a. Should be in monetary (naqdan) b. Should be specific (mu'aiyan) c. Should be known (ma'luman) d. Should be delivered to the agent-manager (musallaman)
2.	The Work a. Should be trading activities (tijarah). Trading was defined as obtaining profit from the act of buying and selling. It excluded the craft and manufacturing activities. b. Free from any restrictions that cause difficulty to the agent-manager in conducting the business, i.e. restrict the agent-manager to trade with only a particular person. c. Unfixed duration
3.	The Profit a. Should be exclusively for the two parties (makhsusan) b. Should be shared (musytarak) c. Should be known to all contracting parties (ma'luman) d. Should be agreed in proportion (i.e. one-third) and not a fixed money such as 100 dirham

4.	The Form of Expression (*sighah*)
	The acceptable forms included *qaradtuka or darabtuka or 'amaltuka 'ala 'anna al-rabha bainana*
5&	The contracting parties (the investor and the agent-manager)
6	The relationship between the two parties is based on the agency (*wakalah*) contract

As indicated in table 3, al-Ghazali concludes that there are six essential elements (*rukn*) of a *mudarabah* contract. They are capital, work, profit, form of expression (*sighah*) and contracting parties (investor and agent-manager). In each of these essential elements, there are stipulated conditions (*shurut*) to be met. Clearly, al-Ghazali's *mudarabah* model was derived from the rulings of the previous jurists. It is noticed that al-Ghazali's only added two new rulings; first the condition stipulating that the capital must be in the possession of the agent-manager and second, the work in *mudarabah* is defined as purely trading activity; the act of selling and buying for profit.

In the sixth/twelve centuries, al-Nawawi improved further the discussion on *mudarabah.* From his time onwards, the Shafi'is have a clear definition of *al-qirad* or *mudarabah.* Al-Nawawi defined *mudarabah* as a contract whereby money is paid to agent-manager to be traded with and profit is to be shared. The *Minhaj* of al-Nawawi is significant in the sense that it highlights the divergence of opinions (*ikhtilaf*) amongst the Shafi'is jurists. A case in point is when investor said to agent manager '*I give you money as mudarabah but all profit will belong to me*' or he said '*I give you money as mudarabah and all profit is for you*' (al-Sharbini, 1958). According to al-Shirazi when such conditions are stipulated, the contract is void. In the first, the contract will automatically change to *bida'ah* contract whereas the second turn to loan (*qard*) contract. More importantly, al-Shirazi argued as if the rule is unanimously agreed by the Shafi'is jurists (al-Shirazi, 1929). Al-Ghazali followed the same approach of al-Shirazi by emphasising that the profit must be shared (*mushtarak*) (al-Ghazali, 1979). However, according to al-Nawawi, the Shafi'is jurists disagreed in that matter. Some of the Shafi'is jurists permit both kinds of conditions.

CONCLUSION

Our findings revealed that the rules of *mudarabah* in *Kitab al-Umm* of al-Shafi'i are preliminary in nature. Although al-Shafi'i ruled various aspect of *mudarabah* but yet it would be exaggerate to claim that he had founded the

fundamental principles of the contract. Hence, we are of the opinion that the *mudarabah* rulings of the Shafi'is school were developed after the lifetime of al-Shafi'i. Based on the analysis of al-Shirazi's *al-Muhadhdhahb*, we suggest that this development happened extensively in particular during the fourth/ tenth centuries. The text of al-Shirazi probably covered all important rulings which became the basis of *mudarabah* doctrine of the school. The jurists in the following centuries did not produce significant new rulings but they did improve and refine the *mudarabah* discussion. Al-Ghazali presented the discussion in a systematic way. He analysed all the rulings of previous jurists and come out with the structure i.e. the essential elements (*arkan*) and stipulated conditions (*shurut*) of the *mudarabah* contract. However, the approach in the writings of al-Shirazi and al-Ghazali are identical in the sense that both jurists tried to demonstrate an agreed Shafi'is rulings on the *mudarabah* contract. In contrast, al-Nawawi's text comprise of divergent opinions (*ikhtilaf*) within the school. He also initiated the Shafi'i definition of the term *mudarabah*. The findings support the Western scholars' theory in which argues that the *madhhab* is a later jurists' creation.

REFERENCES

Abu Ishaq al-Shirazi (1929). *Kitab al-Muhadhdhab fi al-Fiqh Madhhab al-Imam al-Shafi'i*, Egypt : Isa al-Babi al-Halabi. vol.1, p.385-390.

Ali Juma'ah Muhammad (2007). *Al-Madkhal ila Dirasat al-Madhahib al-Fiqhiyyah*. Cairo: Dar al-Salam, 2007.

Christopher Melchert (1997). *The Formation of the Sunni Schools of Law. 9th-10th Centuries C.E.* Leiden: Brill.

Muhammad b. Muhammad al-Ghazali (1979). *al-Wajiz fi fiqh Madhhab al-Imam al-Shafi'i*. Beirut : Dar al-Ma'rifah, vol.1, pp.221-223.

Muhammad ibn Idrss al-Shafi'i (1973). *Kitab al-Umm*. Beirut: Dar al-Ma'rifah, vol.4.

Muhammad Sharbini al-Khatib (1958). *Mughni al-Muhtaj ila Ma'rifah Ma'ani al-Alfaz al-Minhaj*. Cairo : Mustafa al-Babi al-Halabi, vol.2, p.312.

Norman Calder (1993). *Studies in Early Muslim Jurisprudence*. Oxford: Clarendon Press, p.82

R.Kevin Jaques (2006). *Authority, Conflict and the Transmission of Diversity in Medieval Islamic Law*. Leiden: Brill.

Umar Sulayman al-Ashqar (2007). *al-Madkhal ila Dirasat al-Madhhab wal al-Madaris al-Fiqhiyyah*. Amman: Dar al-Nafa'is, 2007.

Wael Hallaq (2001). *Authority, Continuity and Change in Islamic Law.* Cambridge: Cambridge University Press.