

THE DEVELOPMENT OF ISLAMIC LAW: A CASE STUDY OF MĀLIKI'S RULES ON *MUDĀRABAH**

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ABSTRACT

This article examines the development of Māliki's rules on muḍārabah between the period of second and seventh century Hijri. The examination was executed by analysing five Māliki's legal texts namely al-Muwattā' of Mālik (d.179), al-Mudawwanah al-Kubrā of Saḥnūn (d.240), al-Kāfi fī Fiqh Ahl al-Madīnah of Ibn 'Abd al-Barr (d.463), Bidāyah al-Mujtahid of Ibn Rushd (d.595) and al-Dhakhīrah of al-Qarāfi (d.684). It was discovered that the text of al-Mudawwanah al-Kubrā represented the most comprehensive discussion of Māliki's rules on the said subject. The Māliki's jurists after Saḥnūn did not produce significant new rules on muḍārabah but organized the topic systematically. Hence, the discussion concluded that Islamic commercial law within the Māliki's school reaches its maturity since the third century Hijri. The finding implies that the school has a complete legal text nearly two centuries earlier than the Shāfi'īs.

Keywords: *Islamic law, Māliki's, muḍārabah*

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INTRODUCTION

Muslim legal scholars generally acknowledge the fact that the doctrine of Islamic Law was developed gradually through several centuries. The Prophet Muḥammad did not leave a comprehensive codified Law to his companions but dictated its principles for future development. A substantial development of the Law happened during the second century of Hijri. At that time, the Muslim empire experienced a vast expansion where Islam spread from the Arabian peninsular. As a result of the expansion, the Muslim community who lived in simple life; faced challenges in governing the more civilized nations which previously been under the administration of the Byzantine and Sassanid Kingdoms. Hence, Muslim jurists faced many unprecedented cases which required them to interpret the Qur'an and the *ḥadīth* of the Prophet. This interpretive effort eventually led to significant growth of the Islamic jurisprudence (*fiqh*) doctrine.

In general, the above fundamental history of Islamic Law is agreed by the Western scholars. Unfortunately, they contradict the prevalent view of the Muslim scholars by claiming that the extensive development of *fiqh* doctrines ended by beginning of the fourth century Hijri. Joseph Schacht, one of the mostly quoted scholars in this subject argued that all the essential questions in Islamic Law had been thoroughly discussed and finally settled during the fourth century Hijri¹. He further argued that the fourth century Hijri marked the closing door of *ijtihād* which consequently led to the phenomenon of *taqlīd* (blind following). Melchert advanced Schacht theory by contending that the institutions of *madhhab* emerged during the similar period. According to Melchert, a *madhhab* is formed when body of *fiqh* rulings are collected and ascribed to a particular jurist. He believed that the collection process accomplished between the late third and fourth century Hijri in which occurred during the time of Ibn Surayj (d.306), al-Karkhī (d.340) and al-Khallāl (d.311) of the Shāfi'ī's, Ḥanafī's and Ḥanbalī's². Melchert's theory contradicted the general view of Muslim scholars who opined that the *madhhab* established approximately 150 years earlier which was soon after the eponyms' death (Abū Ḥanīfah d.150, Mālik d. 179, al-Shāfi'ī d.204, Aḥmad ibn Ḥanbal d.241).

The main objective of this article is to appraise the Western scholars' theory by examining the development of *muḍārabah* rules in the early Mālikī's school.

¹ Joseph Schacht (1964), *An Introduction to Islamic Law*. Clarendon: Oxford University Press, pp. 70-71.

² Christopher Melchert (1997), *The Formation of the Sunni Schools of Law, 9th-10th Centuries*. Leiden: Brill.

Based on the Western scholars' theory, *muḍārabah* rules are expected to be developed gradually and became comprehensive by the fourth century of Hijri. In this study, I examined five early Māliki legal texts, namely, *al-Muwaḍḍā'ah* of Mālik, *al-Mudawwanah al-Kubrā* of Saḥnūn (d.240), *al-Kāfi fī Fiqh Ahl al-Madīnah* of Ibn 'Abd al-Barr (d.463), *Bidāyah al-Mujtahid* of Ibn Rusḥd (d.595) and *al-Dhakhīrah* of al-Qarāfī (d.684). These texts represented the main texts of the *madhhab* from its early establishment until the late seventh century of Hijri. Our previous study on the Shāfi'ī's doctrine of *muḍārabah* has confirmed the theory of the Western scholars. Based on the analysis of four Shāfi'ī's main legal texts, we found that the *muḍārabah* rulings of the Shāfi'ī's school were in preliminary stage during the time of al-Shāfi'ī and had been developed in the later centuries by his followers. As evident in the text of *al-Muhadhdhab* of al-Shīrāzī (d.472), the development occurred extensively during the end of fourth century Hijri³.

Before we embark further in the discussion, let me explain briefly the definition of *muḍārabah*. It refers to a contract of partnership whereby one party provides capital and the other contributes work. During the pre-Islamic period, *muḍārabah* was practiced widely by the Arab traders for long distance trade. The salient feature of the contract is that; the profit generated from the business will be shared according to pre-determined ratio whereas loss will be borne solely by the capital provider. The agent-manager (*muḍārib*) would only lose his expended time and effort. In the context of modern application, the 'contract' has been used as the underlying principle that governs the relationship between depositors and Islamic banks.

This article is organized into four sections. After the introductory section, the article describes the history of the Māliki's school. The section elucidates the dissemination of the school from its origin land in Medina to Egypt, Iraq, North-western Africa and Spain. The main purpose of the discussion is to highlight the growth of the Māliki's legal texts during the period of this study. Then, the article discusses the development of *muḍārabah* rules in the early Māliki's school. It examines the rules made by Mālik and his followers in the *muḍārabah* contract. Finally, the last section concludes the preceding discussion.

³ Amir Shaharuddin & Robert Gleave (2007), "The Development of Early Shāfi'ī's Rules on *Muḍārabah*", *Journal of Islamic Finance and Muamalat Research*, Islamic Science University of Malaysia, vol. 4 (1).

THE DISSEMINATION OF MĀLIKI'S SCHOOL

The Māliki's school was established based on the adoption of Mālik bin Anas's doctrine. His full name was Abī 'Abd Allāh Mālik b. Anas b. Mālik b. Abū 'Āmir b. 'Amr b. al-Ḥārith b. Ghaymān b. Khuthayn b. 'Amr b. Ḥārith al-Aṣbahī. His family was originally from Yemen. The great grandfather of Mālik; who is Abū 'Āmir migrated to Medina because of his disagreement with one of the governors in Yemen⁴. Mālik was born and spent his entire life in Medina. During that time, the city was the main reference of scholars especially in the science of *ḥadīth*. Medina was the home of many Companions (*ṣaḥābah*) and Successors (*tābi'ūn*). Mālik narrated *ḥadīth* from the Successors such as Nāfi'(d.117), the client of 'Abd Allāh bin 'Umar, Ibn Shihab al-Zuhri (d.124) and Rabī'ah ibn Abī 'Abd al-Raḥman (d.136).

Rabī'ah ibn Abī 'Abd al-Raḥman was also Mālik's teacher in *fiqh*. He was known as Rabī'ah *al-ray'*. Influenced by his teacher, Mālik was said to have incorporated *al-ray'* in developing his *fiqh* doctrine⁵. Apart from relying on *ḥadīth* and the Medinan jurists practices, Mālik also applied the principles of *maṣāliḥ al-mursalah* (public interest) and *sadd al-dharā'i'* (blocking pretences). The reputation of Mālik as the leading jurists in Medina attracted many scholars from various parts of Muslim world to be his protégé.

Similar to other schools, Mālik's doctrine was widely spread by his students. According to Ibn Khaldūn, the schools were actively cultivated in Spain and North-Western Africa until the dynasties of Cordova and Qayrawan were destroyed⁶. This includes the city of Andalusia, Qayrawan and a large part of Tunisia. This situation is explained by the fact that most of the scholars from these areas travelled to Hijaz (Medina) to learn the Islamic sciences, since it was the centre of religious scholarship.

Unfortunately, the Māliki's school did not sustain in its origin land Medina. Approximately after 60 years of Mālik's demise, the number of Māliki jurists in Medina deteriorated⁷. One of the reasons for this phenomenon was

⁴ Muḥammad Abū Zahrah (2001), *The Four Imam*, Aisha Bewley (trans). London: Dār al-Taqwā, p. 50.

⁵ Joseph Schacht (2008), "Mālik b. Anas" in P. Bearman et. al., eds., *Encyclopedia of Islam*. Brill Online Exeter University. Retrieved on 26 August 2008.

⁶ Ibn Khaldūn, 'Abd al-Raḥmān ibn Muḥammad (1967), *The Muqadimah: An Introduction to History*, Franz Rosenthal (trans). London: Routledge & Kegan Paul, vol. 3, p. 16.

⁷ Muḥammad al-Mukhtār al-Māmī (2002), *al-Madhab al-Māliki, Madārisuhu, Mu'ālafatuhu, Khaṣā'isuhu wa Sammātuhu*. al-'Ayn: Markaz Zāid li al-Turāth wa al-Tārikh, p. 51.

the political events within the city. In the year 266 Hijri, the Umayyad and Abbassid fought each other in their attempt to control Medina. As a result, learning and knowledge became secondary in the eye of Medina's rulers. Nevertheless, I emphasize on Mālik's important students who had maintained the survival of Mālik's doctrine in Medina: 'Uthmān bin Kinānah (d.185), Ibn Nāfi' (d.186), 'Abdul Mālik bin al-Mājishun (d.214) and Maṭraf bin 'Abd Allāh (d.220). 'Uthmān and Ibn Nāfi' succeeded as leaders within Mālik's circle after his demise. Ibn Nāfi' was the teacher of Saḥnūn (d.240), the compiler of *al-Mudawwanah al-Kubrā*. An Andalusian jurist, 'Abd al-Mālik Ibn ḥabīb (d. 238) learned the doctrine from al-Mājishun and Maṭraf and spread the Mālikī's doctrine in Andalusia. This at least is the official Mālikī's account of its spread.

Outside of Medina, the doctrine of Mālik was transmitted in Egypt. The transmission was carried out by several prominent students of his such as 'Abd al-Raḥman Ibn al-Qāsim (d.191), Aṣḥhab (d.203) and Ibn 'Abd al-Ḥakām (d.214). Within the Mālikī's school, Ibn al-Qāsim was regarded as having achieved a similar position like al-Shaybānī (d.189) of the Hanafī's school. Both jurists were the key figures in transmitting their eponyms' doctrines. Ibn al-Qāsim's transmission of *al-Muwaṭṭā'* was considered the soundest and his replies to Saḥnūn's inquiries in *al-Mudawwanah* were considered the most comprehensive collection of Mālik's rulings⁸. Ibn 'Abd al-Ḥakām also wrote one of the earliest Mālikī texts, namely *al-Mukhtaṣar al-Kabīr fī al-Fiqh*. In general, the works of Egyptian jurists significantly influenced the dissemination of Mālikī's school since they studied in Baghdad, Qayrawan and Andalusia⁹. In addition to that, the narration of the Egyptian jurists pertaining to Mālik's legal opinions was considered the most reliable source within the school. The later Mālikī's jurists used to come to Egypt to hear Mālik's rulings from Ibn al-Qāsim and his contemporaries. The Egyptian school was perceived as the closest to the Medinan Mālikī in following Mālik's principles.

In Iraq, the doctrine of Mālik was introduced by his students 'Abd al-Raḥman bin Maḥdī (d.197) and 'Abd Allāh bin Maslamah al-Qa'nabī (d.220). Subsequently, the school was led by Ibn Mu'adh dhal. The dissemination of the Mālikī's doctrine was further enhanced during the time of Ismā'īl bin Ishāq (d.282), one of Ibn Mu'adh dhal's students. Ismā'īl became *qāḍī* in Baghdad for 36 years and actively taught the Mālikī's doctrine in the city¹⁰. It should be

⁸ Muḥammad Abū Zahrah (2001), *op.cit.*

⁹ Jonathan E. Brockopp (2000), *Early Mālikī Law, Ibn 'Abd al-Ḥakām and His Major Compendium of Jurisprudence*. Leiden: Brill, p. 49.

¹⁰ Christopher Melchert (1997), *op. cit.*, p. 171.

noted that the Māliki's jurists in Iraq seem to be less extreme in holding their *madhhab* opinions. This is a result of their interaction with the other *madhāhib* such as the Ḥanafī's and Shāfi'ī's. For example, al-Qādi Ismā'īl was reported to be neutral with regards to the conflicts between *ḥadīth* and *ra'y*. This stand contradicted to his contemporaries in Medina and Egypt in which they would prefer *ḥadīth* over *ra'y*. However, the history of the Māliki's in Iraq came to end after their last key figure, 'Abd Wahhab bin Naṣr died in year 422 of Hijri. After him, the line of succession of the Māliki's jurists was unsustainable.

As indicated earlier, the Māliki's school was disseminated widely and maintained for a considerable amount of time in Spain and North-western Africa. Among the earliest jurists in North-western Africa who studied under Mālik was 'Ali b. Ziyād (d.183). He was the teacher of the two Māliki's jurists namely 'Asad bin al-Furāt (d.213) and Saḥnūn (d.240) who played pivotal role in developing the school's earliest texts. As is generally known, *al-Muwatṭā'* was the main reference of scholars in understanding Mālik's legal opinions. After learning *al-Muwatṭā'* from Mālik, 'Asad bin al-Furāt travelled to Iraq to study with al-Shaybānī of the Ḥanafī's. Then he appeared trying to produce a new doctrine for the Māliki's which followed the same style of the Ḥanafī's. He compiled issues discussed by the Ḥanafīs and brought them to Ibn al-Qāsim. Ibn al-Qāsim responded to the issues and his answers were compiled in a text named as *al-Asadiyyah*. The *Asadiyyah* received mixed feedback amongst the Māliki's in Qairawān. They found that some of the answers contradicted to the well-known *fatwā* within the school. Saḥnūn brought the *Asadiyyah* to Ibn al-Qāsim and requested him to revise the text. Ibn al-Qāsim made substantial revisions while Saḥnūn compiled the amendments in *al-Mudawwanah al-Kubrā*.¹¹ It was reported that 'Asad refused to delete from his text on the issues that had been reconsidered by Ibn al-Qāsim and Saḥnūn. Since then *al-Mudawwanah* was widely accepted by the Māliki's in North-western Africa and many jurists regarded it as the second version of *al-Muwatṭā'*.

Among the earliest jurists who spread Māliki's doctrine in Andalusia was Yaḥyā bin Yaḥyā (d.234). He narrated *al-Muwatṭā'* from Mālik and after that went to Egypt to study under Ibn al-Qāsim. The dissemination of the Māliki's in Andalusia was supported by Yaḥyā bin Yaḥyā's influence in the government. When he died, the leadership of the school was led by 'Abd al-Mālik Ibn Ḥabīb. He was the author of an important Māliki's jurisprudence text namely *al-Waḍīhah* in which he tried to adopt the method of Mālik in *al-Muwatṭā'*. After that, al-'Uṭbī (d.254) who was one of Ibn Ḥabīb's students; produced a

¹¹ 'Umar Sulaymān al-Ashqar (2007), *al-Madkhal ilā Dirāsāt al-Madhhab wa al-Madāris al-Fiḥhiyyah*. Amman: Dār al-Nafā'is, p. 155.

revised version of his teacher's text called as *al-'Uṭbiyyah*. According to Ibn Khaldūn, the people of Andalusia had concentrated on studying *al-'Uṭbiyyah* and abandoned other texts¹². After that, the line of succession went to Ibn Labābah (d.314) and Ibn 'Umar al-Makwī (d.401). Other leading figures amongst the Andalusian jurists were Ibn 'Abd al-Barr (d.463) and al-Bājī (d.474). Ibn 'Abd al-Barr wrote *al-Kāfi fī Fiqh Ahl al-Madīnah* while al-Bājī produced *al-Muntaqā*, a commentary of *al-Muwaṭṭā'*. In the sixth century, the Mālikis in Andalusia were led by Ibn Rushd al-Hafīd (d.595). His work on Islamic Law namely *Bidāyah al-Mujtahid* was recognized as one of the most important manuals in the *fiqh* of disagreement. This is because in his work, Ibn Rushd did not only record the opinions of jurists but also explained the reasons to their disagreement. During the sixth century of the Hijri, the Māliki's school in Egypt re-emerged. It was developed by Abu Bakr al-Ṭurṭushi (d.520), one of al-Bājī's students. The school produced a number of great Māliki jurists such as Ibn al-Ḥājib (d.646), al-Qarāfi (d.684) and Khalāl bin Ishāq (d.768). The jurists of this school were very loyal to the legal opinions founded by the previous Māliki's¹³.

Based on the preceding discussion, perhaps we could conclude that the main texts of the Māliki's in the second and third centuries of Hijri were *al-Muwaṭṭā'*, *al-Mudawwanah*, *al-Waḍīhah* and *al-'Uṭbiyyah*. Later in the fourth century, Ibn Abī Zāid (d.310) from Qairawān produced an important book namely *Nawadhir wal al-Ziyādāt*. The book is significant as it gathered the principles (*al-uṣūl*) and the positive legal rulings (*al-furū'*) of the previous Māliki's masters. The book became the main reference of the Māliki's until Ibn al-Ḥājib produced its commentary (*Jamī'al-Ummahāt*) and al-Qarāfi who wrote *al-Dhakhīrah* in the middle of the seventh century of Hijri. Ibn al-Ḥājib also wrote *al-Mukhtaṣar* of the book *al-Tahdhīb* by al-Barāda'i (a student of Ibn Abī Zāid). *Al-Tahdhīb* was an abridgment of Ibn Abī Zāid's *Mukhtaṣar li al-Mudawwanah*. The work of Ibn Ḥājib was widely accepted by the majority of the Māliki's. In the following century (eighth), Khalāl ibn Ishāq wrote a *Mukhtaṣar* of Ibn Ḥājib's work. Since then, the *Mukhtaṣar* of al-Khalāl became, *par excellence*, the principal teaching book within the school.

THE EARLY DEVELOPMENT OF MĀLIKI'S RULES ON MUḌĀRABAH

Mālik's rules pertaining to *muḍārabah* were examined in *al-Muwaṭṭā'* and *al-Mudawwanah al-Kubrā*. As mentioned earlier, both texts were the main references of Māliki's Law since its early establishment. The former was

¹² Ibn Khaldūn (1967), *op. cit.*

¹³ Muḥammad al-Mukhtār al-Māmī (2002), *op. cit.*, p. 104.

written in *ḥadīth* narration style whereas the latter was written in a problem solving or *mas'āil* approach. Instead of *muḍārabah*, Mālik used the term *qirāḍ*. He defined *qirāḍ* as a contract in which 'a person takes money from his friend to work on it and the person is not liable (for any loss incurred)'¹⁴. Based on the definition, it seems clear that *muḍārabah* and *qirāḍ* indicated similar meaning, except for the former came from the terminology used by Iraqis. The latter was used in the Hijaz. The *muḍārabah* topic in *al-Muwatṭā'* began with two *athār* (actions of Companion) in which reported that the contract had been practised by 'Umar al-Khaṭṭāb and 'Uthmān b. 'Affān during their lifetime. The narration of these *athār* was to demonstrate that *muḍārabah* is a permissible contract. It also shows that Mālik relied on Medinans' practices ('*amal ahl al-Madīnah*) as one of his sources of law.

Al-Muwatṭā' consists of 20 rules on various issues of *muḍārabah*¹⁵. This includes the issues of permitted and prohibited activities in the contract, types of accepted capital, conditions (*shurūṭ*), the maintenance of agent-manager and his negligence as well as the method in solving disputes between the contracting parties. For example, Mālik stated that:

"The agent-manager has the rights to use part of the capital to cover his nafqah (maintenance) when he travels; that includes foods, clothes and other needs, subject to the availability of the capital and in reasonable manner. If the agent-manager resides with his family, there is no maintenance or clothes from the capital".

In my opinion, although the rulings in *al-Muwatṭā'* cover various issues, it would be exaggerated to claim over its comprehensiveness.

The discussion of *muḍārabah* was enhanced further by Saḥnūn in *al-Mudawwanah al-Kubrā*. The text consists of 69 cases of *muḍārabah* which ruled either by Mālik or Ibn al-Qāsim¹⁶. Obviously, the large number of cases discussed in *al-Mudawwanah* indicated a significant development of Māliki's rules over this subject. Table 1 below shows the sub-topics of the cases.

¹⁴ Abū Walīd Sulaymān al-Bājī (1999), *al-Muntaqā Sharḥ Muwatṭā' Mālik*. Beirut: Dār Kutub al-'Ilmiyyah, vol. 7, p. 71.

¹⁵ *Ibid.*, pp. 73-128.

¹⁶ Saḥnūn bin Sa'īd al-Ṭanukhī (1970), *al-Mudawwanah al-Kubrā li al-Imām Mālik bin Anas*. Baghdad: Maktabah al-Muthannā, vol. 5.

Table 1: Sub-topics of *Muḍārabah* Cases in *al-Mudawwanah*

Sub-topic	Cases
<i>Muḍārabah</i> capital	
(a) Types of capital	- Dīnār, Dirham, Fulūs, Molten gold and silver, wheat, barley, trust (<i>wadī'ah</i>), debt
(b) Damages of capital	- Some of the capital damaged and the remaining was invested and bring profit to business - Capital lost before the business commences
(c) Commingling of capital	- Capital commingle with agent-manager's asset - Capital commingle with asset from previous <i>muḍārabah</i>
The nature of <i>muḍārabah</i> business	- Supplying leather (as capital) for shoe manufacturing business
Profit ratio	- Agreeing that only one party will receive all profit - Profit ratio for two and more agent-managers - Agreeing that part of the profit will be donated to poor
Maintenance (<i>naḥqah</i>) of agent-manager	- Food, accommodation and limitation
The zakāt (almsgiving) in <i>muḍārabah</i>	- Paying zakāt of <i>muḍārabah</i> revenues without the presence of investor
The scope of empowerment for agent-manager	- Appoint agent (<i>wakīl</i>) - Hire assistant - Entrust capital as <i>wadī'ah</i> to the other party - Entrust capital to other party in another <i>muḍārabah</i> contract - Include travelling matters - Manage credit transaction issues - Anticipate agent-manager breaches investor's rule concerning credit transaction - Include defect of the <i>muḍārabah</i> assets - Possibility of agent-manager buys/sells <i>muḍārabah</i> assets to investor
The role of investor	- Participation of investor in <i>muḍārabah</i> business - Participation of investor's slave in <i>muḍārabah</i> - Restrict agent-manager from selling/buying certain things - Prohibit or reduce possibilities of agent-manager from travelling - Specify agent-manager to deal with certain people only

Sub-topic	Cases
Dispute between investor and agent-manager	- Dispute on the ratio of profit
Muḍārabah with slaves	- Involves different types of slaves (i.e. <i>makātib</i>) in <i>muḍārabah</i> - Involves <i>muḍārabah</i> with persons who can be ignorant to the <i>ḥukm</i> - Agent-manager buys investor's slave (as assistant in the business) - Agent-manager frees slave who use <i>muḍārabah</i> capital
Guarantee in <i>Muḍārabah</i>	- Investors ask agent-manager to guarantee his capital

The text *al-Mudawwanah* did not only cover many new topics but it details the rules expounded in *al-Muwaṭṭā'*. For example; *al-Muwaṭṭā'*, Mālik only explained the rule of merchandises (*al-urud*) as capital. He stated that '*al-muqāraḍah (muḍārabah) with merchandises is not permitted*'. In *al-Mudawwanah*, in addition to merchandises, Saḥnūn explained the rules of other types of capitals including the currencies (*dīnār; dirham, fulūs*), molten gold and silver ingot, wheat, barley, debt and trust (*al-wadi'ah*). The text also provides evident that Ibn al-Qāsim made *ijtihād* based on Mālik's rules. For example, Mālik ruled that an agent-manager is entitled for personal expenses when he travels to a place where he does not have any family members. Mālik was asked about a man who conducts *muḍārabah* business in city A in which he does not have any family member, then he travels (for business purpose) to city B which is his home town. According to Mālik, his journey from city A to city B will not be covered, but on his return to city A, he could claim on his personal expenses. Saḥnūn asked Ibn al-Qāsim, if the person has family in both cities A and B. Ibn al-Qāsim ruled that, based on Mālik's principles; the agent-manager is not entitled for travel expenses¹⁷.

In my opinion, the text of *al-Mudawwanah* represented the most comprehensive discussion of Māliki's rules on *muḍārabah*. The comprehensiveness of *al-Mudawwanah* was evident especially when we compared the rules in *mukhtaṣar* produced by the Māliki's beginning from the third century of Hijri. It was found that the *muḍārabah* rules in the *mukhtaṣar* were merely repetitive of the rules established in *al-Mudawwanah*. Hence, based on the evidence from the rules on *muḍārabah*, I argue that the development of Māliki's *fiqh* doctrine became complete a century earlier from what had been believed by most of the Western scholars. It also suggests that

¹⁷ Saḥnūn bin Sa'īd al-Ṭanukhī (1970), *op. cit.*, p. 93.

the Māliki's jurists were advanced in term of writing up their Law doctrine as compared to the Shāfi'īs. This is because *al-Mudawwanah* was written during the early third century as compared to *al-Muhadhdhab* of al-Shirāzī (as the earliest complete Shāfi'ī's text) produced in the end of fourth century of Hijri.

In relation to this, I examine the rules of *muḍārabah* in *Kitāb al-Kāfi fī Fiqh Ahl al-Madīnah* of Ibn 'Abd al-Barr. The text is a good example of *mukhtaṣar* produced by the Māliki jurists in the fifth century Hijri. Ibn 'Abd al-Barr recorded rulings of Mālik and his prominent students without adding new of them. The significant change is in the presentation style of the text. In contrast to the *ḥadīth* narration style in *al-Muwatta'* and problem style in *al-Mudawwanah*, the text of *al-Kāfi* was written in a text book style. Perhaps, the text book style was more suitable to facilitating the teaching of Māliki doctrine to the public. In the text of *al-Kāfi*, the discussion of *muḍārabah* is divided clearly into five sub-topics which are entitled as the permitted and prohibited activities in *muḍārabah*, combined *muḍārabah* (with other contract), rules of void *muḍārabah*, zakāt of *muḍārabah* and negligence in *muḍārabah*. In each sub-topic, the rules of *muḍārabah* are elucidated with a little explanation of their reasoning¹⁸.

Mālik's rules obviously possessed the highest authority in the school. His rules were narrated by many of his students. It is noticeable in some cases that there are contradicting narrations of Mālik's rulings. For example, in the case of a void *muḍārabah* contract, Ibn 'Abd al-Hakām ruled that all void *muḍārabah* will be treated as *qirāḍ mithil*. However, according to Ibn al-Qāsim, not all void *muḍārabah* will be treated as *qirāḍ mithil* because in some cases the void contract would be converted into *'ujr mithil*. The two jurists claimed that their rules were based on Mālik's personal opinions. The difference between the rules is the remuneration of agent-manager (for work has been done) is not guaranteed in *qirāḍ mithil*, as it depends on the profit earned. The agent-manager will surely get paid regardless the business makes profit or not. If a void *muḍārabah* converts into *'ujr mithil*, same situation applies. In relation to the conflicting narrations, Ibn 'Abd al-Barr did not make any preference (*tarjīh*) but simply reported both of them.

Although majority of the Māliki's seem to be in the *mukhtaṣar* group, there are people who put a lot of effort to practice *ijtihād*. I examined two texts of jurists which are said to belong to this group. The first is *Bidāyah al-Mujtahid* of Ibn Rushd in the sixth century and the second is *al-Dhakhīrah* of al-Qarāfī in the seventh century. *Kitāb Bidāyah al-Mujtahid* is a text that highlights the disagreement among earliest jurists in Islamic Law. In general, according to Ibn Rushd, the jurists agreed on the basic element of *muḍārabah* contract

¹⁸ Ibn 'Abd al-Barr (1980), *Kitāb al-Kāfi fī Fiqh Ahl al-Madīnah al-Māliki*. Riyādh: Maktabah al-Riyādh al-Hadīthah, vol. 2, pp. 771-779.

but differ on its details. For example, the jurists unanimously agreed that the empowerment given to the agent-manager is not absolute but restricted. However, they differed in deciding the limitations for the agent-manager in performing his task. Mālik, Abū Ḥanīfah and al-Shāfi‘ī had different opinions regarding credit transaction executed by an agent-manager without obtaining explicit permission from the investor. Mālik and al-Shāfi‘ī disapproved the transaction whereas Abū Ḥanīfah permitted it.

Ibn Rushd did not only record the rules made by the jurists but he also provided their justifications or reasoning. The explanation to the jurists’ justification is vital because with that understanding, people understand better of the disagreements. In the case of a credit transaction, Ibn Rushd explained that the disagreement occurred because the jurists differed in determining whether the action is a common or rare practice among the public. Abū Ḥanīfah allowed the credit transaction because he believed it is practised widely. On the other hand, Mālik and al-Shāfi‘ī viewed the transaction as occasional practice¹⁹. It should be noted however, Ibn Rushd did not express his own preference from the jurists’ disagreement. He just presented the different views and explained the reason behind the disagreement and left it to readers to evaluate or decide which rules are more accurate. In this respect, probably he wanted to encourage *ijtihād* among the later jurists.

In the seventh century of Hijri, al-Qarāfi produced *al-Dhakhīrah*. The text is distinctive due to Qarāfi’s approach that not only presented the rulings of the Māliki’s but attached them with the legal methodology (*uṣūl al-fiqh*) of the school. In addition to that, al-Qarāfi enhanced the organization further (*taqṣīm* and *tabwīb*) of *muḍārabah* topics. The presentation of the topic is sophisticated, and modern in its presentation. It began with the literal and legal definition of the term *qirāḍ* and continued discussion on the evidence (*dalīl*) of its permissibility. Al-Qarāfi summarised the rulings of previous Māliki’s and emerges with the essential elements (*arkān*) and conditions (*shurūṭ*) of the contract²⁰.

¹⁹ Ibn Rushd, Muḥammad ibn Aḥmad (1995), *Bidāyah al-Mujtahid wa-Nihāyah al-Muqtaṣid*. Cairo: Dār al-Salām, vol. 4, p. 1843.

²⁰ Qarāfi, Aḥmad ibn Idrīs (1994), *al-Dhakhīrah*. Beirut: Dār al-Gharb al-Islāmī, vol.6, pp. 23-92.

CONCLUSION

The most significant development of Islamic commercial law happened during the second century of Hijri. One of the prominent jurists during this period was Mālik b. Anas. His *fiqh* doctrine gradually developed into one of the four main sunni *madhāhib*. From its land of origin in Medina, the Māliki's *madhhab* spread widely to Egypt, North Western Africa and Spain. The main earliest legal texts of Māliki's *madhhab* were *al-Muwaṭṭā'* of Mālik and *al-Mudawwanah al-Kubrā* of Saḥnūn. Based on the study of rules regarding *muḍārabah* contract, I think the text of *al-Mudawwanah* represents the earliest comprehensive legal text within the school. The text consists of 69 cases study that describes various practical issues regarding the contract. The comprehensiveness of *al-Mudawwanah* is evident when we compare it to the later Māliki's texts. I found that the *muḍārabah* rules in the *mukhtaṣar* which were produced by the Māliki's jurists beginning from the third century were merely repetitive of the rules established in *al-Mudawwanah*. Hence, the present article suggests two important points. Firstly, it shows that the discussion of Islamic commercial Law within the Māliki's school had reached its maturity since early third century Hijri. This contradicts the prevalent view of majority Western scholars who believed that the maturity happened only by the fourth century Hijri. Secondly, the finding also shows that the Māliki's had a complete legal text almost two centuries earlier than the Shāfi'īs *madhhab*. This is due to the fact *al-Mudawwanah* was written during the early third century as opposed to *al-Muhadhdhab* of al-Shirāzī produced at the end of fourth century Hijri. Perhaps, future research can be carried out to investigate the development of *muḍārabah* rules in the other two schools; the Ḥanafī's and Ḥanbalī's.

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