TITLE PAGE

COMPARATIVE STUDY OF PARTNERSHIP UNDER ISLAMIC AND STATUTORY LAWS IN NIGERIA

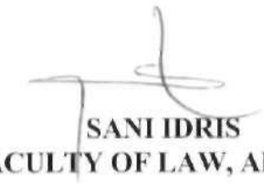
BY

SANI IDRIS

Ph.D. THESIS 1998

DECLARATION

I hereby declare that this thesis has been produced by me and is a record of my own research work. It has not been presented in any previous application for a higher Degree by anybody. All quotations and references are indicated in the end notes with specific acknowledgement.



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CERTIFICATION

This thesis entitled: A COMPARATIVE STUDY OF PARTNERSHIP UNDER ISLAMIC AND STATUTORY LAWS IN NIGERIA by SANI IDRIS Meets the regulation governing the award of the Degree of Doctor of Philosophy in Law of Ahmadu Bello University, Zaria and is Approved for its contribution to knowledge and literary presentation.

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DEDICATION

This dissertation is dedicated to my late father Alhaji Yusuf Muhammad and my late uncle Alhaji Idris Tela Kajuru. May their souls rest in perfect peace.

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ABSTRACT

Partnership as a means of trade and commerce is widely practice in an infinite variety of circumstances. In choosing the type of business enterprise one is to engage in from range of options such as sole proprietorship, forming a registered company or forming a partnership, regard is to be heard to ones financial capability. This is more so in the contemporary Nigerian society where the outcry of lack of funds is the order of the day in almost every household. This condition makes investment as a sole proprietor or forming a company affordable only to very few people. The option open to the vast majority of others is to engage in Partnership - a system that permits people to put their respective resources together with a view to profit.

Nigerian society is by all standards a complex one with multi-religious and ethnic groups. Although majority of its population arc Muslims, the country follows English based legal system with very few exceptions that permits the application of Islamic law in some areas which include, the muslim personal laws. In this respect matters involving Muslims - relating to marriage, divorce and civil transactions may be govern by Islamic Law. Thus the choice of a comparative study of partnership under both statutory and Islamic Law is a necessity.

The laws applicable to partnership involving muslim parties on the one hand is or ought to be Islamic Law and statutory laws in all partnership involving other categories of people with or without a muslim partner on the other. In respect of the statutory laws, we use the English Partnership Act of 1890 which is a statute of general application and still applies to many states that are yet to enact their own indigenous partnership laws. In fact in Northern States, it is only Kaduna State that enacted their partnership Edict and in the South, states like Lagos, former western state now Ekiti, Oyo, Ondo, Ogun and Osun and former Bendel State,

now Delta and Edo. It is not in doubt that even the states that have succeeded in enacting their indigenous partnership laws, it was a substantial reproduction of the English Act with virtually little or no modification. This makes the historical development of the Nigerian Partnership laws (statutory) inseparable to that of the English Act.

The above notwithstanding, vast majority of partners are completely ignorant of the legal provisions governing partnership both under the statutes and Islamic Laws alike. Thus the rules for determining the existence or otherwise of partnership, capacity of the parlies to enter into partnership and the essential issues that need to be agreed upon by potential partners are the bedrock of any partnership agreement. This, considered as a prelude, forms the basic of our discourse in Chapter one.

When a party decides to engage in partnership, the next huddle is to know and chose the type of partnership he is to go into. Partnership both under Islamic and statutory Laws are of various types and their division is based on the nature of business involved. Under statutory laws, if it does not involve a lot of commercial activities it is categorised as civil this include partnership such as that of farmers, artisans, labourers. While if it involve a lot of commercial activities, like trading it is categorised as commercial.

Partnership may be divided into undisclosed, general and limited partnerships. In some circumstances partnership may also arise by estoppel. Other type of partnership includes corporate, group, particular, sub and illegal partnerships. Whereas under Islamic Law Partnership is broadly categorised into proprietary (Sharikat al-milk) which does not involve much commercial activities and contractual or commercial (Sharikat al-aqd); which, as the name suggest involved commercial activities. It comprise of - unlimited investment partnership (Sharikat-al-mufawada). limited investment partnership (Sharikat- ul-Inan), commenda (Sharikat-al-mudarabah) skilled partnership (Sharikat al-Sanai), credit partnership

(Sharika al-wujuh), share tenancy (Muzara'a and Musaqat). Attempt has been made to high light the areas of differences and similarities between the categories under statutory laws and those under Islamic law. These have been exposed in chapter two.

The whole essence of engaging in partnership is to make profit. The profit cannot be made except some obligations are met. It is the criss-cross of these two factors that culminates into the rights and obligations of the partners which is our main concern in chapter three. There are a lot of similarities in the rights and duties under the two laws but a sharp distinction exist in the freedom of the parties to agree on the share of loss. Under Islamic Law, loss follows capital contribution and it is not permissible for partners to agree on any proportion other than that of capital contribution while under statutory laws the parties are free.

As a necessary antecedent to rights and obligation of partners, comes the partners' relationship to third parties. Part of each partner's obligation is how he relates to third parties on behalf of the partnership firm. Each partner acts in dual capacity:- as principal when his co-partners act for the firm and as agent when he acts for the firm. Here again there are a lot of similarities with some sharp differences when it comes to the right of third party against the firm. Under statutory laws a third party can sue the firm as a whole whereas under Islamic Law, he can only sue the partner he had dealings with. This has been treated in chapter four. Chapter five focuses on the relationship of partnership as a concept to other related business concepts with particular references to company and agency. It examines the differences and similarities between company and partnership in areas of legal personality, limited liability, perpetual succession, possibility of transfer of shares and ownership of property as it applies both under statutory and Islamic Laws. Whereas in the case of partnership and agency we

examined them as twin sisters in that partner acts as principal on the one hand and as agent on the other. Principal and agent are the two pillars for the existence of agency relationship.

Having considered the formation and types of partnership, rights and obligation of the partners, partners relation to third parties and the relationship of partnership to company and agency. Chapter six examines the ways and manners through which partnership can be dissolved. Dissolution under statutory laws is of two types i.e. dissolution in the ordinary process not by court and dissolution by court, depending on the factor calling for the dissolution. Although not expressly categorised, dissolution under Islamic law follows virtually the same process to that under statutory laws with few differences.

Dissolution whether pre-arranged, or agreed by the parties or abrupt is always visited with some consequences. The connection of the partners still remains, until the affairs of the firm are finally wound up. In other words the dissolution give rise to certain rights and obligations pending winding up and final settlement of account. Chapter seven examines the processes of winding up to final settlement of account, as the consequences of dissolution.

Finally chapter eight reviews the whole work and attempted to harmonise the practical operation of partnership with the legal provisions. It highlighted the lots of problems associated with partnership and canvassed some suggestions with a view to arresting the problems.

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TABLE OF CONTENT

Page

Title Page.....i

Declaration.....ii

Certification.....iii

Dedication.....iv

Acknowledgement.....v

Abstract.....vii

Table of Cases.....xi

Table of Content.....xv

CHAPTER ONE

1.0 Introduction.....1

1.1.0 The Need for Comparison of Partnership Laws.....2

1.1.1 Historical Development of Partnership Laws.....3

1.1.2 Future of Partnership.....5

1.2.0 Sources of Partnership Law.....5

1.2.1 Partnership Act 1890.....6

1.2.2 Application to Nigeria.....6

1.3 Definition of Partnership.....7

1.4.0 Nature and Scope of Partnership.....11

1.4.1 Rules for Determining the Existence of Partnership.....11

1.4.2 Co-ownership.....12

1.4.3 Co-owners Sharing Gross Returns, Produce or Profit.....13

1.4.4 Receipt of Profit as Evidence of Partnership.....13

1.4.5 Position of Beneficiary in Profit Vis-a-viz others creditors.....16

1.5.0 Capacity of Parties to enter into Partnership.....18

1.5.1 Capacity of Infants.....18

1.5.2 Capacity of Mental Patient.....19

1.5.3 Capacity of Married Women.....20

1.5.4 Capacity of Allien.....20

1.4.5 Capacity of Corporation.....20

1.5.6 Capacity of Bankrupt.....21

1.6.0 Formation of Partnership.....21

1.6.1 Drafting the Partnership Agreement.....21

1.7 Need for Registration.....24

1.8 Historical Development of Islamic Law of Partnership.....25

1.9 Source of Law.....27

1.10 Definition of Partnership.....28

1.11 Nature and Scope.....30

1.12 Rules Governing the Existence of Partnership.....33

1.13 Capacity of the Parties to Enter into Partnership Agreement.....35

1.14 Formation of Partnership.....37

1.15 Requirement for Registration.....38

Notes and References.....39

CHAPTER TWO

2.0 Partnership and other related Concepts.....41

2.1.0 Partnership and incorporated Company.....43

2.1.1 Legal Personality....43

2.1.2 Legal Personality as it applies to Islamic Law....51

2.1.3 Limited Liability....51

2.1.4 Concept of Limited Liability under Islamic Law....54

2.1.5 Perpetual Succession....56

2.1.6 Perpetual Succession under Islamic Law....59

2.1.7 Transfer of shares....60

2.1.8 Transfer of shares under Islamic Law....63

2.1.9 Ownership of Property....64

2.2.0 Partnership and Agency....66

2.2.1 Partners as Agent....67

2.2.2 Partners as Principal....69

2.2.3 Duty of Honesty....70

2.2.4 Indemnity....71

2.2.5 Application to Islamic Law....72

Notes and References....74

CHAPTER THREE

3.0 Types of Partnership....76

3.1 Civil and Commercial Partnership....77

3.2 Undisclosed Partnership....77

3.3 General Partnership....78

3.4 Limited Partnership....78

3.5.0 Partnership by Estoppel....79

3.5.1 Representation or Holding out.....80

3.5.2 Reliance on the representation.....81

3.5.3 Giving of Credit.....82

3.6.0 Corporate Partnership.....83

3.6.1 Advantages of Corporate Partnership.....84

3.6.2 Contents of a Corporate Partnership Agreement.....84

3.7.0 Group Partnership.....84

3.7.1 Advantages of Group Partnership.....85

3.7.2 Contents of Group Partnership Agreement.....85

3.8 Particular Partnership.....85

3.9 Sub-Partnership.....86

3.10 Illegal Partnership.....87

3.11 Partnership Under Islamic Law.....88

3.12.1 Proprietary Partnership - Sharikat Al-milk.....88

3.12.2 Applicable Principles.....91

3.13 Sharikat Al-mufawada - Unlimited Investment Partnership.....92

3.14 Sharikat Ul-Inan - Limited Investment Partnership.....95

3.15 Sharikat Al-Mudaraba - Commenda.....100

3.16 Sharikat Al-Sanai - 103

3.17 Sharikat Al-Wujuh - Credit Partnership.....106

3.18 Muzara'a and Musafat - Share Tenancy. 107

Notes and References.....115

CHAPTER FOUR

4.0 Partners Relation among themselves 117

4.1 Partners Relation among themselves under Statutory Laws. 117

4.2.0 Partnership Property.....119

4.2.1 What Constitute Partnership Property.....119

4.2.2 Devolution of Legal Estate or Interest in Land.....121

4.2.3 Position of Co-owners of Property Sharing Profits.....122

4.2.4 Conversion into Personal Estate of Land held a Partnership Property.....123

4.2.5 Charging Order against Partner's interest in Partnership Property.....124

4.3 Rules Relating to interest and Duties of Partners.....125

4.4 Expulsion of Partner.....131

4.5 Retirement From Partnership at will.....133

4.6.0 The Fiduciary Duties of Partners.....133

4.6.1 Duty to Render Account.....134

4.6.2 Accountability for Private Profits.....134

4.7 Rights of Assignee of Share in Partnership.....137

4.8 Partnership Relation among themselves under Islamic.....137

4.9 Partnership Property and Its Constituents.....138

4.10.1 Formulation of Joint Capital.....141

4.10.2 Partnership Investment in Consideration other than Cash.....142

4.10.3 Labour as a Form of Partnership Investment.....144

4.11.0 Rules Relating to interest and Duties of Partners.....144

4.11.1 Participation in Management.....144

4.11.2 Fiduciary Duties of Partners.....146

4.11.3 Duty to Account.....148

4.12 Distribution of Profit and Loss.....149

4.13 Equality in Partnership.....153

Notes and References.....155

CHAPTER FIVE

5.0 Relationship of Partners to third Parties.....157

5.1 Partners Power to bind the Firm.....157

5.2 Acts done on behalf of the Firm.....160

5.3 Liability of Firm for unauthorised Acts.....163

5.4 Partners Liability for Debts and Obligation of the Firm.....165

5.5 Firm's Liability for wrongful Acts of Partners.....167

5.6 Liability for misapplication of Money or Property received for or in custody of the Firm.....170

5.7 Partners Liability for Breach of Trust.....172

5.8 Liability by Holding Out.....173

5.9 Firm's Liability for Admission and Representation of Partners.....175

5.10 Effect of notice of acting Partner on Firm.....176

5.11 Liability of Incoming Partners.....178

5.12 Revocation of continuing Guarantee by change in Firm.....180

5.13 Relationship of Partners to Third Parties under Islamic Law.....181

5.14 Partners Relation to Third Parties in Sharikah and Mudaraba.....182

5.15 Right to supply joint capital to third Party on Sharikah.....183

5.16 Right to supply joint capital to third Party on Mudarabah.....185

5.17 Right of working Partner to supply Mudaraba Capital to Third Party on a Mudaraba or Sharikah.....186

5.18 Right of Third Party to a share in profit.....188

5.19 Right and Liabilities in respect of credit and other transactions.....190

5.20 Partners Relationship to third Party in Mufawada.....194

5.21 Liability for lost goods entrusted to a third party (ibda).....195

5.22 Investment with Third Party.....196

5.23 Limits of mutual surety in Mufawada.....196

Notes and References.....198

CHAPTER SIX

6.0 Dissolution of Partnership.....200

6.1.0 Dissolution otherwise than by court.....201

6.1.1 By Mutual Agreement.....201

6.1.2 Exercise of reserved Power.....202

6.1.3 By rescission or Repudiation.....202

6.1.4 By Breach.....202

6.1.5 By Frustration.....202

6.1.6 By Retirement and Expulsion.....203

6.1.7 Dissolution by Effluxion of Term/Conclusion of Adventure.....203

6.1.8 Dissolution by notice.....205

6.1.9 Dissolution by Bankruptcy, Death or Charge.....208

6.1.10 Dissolution by Operation of Law.....211

6.2.0 Dissolution by Court.....213

6.2.1 Mental Infirmity.....213

6.2.2 Permanent Incapacity.....214

6.2.3 Prejudicial Conduct.....215

6.2.4 Persistent and Wilful Breach of Partnership Agreement.....216

6.2.5 Business running at loss 217

6.2.6 Just and Equitable ground.....218

6.3.0 Dissolution under Islamic Law.....219

6.3.1 Dissolution by repudiation, renunciation and mutual agreement.....220

6.3.2 Dissolution by reason of death.....223

6.3.3 Dissolution by reason of Apostasy.....225

6.3.4 Dissolution by reason of mental infirmity, lack of discretion and bankruptcy.....225

6.3.5 Dissolution by lapse of equality.....226

6.3.6 Dissolution by effluxion of term/accomplishment of purpose.....226

Notes and References.....228

CHAPTER SEVEN

7.0 Consequences of Dissolution.....230

7.1 Right of persons dealing with the firm against apparent members of the firm.....230

7.2 Right of partners to notify of dissolution 231

7.3 Winding up.....232

7.4 Right of Partners to application of Partnership Property.....234

7.5 Partnership right to goodwill 236

7.6 Apportionment and return of Premiums.....239

7.7 Amount of Premium Returnable.....244

7.8 Right where Partnership was dissolved for fraud or misrepresentations.....245

7.9 Right of outgoing Partner to Post dissolution Profit.....246

7.10 Retiring or deceased partner's share to be a debt.....250

7.11 Rule for distribution of assets on final settlement of account.....251

7.12 Consequence of dissolution under Islamic Law.....260

7.13 Winding Up under Islamic Law.....261

7.14 Deductible Expenses.....266

7.15 Restoration of Capital and Division of Profit or loss.....267

Notes and References.....268

CHAPTER EIGHT

8.0 Conclusion.....270

8.1 Summary.....271

8.2 Observation.....283

8.3 Recommendation.....288

8.4.0 Sample of Partnership Agreement.....292

8.4.1 A draft sample of Partnership Agreement Under Statutory Laws.....292

8.4.2 A draft sample of Partnership Agreement under Islamic Law.....304

Notes and References.....307

Bibliography.....308

Table of Statutes.....310

Questionnaire.....311

A COMPARATIVE STUDY OF PARTNERSHIP UNDER ISLAMIC AND STATUTORY LAWS IN NIGERIA

PH.D.THESIS BY:- SANI IDRIS

CHAPTER ONE

1.0 INTRODUCTION

Partnership is one of the commonest means of association employed by person in an infinite variety of circumstances. As a concept both under Islamic and statutory laws it is a related area within realm of contract law. As it is often said, it takes two to tango, so it do takes two or more persons to form a partnership. Partnership is widely practised as a medium in almost all conceivable aspects for earning livelihood ranging from trade and commerce, agriculture, labour, management resources, livestock, manufacturing, mining, retailing, transportation, to mention but a few. The fact that one individual may not command all the needed resources to engage in a particular trade or profession coupled with the advantages of joining force and resources together necessitate the formation of Partnership. This work is especially important for Nigerian Society where people, though engaged in Partnership related transaction in a wider dimension are by far ignorant of its legal implications both under Islamic and statutory laws alike. This problem coupled with the impending need for a legal literature that address Nigerian peculiarities on the subject make this work a necessity. Moreover the need to educate people of their rights and duties in association of great magnitude as *partnership cannot be over-emphasised.*

The problems facing the conduct of partnership includes inter alia:- ignorance of the legal provision governing it, failure of parties to explore the benefits of reducing such agreement into writing; laxity in stipulating before hand the nature and types of business, rights and duties of partners, the quantum of profit and loss, duration of business, extent of contribution, level of participation in management etc. These problems have adverse effect in the conduct of partnership and in some cases may lead the partners to an inadvertent usurious transaction. It is our intention to highlight and examine these problems with a view to bringing

to limelight the correct legal position governing the conduct of partnership under both Islamic and statutory laws in Nigeria. We shall also attempt to distinguish and make comparative analysis of the two laws.

The work consists of eight chapters. Chapter One outlines the historical development, sources, definition, nature and scope of partnership under the two laws. While chapter two examines whether the concept of legal personality and limited liability applies to partnership and in the same vein attempt to compare and contrast the application of these concept to incorporated companies vis-à-vis partnership. Chapter three examines the types and categories of partnership. Chapters four and five deal with managerial aspect i.e. the relationship of partners inter se and to third parties respectively. Chapter six considers the various ways of terminating or dissolving partnership. Chapter seven examines cursorily the attendant consequences following dissolution. Chapter eight, which is the concluding chapter, outlines the shortfall of the laws and offer suggestion in possible areas of reform.

1.1.0 THE NEED FOR COMPARISON OF PARTNERSHIP LAWS

Majority of the population of this country are Muslims. Unfortunately the country being a secular state, adopts a legal system closer if not wholly to English law. Some courts are however, eligible to apply Islamic law, especially those relating to Muslim personal laws and laws relating to day to day transaction by Muslims. For the law to be applicable however, the parties must be Muslims. Where a non-muslim is a party the courts have to apply statutory laws. Considering the fact that Nigeria is a multi-religious country and people are by necessity forced to interact with one another and transact in all matters including partnership and other related contracts. For this reason it is necessary to have a literature that would provide a comparison of the partnership laws as is represented both under statutory and Islamic law alike. A successful completion of this work would afford people the opportunity of getting to know the two laws compared and thereby help in addressing their problem. Moreover there is virtually no literature on the area that attempted to make such a comparative study. Thus,

coupled with the ignorance of people both Muslims and non-muslims on the legal provision governing partnership makes the undertaking of this work inevitable.

By and large, partnership, being a means of trade, commerce and other related transactions is widely practised and as a necessity in some cases Muslims have to enter into such transactions with non-muslims. For this reason the need for writing a comparative analysis of the two laws is further strengthened.

The basis of our comparison would be, the analysis of the different statutes on the subject, with particular reference to the partnership Act 1890 and Kaduna State Partnership Edict Laws of Kaduna State of Nigeria 1991 on the one hand and an analysis of the various position held under Islamic law on the other. This we intend to do first by presenting the position under statutory laws, followed by a corresponding presentation of the position under Islamic law. In the process of presenting the Islamic position, we shall attempt to bring out the differences and similarities between Islamic law position and that of statutory law position. In doing so the methodology to be adopted would involve library research of materials already written by different authors on the two subjects. We shall also make use of the provisions of statutes and provisions of the Holy Qur'an and Sunnah as translated by various jurist. We also intend to administer questionnaire with the sole purpose of drawing our conclusion. The questionnaire will be used to gather information and data on the practical operation of partnership; it would therefore involve us in trips to different markets and shops to sample the views of those that are conducting their businesses on the basis of partnership. This would give us the necessary information as to the problems and prospect of this viable medium of trade and commerce, we would then analyse such problems and apply the letters of the law with a view to providing useful suggestions.

1.1.1 HISTORICAL DEVELOPMENT OF PARTNERSHIP LAWS

Like other statutory laws, the Nigerian Partnership Laws also derived their origin from the received English Laws. It is therefore necessary to trace their History to the development of English Partnership Law. It has been observed that insofar, as commerce was concerned

partnership found expression in medieval English Law in the trade guilds, which functioned as trade protection societies and fellowships for initiates, not trading associations and in two forms of trading associations; the commenda and the societas[1].

The commenda on the one hand has been described as the relationship between a lender and an active trader in a particular venture. The lender shares the profits but was not liable for losses beyond the amount of investment. The trader had the management of the venture and full responsibilities of the losses. It has been submitted that this type of association although appears to be the first to develop, it declined in the face of inadequate accounting facilities and suspicion that it was a device to disguise usurious loans. It was however revived in statutory forms as limited partnership and under the Bovills Act[2].

The societas on the other hand has been characterised as the forerunner of the modern general partnership. It was more or less permanent association between two or more associates often trading under a distinct firm name, each had capacity to represent the others and to bind them in contracts made for the firm, share personal and unlimited liability to creditors of the firm.[3]

The legal incident of the modern law of partnership were not developed until the 18th and 19th Centuries, by which time the unincorporated business association was facing a strong challenge from incorporated trading associations.

The history of the development of English Partnership law is interesting. It developed gradually with the decision of the common law courts mostly due to necessity and shortcomings of unincorporated associations, which is a known phenomenon to the common law since 15th Century. However, the concept of limited liability is comparatively a recent development and until the end of the middle ages incorporation appears to have been reserved for ecclesiastical bodies, municipal governing bodies and certain other bodies performing quasi public functions, such as the universities and trade guilds. The crown, as feudal overload, arrogated to itself the sole right to confer corporate status in the case of lay corporations[4].

The restrictive nature of acquiring corporate status as mentioned above necessitated and facilitated the development of trading associations in the form of partnership. Thus by 18th

Century those who wished to carry on business, with access to incorporation blocked fall back to forming associations with others in almost the same way as we know partnership of today; this lasted till the mid 19th Century. With the advent of the age of discovery however, partnership as a trading mechanism could not command the financial resources needed to finance the vast expansion of trade and industries. This culminated into the evolution of trading corporation and by 1855 Incorporation with limited liability was extended to any form of trading enterprises[5]. It was at this stage that the distinction between trading corporations and unincorporated partnership began to emerge; For example the concept of legal entity, perpetual succession, limited liability etc.

1.1.2 FUTURE OF PARTNERSHIP

With the availability of incorporation, the future of partnership was blink; its participatory nature in business transaction went into decline. People now prefer to go for incorporation which crown them with limited liability, corporate shell and perpetual succession. This however, by no means relegated partnership to the background, it still continue to rub shoulders with corporate bodies. To a great extent it remained relevant in meeting the need of small business and even more-so in a changing economic climate where business arrangement between corporation are made in form of partnership. It was rightly observed that this would ensure partnership law is not an historical fragment fossilised by enactment but remains a living and evolving body of law[6].

1.2.0 SOURCES OF PARTNERSHIP LAW

Partnership was governed exclusively by the rules of common law and doctrine of equity embodied in legal decisions and textbooks, this makes case law to be an important source of partnership law. It remained the chief source until 1890 when the partnership Act was passed into law.

1.2.1 PARTNERSHIP ACT 1890

The partnership Act 1890 is the main source of contemporary English partnership Law, it can be traced to a draft Bill drawn by Sir Frederick Pallock in 1879 for the consolidation and amendment of partnership law which was submitted before the House of Commons in 1880. In the course of succeeding decade the Bill was resubmitted with modifications in 1882, 1883, 1884 and 1889. It was the 1889 modified version that was finally taken and passed into law as Partnership Act in 1890[7].

1.2.2 APPLICATION TO NIGERIA

The 1890 Partnership Act like other received English laws applies to Nigeria by virtue of the reception provision[8]. It makes the rules of English Common Law, the doctrine of equity together with statute of general application in force in England by 1st January 1900 applicable to Nigeria. Until recently, this has been the main source of partnership law. However, with the attainment of independence and the quest for indigenous legal system, many states like Lagos state, former western state now Oyo, Ondo, Ogun and Osun states; former Bendel state now Delta and Edo states, Kaduna state etc enacted their partnership laws. While some states still refer to the English Act. It suffices to note however, that even those states that enacted their partnership laws; those laws are substantial reproduction of the English Act with little modifications. It suffices to note that partnership Act is among the statutes of general application relegated to state levels. Many states have enacted their laws per our above observation but some are yet to follow suit. For those states that are yet to enact their partnership laws, the partnership Act still applies. It is for this reason that we deem it necessary to use for reference the English Act and the Kaduna State Partnership Edict.

The English Act though a masterpiece, is not without it shortcomings, there are a lot of circumstances that were not addressed. In such cases one may have to fall back to the pre-existing rules of common law and equity. This necessity makes these two sources still relevant to partnership. In this respect it has been observed that:-

"The Act is not (and does not purport to be) a complete code of partnership law, thus, it contains no provision relating to goodwill, to the administration of partnership assets in the event of a partner's bankruptcy or, indeed to the manner in which legal proceedings can be brought by and against a firm. Moreover, section 46 preserves the pre-existing rules of equity and common law except in so far as they are inconsistent with the Act's express provisions"[9]

1.3 DEFINITION OF PARTNERSHIP

Partnership in a wider sense may be defined as the association of two or more persons joining resources; skill or force with a view to achieving some results be it profit or otherwise. Whereas in a purely commercial sense partnership, denotes the joining of resources or skill by two or more persons with a view to profit. One author defines partnership as one of the basic form of business organisation, which provide a ready means whereby two or more persons may join in business, each providing, labour and skill either together or separately[10].

While the English Act simply defined a partnership as the relation which subsists between persons carrying on a business in common with a view of profit[11]. In another law partnership has been defined as the relationship which subsists between persons who have agreed to carry on and are carrying on a business in common with a view to profit.[12]

The difference between the two laws is the addition under the Kaduna State partnership Edit of the words – "who have agreed to carry on and are" – in terms of effect, it laid emphasis on agreement between the parties to carry on business. In our opinion agreement can be expressly reached or even by conduct, therefore once the parties are carrying on business, it is implied that they have agreed to do so. Thus the addition did not introduce any important difference to the English Act.

By and large, the Act and the Edict have save us the trouble of much speculation by providing a definition of what is partnership. In the same vein provided a caveat limiting the scope of such definition otherwise it would be too wide to cover all types of business

enterprises; it expressly excludes incorporated companies of all categories registered under the companies Act 1968 and companies and Allied matters decree, 1990.[13]

In order to appreciate the scope of the definition as offered by the act, we have to analyse the wordings of the provision.

The word "relation which subsists between persons" implies plurality of person i.e. two or more. The question then is how much more? The Act or Edict did not provide. A recourse to the provisions of the companies Act, 1968 is necessary. Under Section 377(2) the number of persons that can form partnership has been limited to twenty. If more than twenty, it has to incorporate as a company.

The words "carrying on business" means every trade or profession, or a commercial enterprise as a going concern. This clearly excludes domestic transactions, such as jointly owned family home or investment in a unit trust and the incidental trading of non-profit associations such as clubs. Although where such jointly owned family home are rendered for commercial purpose, they would certainly qualify as partnership. The expression clearly implies the idea of continuity either in fact or intention.

In Smith v Anderson[14]

The view was taken that the expression "carrying on business" implies a repetition of acts and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts are to be series of acts which constitutes a business.

In Re Griffin, ex parte Board of Trade[15]

Lord Esher M.R. observed "whether one or two transactions make a business depends on the circumstances of each case. I take the test to be this: if an isolated transaction which if repeated would be a transaction in a business, is proved to have been undertaken with the intention that it should be the first of several transaction, that is with the intent of carrying on a business, then it is a first transaction in an existing business. The business exists from time of commencement of that transaction with intent that it should be one of a series".

The above observations goes to suggest that continuity in the business is a condition precedent to the existence of a partnership. This by implication removes single ventures from

the scope of partnership. We however submit that this cannot be an accurate definition of "carrying on business" thus where two or more person carried on a business in a single venture, contribute their resources with a view to profit in that venture, those persons can certainly be regarded as being engaged in partnership in respect of that particular venture. Thus the distinction between a single venture and continuing one in relation to existence or otherwise of a partnership is irrelevant. Accordingly the validity of partnership in a single venture was acknowledged and recognised by Phillimore J. in construing business as relating not merely to a lifelong or universal business or a long undertaking but to any separate commercial adventure in which people may embark[16]

Likewise in

Mann v Archy[17]

It was held that a contract to go halves in the profit or loss on the sale of a shipload of Potatoes constituted a partnership between the owner and the insurer. That a general partnership of years may be very different in substance from a partnership in a single venture, and one single venture may differ greatly from another.

These latter decisions seem to be preferable authorities in defining the phrase "carrying on business". It implies that any commercial venture, whether performed over a matter of minutes, days, months, or years may be a business sufficient to attract the application of partnership law, provided there is mutuality of rights and obligations between the parties.

Although the fact that two traders use the same place of business does not necessarily make them "partners" without more.[18]

The next important phrase in the definition that needs elucidation is "in common". This implies that the business, occupation or venture must be carried jointly or in conjunction by the parties. This does not mean each of the parties must partake physically in the business; what is necessary is that the business must be carried on either by or on behalf of all the persons who are alleged to be partners, but their personal liability to the firm debt remains[19]. Consequently, the essential factor is the joining of resources together; who carries on the business can be anybody provided he does so as an agent for the parties who owned that

resources in partnership. A brief but comprehensive definition of what constitute partnership has been offered by the Court of Appeal in the case of:-

Omidiora v Ademiluyi[20]

Where it held that the prerequisite of a partnership relationship is that persons (or partners) are carrying on a business in common.

The next limb of the definition is the expression "with a view to profit". This implies that partnerships are business associations. It excluded associations formed for purposes other than the financial gain of the members, thus non-profit associations such as clubs and societies commonly formed for the promotion of religious, social, cultural, educational, sporting and recreational activities are not partnership. Unlike partnership in profit making association there is no mutuality of rights and obligations among members which is an essential element of partnership[21].

Based on the foregoing discussion for one to ascertain what is partnership, it appears he needs to ensure that there are two or more person, carrying on business in common whose sole aim was the achievement of profit. For the purpose of partnership law, it is only when these elements are present that a partnership can be said to exist.

When one talks of profit in partnership, he is referring to the net amount remaining after paying out all expenses incurred including the amount of capital invested from the gross return. As to whether division of profit is essential to the existence of partnership, it has been submitted that before the partnership Act 1890, it was essential for a partnership to have for its objects, not only the acquisition, but also the division of profit. That the term partnership and partner are evidently derived from the verb 'to part' in the sense of to divide among or share and that there can be little doubt that the division of profits among partners is the general, if not universal objective of partnership. However, its omission in the statutory definition indicates that it is an incident of the partnership relation rather than of its very essence[22].

This goes to show that the profit view does not necessarily mean division, among the partners, that object can still be achieved if the profits are for example applied for charitable purposes.

1.4.0 NATURE AND SCOPE OF PARTNERSHIP

The nature of partnership may be viewed from two perspectives:- commercial and legal. From both; partners are collectively referred to as a firm. The commercial view involved treating a firm like a company that is as an entity distinct and separate from its members. Partners are seen merely as agents and sureties of the firm. Whereas in the legal view, the firm is not generally recognised as distinct from the partners composing it. A change in the number of partners destroys the identity of the firm. What is styled "partnership property" is in reality the properties of the partners and the firm's debts and liabilities are the partners debts and liabilities[23]

Though partnership is not a separate legal entity distinct from its members but for convenience actions can be commenced by or against a partnership in the firm's name without affecting the personal liability of each partner. The recognition of partners as firm is very clear from the provision of the Act; which provides: -

> Persons who entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name[24]

This provision clearly permits a firm to trade under any name just like any other private individual and can add "and company" but it cannot add limited or PLC.

1.4.1 RULES FOR DETERMINING THE EXISTENCE OF PARTNERSHIP

The existence or otherwise of a partnership may be determined by reference to the partnership Act which defines what a partnership is and the categories of association that are not partnership. The consideration of these negative provisions and rules set down by the Act[25] would enable us to arrive at what is and what is not partnership.

Whether or not partnership exists in a particular case is basically determined by assessment of what the parties must be taken to have intended as evidenced not only by the terms of their express agreement but by their conduct towards one another during the course of carrying on the business. No one factor of itself is conclusive. All the facts and relevant

circumstances of the relationship between the parties must be considered[26]. If on consideration of all the surrounding circumstances, a contract exhibit all the normal attributes of a partnership save that the parties are called something other than partners, for example "joint venturers", or " syndicate" they will almost inevitably be held to be in partnership[27].

Thus it is apparent that irrespective of the nomenclature the parties decided to give their association the most important thing in the eyes of the law is whether that business for all intent and purposes is partnership. If it is, so it will be notwithstanding whether the parties decided to declare it otherwise. All that one needs to address is whether the transaction in point of law is really partnership. The position of the law was stated thus:-

> " If a partnership exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership"[28].

With the above observation in mind, we shall now examine the rules set down by the Act as a guide for determining the existence or otherwise of a partnership.

1.4.2 CO-OWNERSHIP

Co-ownership per se for instance joint tenancy, tenancy in common; joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned; whether the tenants or owners do or do not share any profits made by the use thereof[29].

Co-ownership may or may not arise by agreement of the Parties while partnership in all cases arises as a result of agreement. Likewise co-ownership may not necessarily involve a community of profit or loss while partnership to greater or lesser extent does. Also co-owner can transfer his interest without the consent of the other while a partner cannot. While partners are agents to one another co-owners are not. In any case, to remain within the ambit of the rule, it has been submitted that a co-ownership arrangement, between the heirs of a property, who agrees to make it available for renting to meet costs, or co-owners who merely distributes

income arising from jointly owned shares or rights, will always be within the rule. Where, however, a business in the traditional sense, is to be carried on upon the property jointly owned, by or on behalf of co-owners, then a partnership will be created[30].

1.4.3 CO-OWNERS SHARING GROSS RETURNS, PRODUCE OR PROFITS

The law provides that:- The sharing of gross returns does not of itself create a partnership, whether the person sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived[31].

Gross return, refers to the total amount of income or money received from a particular venture before deducting expenses. If each co-owner receives his share of the gross return such will not create a partnership.

On the other hand where co-owners share profits realised from the employment of these joint property, their relationship may appear to be almost indistinguishable from partnership. The question then whether an agreement of partnership should be inferred. The receipt of such a share of itself does not create a partnership. However, if the co-owner converts the produce or returns into money, use the money to defray the cost of obtaining such produce or returns, and ultimately divided the net profits a partnership may be created in relation to those profits but not in relation to the property itself[32].

1.4.4 RECEIPT OF PROFIT AS EVIDENCE OF PARTNERSHIP

As a general rule the receipt by a person of a share of profit of a business is prima facie evidence that he is a partner in the business. However, the Edict like the Act went ahead to set out five exceptions where such presumption does not arise[33]. These are:-

(i) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of accruing profits of a business does not of itself make him a partner in the business or liable as such.

This subsection ensures that creditors who give loan to others for the purpose of business and by no means intending to participate or take part in the business are

safeguarded, they cannot be considered as partners since there is no such agreement or intention between these parties. The debt might have resulted directly as a result of capital advanced or labour or services.

(ii) A contract for the remuneration of a servant or agent of a person engaged in business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such.

Depending on arrangement between the parties, they may agree to remunerate the servant or agent by a share in the profit either solely or in addition to salary. This may be done in the form of inducement to encourage the agent or servant to work harder towards the achievement of the profit. For a person to be categorised as a partner he must be recipient of actual share in the profits in contrast to mere remuneration.

(iii) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner in the business or liable as such.

The relationship of partners being that of confidence entitled the estate of a deceased partner where the business is continued after the death to a share in the profits made from employment of the partners interest, such does not make the recipient a partner.

(iv) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided the contract is in writing and signed by or on behalf of all the parties thereto.

The provision here may be to ensure compliance with the money lenders law[34]. The intention of the subsection is to recognise loans as a means of facilitating business, the payment received from profits may be merely in the form of servicing or paying off the loan; that in no way qualifies the lender as a partner.

In view of the above, it is our submission that; the requirement for the loan agreement to be in writing and signed by the parties does give rise to the presumption that, in the

absence of such document, a partnership relation would be implied. However, the true position appears to be that, in the absence of such written evidence, the general rule, of which the provision is but one particular exception, will apply so as to make the presumption of participation in the profits though a prima facie evidence of a partnership, not to be conclusive. To prove partnership, the profits sharing would have to be supported by other terms of the agreement or course of dealings between the parties. It appears that the same principles will apply where though there is a written agreement but the court decides that on the true construction of the document in all relevant circumstances, a partnership was intended and not merely the relationship of debtor and creditor[35].

In Re Megevand, Ex parte Delhasses[36]

It was held that, where "lenders" power of control and his right to receive a share of profits were to continue so long as the partnership business was in existence and the "lender" was in a position to decide how long the business was to continue it was a partnership.

(v) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Members of a dissolved partnership may sell the goodwill of such business and if; depending on the sale agreement the partner is to be receiving some annuity as consideration, such alone will not make him a partner in such business.

The essence of these rules, apart from establishing what is partnership, it also clarifies and distinguishes partnership from other related concepts. A lot of transactions may be easily confused with partnership because of their semblance, especially in relation to benefitting from the profits of a business. The rules have thus clearly demacate partnership from those related or quasi-partnership transactions.

1.4.5 POSITION OF BENEFICIARY IN PROFIT VIS-A-VIZ OTHER CREDITORS

Where the interest of beneficiaries in profit competes alongside the interest of other creditors in case of insolvency, the rights of persons benefitting from profits (though not partners) is postponed to that of other creditors. That is to say the rights of person lending or selling in consideration of share of profits in case of insolvency of the borrower or purchaser; is postponed. They would not be allowed to recover anything in respect of the loan, until the claims of the other creditors of the borrower or purchaser for valuable considration in money or money worth have been satisfied. The same applies to seller of goodwill in consideration to share in profits[37].

The above position has two possible effects viz: It drastically cuts down the protection given to the lender and seller of goodwill. It imposed upon them a form of limited liability towards the business creditors in as much as what would otherwise be available to them for their debts was primarily reserved for other creditors. As a matter of fact it is our submission that this position is fair enough since the lenders have been benefiting in the business while the other creditors have not direct benefit in the business. It is therefore more equitable to allow the claim of the ordinary creditors to prevail. By and large, apart from the above position, the lender or seller, unlike a limited partner who has no recourse against the personal assets of the active partner may bring personal action against the partners. If he has taken any security as secured creditor he would not be prevented from retaining such security.[38]

From the foregoing discussions, the following characteristics are deducible as the main features of partnership.

[a] ***Lack of legal personality:***- Unlike the registered companies which are clothed with legal personality; a partnership lacked legal existence. Its members are not considered to be separate from the firm, the opposite is exactly the case; meaning they are more or less one and the same thing. This suggests that the actions of partners have dual implication, signifying that they act both as principals and as agents to one another. Thus their actions binds one another as principals; in the same manner the acts of agent binds his principal under the law of agency.

[b] ***Unlimited liability:-*** Another important feature of partnership is unlimited liability of its members. The acts of each and every partner in the course of the partnership business bind all other partners. This implies that each partner is liable to the partnership debt to the extent of his last kobo. It was this consideration which dictates that each partner is to pick his own partner with great care, based on trust and confidence.

[c] ***Partnership property:-*** The partnership property is held jointly by the partners who cannot create floating charge over the firm's assets comparable to the company floating debentures.

[d] ***Personal Relationship:-*** The mutual confidence and trust upon which partnership is founded imports into it the idea of personal relationship. Death, retirement or bankruptcy of a partner works dissolution notwithstanding whatever arrangement the partners might have made for its continuation. It has been observed that the personal nature of partners' relationship is apparent from the rule that in the absence of agreement on the matter a partner agrees to associate with his co-partner and no one else. Thus a new partner cannot be imposed on him by a majority decision. Likewise the deadlock principles which enable the court to order dissolution of partnership where personal relationships have deteriorated to such an extent that it render the continuation of the firm impossible is another good example of the personal nature of partnership. Likewise though there is nothing in law that prevent a partner from either creating a sub-partnership relating to his share in the firm with a stranger or assigning his share either absolutely or by way of charge to an assignee, but in neither event does the sub-partner or assignee become a partner in the firm[39].

[e] ***Informality:-*** Unlike incorporated bodies, partnership is free from formalities both in creation and continuance. Partners may come together without any formal contract or deed and in fact even without addressing their minds to the legal incident. If any problem arose, the court will be guided by the course of dealings, between the parties.

1.5.0 CAPACITY OF PARTIES TO ENTER INTO PARTNERSHIP

Like any other contractual relationship, before a person can lawfully enter into partnership he must possess the requisite legal capacity, that is to say he must be a sui juris. The rules that underlies this principle are considered as follows:-

1.5.1 CAPACITY OF INFANTS

Ordinarily an infant is free to enter into a partnership. The constraint however, has more to do with his other partners since the minor cannot incur contractual liability for the partnership debts either to his partners or to third parties. It thus goes without saying that he who enters into partnership with a minor does so at his own peril. Since apparently a judgement against the firm cannot be enforced against the minor, that is to say it cannot be enforced against the firm as a whole but only against the other partners that are not minors. It means a judgement creditor against the firm may only levy execution against the firm's property or the property of other partners other than the minor partner[40].

Equally an infant partner cannot be held liable in torts for the misconduct of his co-partners though he is liable for his own torts, fraud or negligence. In case of fraud; equitable relief such as rescission or an injunction may be readily granted. For example in

Woolf v Woolf[41]

A minor was restrained from carrying on his business in such a way as to represent it as the plaintiff's.

The partnership contract remain voidable and the infant is free to avoid it during his infancy or within reasonable time after attaining the age of majority otherwise he will risk being held liable for debts incurred after that date by reason of the doctrine of holding out. In

Goode v Harrison[42]

The defendant was held liable for goods delivered after he attained the age of majority because he did not either expressly affirm or disaffirm the partnership.

1.5.2. CAPACITY OF MENTAL PATIENT

This consists of idiots and lunatic. An idiot has been defined as

"a natural fool; one that has no understanding from his nativity, and therefore is by law never likely to attain any. A man is not an idiot, if he has any glimmering of understanding, so that he can tell his parents, his age or the like common matters"[43].

While "a lunatic or non compos mentis is one who hath had understanding but by disease, grief or other accident has lost use of his reason. A lunatic is indeed properly one that has lucid intervals, sometimes enjoying his senses and sometimes not, and that frequently depending upon the changes of the moon"[44]

As a general rule mental patient can enter into a legally binding partnership contract, provided the other partner is not aware of his state of mind. In

Molton v Camroux[45]

It was stated that:-

"the modern cases show, when the state of mind was unknown to the other contracting party; and no advantage was taken of the lunatic, the defence (of lunacy) cannot prevail"

This goes to show that ordinarily a mental patient may enter into partnership agreement. Such agreement will however, remain voidable and may be avoided by the patient if he can prove that at the time of entering into the agreement he did not appreciate its implication by reason of his mental condition and that the other partner knows about his condition. Furthermore, in the absence of contrary agreement, the insanity of a partner including a supervening mental disorder though may not occasion automatic dissolution, it is however, a ground upon which application may be made to the Court for an order of dissolution. Where the Partnership continues such partner will remain entitle to his due share of profit[46] and responsible for a subsequent misconduct of his co-partner[47].

1.5.3 CAPACITY OF MARRIED WOMEN

Under the classical common law doctrine, married women are restricted from contracting on their own, however successive legislation have progressively removed such barrier and now married women can enter into contract or partnership as if they are feme sole. They are capable of suing or being sued both in contract and in tort and are subject to the rules of enforcement of judgement and being declared bankrupt or incur liability.[48]

1.5.4 CAPACITY OF ALIEN

Generally, without prejudice to immigration rules, alien are competent to enter into partnership save in the case of an alien enemy. In such cases a partnership cannot be created and where it was created before the outbreak of hostilities, it automatically dissolve from the moment the hostilities started. This is because under public policy, it is illegal to trade with enemy or alien enemy.

1.5.5 CAPACITY OF CORPORATIONS

As a general rule, a company is crown with legal personality and can contract like any other natural person. However its rights to contract or enter into partnership is determined by the terms of its memorandum and articles of associations. Where it is not authorise to engage in partnership if it does, it will be ultra vires and therefore void.

It is however, worthy to note that, the contemporary practice is to draw the object clause so widely that it enable the company to carry out almost all conceivable business. Therefore a company in most cases, may perform its function within the bounds of its objects by engaging in partnership notwithstanding the absence of express provision to do so. Thus in

Newstead v Frost[49]

It was held that the words "all kind of financial ------- or other operations" in the company memorandum did authorise it to carry on business in partnership.

1.5.6 CAPACITY OF BANKRUPT

A bankrupt person cannot properly enter into or join a partnership which carries on business in any name other than his own, unless he discloses to all person dealing with the firm his true name and the fact that he is an undisqualified bankrupt[50]

1.6.0 FORMATION OF PARTNERSHIP

A partnership agreement like other ordinary contract may be entered into by deed, in writing or by words of mouth or even by conduct. However, prudence dictates that a well drawn agreement stipulating rights and duties and other conditions guiding the partnership relationship would be preferable and most ideal.

It is however, worthy to note that the informality and flexibility of the partnership relationship could be deceptive and unsatisfactory. Thus some reasons that make it prudent to have the agreement formalised in a properly drawn partnership agreement have been identified as follows:-

[i] An Agreement formed when consensus prevails would be useful in settling dispute when dissensus sets in.

[ii] Although the partnership Act 1890 provides rules to be applied in default of express rules agreed by the parties, it is most unlikely that the statutory code will represent the true wishes of the partners.

[iii] The statutory rule do not deal with several matters, which if left in the limbo of doubt can be sources of friction[51]

[iv] The fragility of partnership at will and the increasing complex financial and management structures adopted in modern day firms.

1.6.1 DRAFTING THE PARTNERSHIP AGREEMENT

Where parties made up their minds to engage in partnership, the next important thing to do is to draft the agreement; incorporating all what they had in mind, which they desire to govern the relationship. Ordinarily there is no such thing as standard partnership agreement

and no draft agreement can be wholly exhaustive. Lord Lindley rightly pointed out that "partnership agreement are not intended to define, and are not construed as defining, all the rights and obligations of the partners inter se. A great deal is left to be understood"[52]

In partnership agreement the provisions of the partnership Act[53] are implied except otherwise expressly or implied excluded by the agreement. The agreement may contain the following clauses:-

Parties of the Agreement:- The agreement must identify clearly all the parties to the agreement and the nature of partnership. If a party is an equity partner or non-equity or salaried partner, it must be stated. Where the firm has many partners, the names and addresses of each of them should be stated in a schedule. Where one of the partners is to hold a particular position, such as Principal, Senior, Managing, administrative etc partner; it should clearly be stated in the agreement.

Equality in shares, profits, and losses:- Except otherwise agreed all partners are entitled to share equally in the capital and profits of the business, and must contribute towards the losses whether of capital or otherwise sustained by the firm. It is not uncommon however; that partners contribute in different proportion and therefore profits and loss shares in such circumstances is likely to be different. Thus where profits are shared in unequal proportion and there is no express provision in the agreement as to apportionment of losses, there is a presumption that they will be borne by the partners in the same proportion as shares of profits[54].

Indemnity clause:- There must be a clause in the agreement upholding partners right to be indemnified by the firm in respect of payments made and expenses incurred in the ordinary and proper conduct of the firm's business or in or about anything necessarily done for the preservation of the business or property of the firm.

Nature of Business:- The agreement must state how and in what business the firm is to be involved and the extent of each partner's authority in dealing with third parties.

Commencement Date:- Mere agreement to enter into partnership does not actually give rise to liability, it is from the time and date that business is commenced that the liability of the partners to the debts and obligation of the firm is determined. It is submitted however that where no

date is specified, it is deemed to commence from the date when the deed was executed, but that a clause stipulating retrospective and future commencement date is not really effective[55].

Duration:- The life span of partnership must be stated in the agreement. This is necessary in order to avoid the inconveniences of partnership at will. In the same vein provision should also be made to take care of eventualities such as death, bankruptcy, retirement, misconduct or lacklustre attitude by a partner since by law such would lead to dissolution. It is expedient to expressly negative such provisions by inserting that such eventualities will not determine the partnership and by necessary implication a clause enabling the continuing partners to acquire the shares of such outgoing partners should also be inserted.

Name of the Firm:- It is desirable to state the firm name in the agreement and where names other than the surname of the partners are to be used, care must be taken to avoid the choice of name identical to that of another firm.

Partnership property: - The agreement should clearly identify partnership assets such as interest in land, goodwill, offices, trade secret etc.

Capital:- This refers to the total amount agreed to constitute the partnership capital; it includes both contribution in cash and goods, lands, etc. The sum total of the firm's capital must be expressed in terms of money and each partner's proportion should be stated. Where the proportion of capital contribution varies, it is expected to state whether or not the rule of equality implied in the Act will apply or not. If it is intended that the relationship should be governed in terms of ratio of capital contribution and thereby profits and losses are to be shared accordingly it should be expressly stated. Provision may also be made for calling of additional capital when the need arose.

Bankers of the firm:- It is also ideal to name the Bankers at which the firm will maintain its accounts and the authorised signatories to the account.

Books and Accounts:- Provisions governing both the maintenance of partnership books and preparation of annual account should be made. This will give the financial standing of the firm and that of each partner.

Management of the Business:- The manner of the day to day running of the business should be provided, the role of each partner, if there is any restriction on the implied authority of a partner, it should be specifically mentioned. The manner of taking decision must be ascertained; if by counting the number of heads or by share of capital contribution.

Change in firm:- This may occur as a result of introduction of new partners or by retirement or death. In case of a new incoming partner provision should be inserted for his rights and liabilities if any to all transaction prior to his joining the firm. In the case of outgoing partner a clause should be inserted restricting competition and the right to acquire the outgoing partner's share should as well be reserved.

Arbitration:- It is important to insert an arbitration clause in case of dispute. Such clause should state that in case of dispute the matter should be referred to a named person for arbitration, this may help to deter or minimise legal proceedings.

Dissolution:- Generally every partner has a power to bring about dissolution by notice. It is therefore expedient to set out circumstances in which partners will be entitled to dissolve the partnership. However, where circumstances calling for dissolution occurred but the partner did not take step to serve notice of dissolution within reasonable time, such partner will be deemed to have waived such power[56].

As observed earlier these are only but a few of the conditions that need to be inserted in draft partnership agreement. They are not exhaustive and can cover almost all conceivable circumstances depending on the wish of the parties though the foregoing have been identified as the most common and essential.

1.7 NEED FOR REGISTRATION

The statutes governing general partnership made no mention of the need for registration, this therefore imply that as a general rule registration is not an essential requirement of a general partnership. This general rule is however subject to certain exception in which registration may be necessary. These are:-

[1] Where the partnership is carried on in a name other than the true surnames of the partners, it requires registration under the registration of business names Act. And

[2] In case of limited partnership, it requires registration. The Act provides that: "Every limited partnership must be registered as such in accordance with the provisions of this Act, or in default thereof it shall be deemed to be a general partnership, and every limited partners shall be deemed to be a general partner"[57].

1.8 HISTORICAL DEVELOPMENT OF ISLAMIC LAW OF PARTNERSHIP

Partnership associations as a system of trade was known and practised by Arabian merchants before the advent of Islam, under Islamic law the practice were retained with modifications. This invariably implies that the commenda and other types of partnership are in vogue by the Arabs long before the development of the English Commenda. The Arabian Merchants travel far and wide in caravans; in most cases trading with the goods of other wealthy people in return for a share of profit. It is on record that Khadijah bint Khuwailid, the first wife of the Holy Prophet, was a very rich widow in Mecca and she used to give her wealth to other people to trade with them in return for a share of profit. Being impressed by the honesty and righteousness of the Holy Prophet requested him to take her commercial goods to Syria. There was a huge profit, out of which the Holy Prophet received ample share[58].

With the advent of Islam, Muslims are taught the best rules of conduct, partnership and profits sharing are widely practised during the early period of Islam by the Prophet and his companions. The following are but a few examples of some partnership practices that are either practised by the Holy Prophet himself or by others to which the Prophet gave his tacit approval; this fact goes to prove the legitimacy of partnership.

It is on record that when the Muslims conquered Khaibar, the Holy Prophet granted the land to the Jews (on their request) on the condition that they would cultivate the lands and share the produce equally with the Muslims.[59]

Likewise the Prophet was reported to have entered into a partnership with Saib bin Sharik at Mecca. When he met him at Medina, he recollected the incident and mentioned it

with approval[60]. Many other traditions and precedent have been cited in support of partnership; some of them are:-

The Holy Prophet is reported to have said in respect of partnership that God affirms that until one of the two partners breaks the trust, I remain their third partner.

It is reported that a man came to the Prophet and said, I work at the market and my partner engages himself in the mosque, the Prophet remarked, probably the prosperity of your business is due to that fact.

The Prophet is reported to have said that a man who is bringing up three daughters is like a prisoner, so O! Slaves of Allah, do Mudarabah with that man, lend him.

It has also been reported that Abbas bin Abdulmuttalib engaged in Mudarabah deals with certain conditions and when the Prophet came to know of it, he expressed his approval.

That Qasim bin Muhammad reported that we had deposited some of our Savings with Aisha who lend them out on Mudarabah on business purposes.

Likewise Umar was reported to have concluded Mudarabah contract with Zaid bin Khulaida and had also concluded a Mudarabah contract on behalf of Bait-ul-mal. It is reported of him that he gave out savings of the orphans on Mudarabah for business purposes in order that these savings might grow[61].

It is also reported from Zaid bin Aslam from his father that Abdullah and Ubaidullah, two sons of Caliph Umar, went to Iraq for jihad with Muslims army. On their return they went to Abu Musa, who was the administrator of Basra. He welcomed them and said "I wish I could do you a favour. I have some money of Bait-ul-mal (treasury) which I want to sent to Umar. Now I give this money to you as a loan, you purchase some goods with it from Iraq and sell them in Medina, pay the capital to Umar and keep the profit for yourselves". They agreed to this proposal and got the money from Abu Musa who wrote to Umar to receive it from them. When they came to Medina they sold the goods and made some profits. Then they took the capital to Umar who asked them, 'did he give such a loan to every man in the army? They replied in the negative. Then Umar said "This money has been given to you for being sons of the Caliph, give me the capital as well as the profit. Abdullah kept quite but Ubaidullah said O!

Amirul-muminin! you should not do this(to us). Had the money been lost or had we suffered a loss, we would have paid the capital. Umar said No! you must pay it. Ubaidullah again requested. Then Abdur Rahaman bin Auf suggested that it would be better if it was counted as Mudaraba. Umar agreed and took the capital with half the profit and the other half was given to them[62].

The foregoing clearly established the historical basis and root of partnership under Islamic law. The Nigerian Muslims with other Muslim alike are bound by its legal provision which would be considered in due course.

1.9 SOURCE OF LAW

Islamic Law is an all-encompassing system covering all aspect of human life. Its primary source being the Qur'an and Hadith of the Prophet, followed by Ijma and Qiyas and other subsidiary sources like istihsan, istidlal, massalih al-mursala, istishab etc. The law of partnership like other branches of law also found its basis from these sources.

Briefly stated, the Holy Qur'an, is the first and the most important source of Islamic law, it consists of revelations from God to the Holy Prophet. These revelations are interpreted and explained to mankind by the Holy Prophet, therefore the sayings; deeds, actions and tacit approval of actions are what constitute the hadith of the Holy Prophet. While the Ijma is the consensus of opinion of the muslims jurist over issues or matters of law. While Qiyas is analogical deduction, a method of comparing between two situations to arrive at a solution to a new problem which has not been expressly covered by the preceding sources. In case of a legal problem, a person is expected first to have recourse to the Quran when he could not find an answer, he turn to hadith, if he could not find an answer he turn to Ijma and finally if no direct answer he resort to Qiyas.

There is no difference among the Muslims jurists about the validity of partnership Qirad. It is one of the practices that existed before the coming of Islam, which Islam adopted.[63]

It has been contended that all legal topics are based and rooted in the Quran and Sunnah except the matter of Qirad – partnership. We find for it no basis but there is complete

consensus over its lawfulness. It is to be inferred therefore that it existed during the time of the prophet and he knew of it and approved it.[64]

Partnership derives its source from both the Quran and Hadith. It has been submitted that partnership Al-Sharikah is lawful by the saying of Allah the Most High in Quran 4:12 which speaks of the uterines two or more as partners in the share of one third of the estate and His saying in Quran 38:24 Al-khulata'a here indicates partners.[65]

From the Hadith, the Prophet is reported to have said: -

"Allah the Most High says: I am the third of every pair of partners so long as one does not cheat the other".[66]

In another tradition he says: -

"The hand of Allah is with the pair of partners so long as they do not cheat".[67]

Likewise, it is reported by Abu Hurairah that: -

The Ansar requested the Holy Prophet that their gardens of dates be divided between Muhajirin and themselves. The Holy Prophet refused. They then said that they should provide labour and we would all share in the fruits. The Holy Prophet accepted this proposal[68]

The above provisions of the Holy Quran, the traditions and others cited previously lend weight to partnership as a system of trade and commerce. Even though there are differences of opinion among the jurists in relation to the validity of some type of partnership, that would be considered in the latter part of this work.

1.10 DEFINITION OF PARTNERSHIP

Partnership has been defined as the relationship where two or more persons jointly contribute capital and share profits as well as loss[69].

Another definition was offered on the basis of categorisation of partnership which is divided into two main categories depending on the school of Jurisprudence. The Maliki and Hanbali accepted Mudarabah as variant forms of Sharikah. The Hanafi on the other hand called partnership Sharikat ul-inan and accepted some form of Mudarabah, the Hanbali and Shafi'i also used the term inan while maliki used Sharikat ul-Mufawada.

Sharikah (Partnership) has been defined to mean participation of two or more persons in a certain business with defined amount of capital according to a contract for jointly carrying out a business and for sharing profit and loss in a specified proportion. While Mudarabah means that one party provides the merchandise or capital and the other utilised it for business purposes under the agreement that profits from the business will be shared according to a specified proportion.[70]

Another definition offered was based on the distinction between proprietary partnership and contractual or commercial partnership. Briefly stated; proprietary partnership is concern exclusively with joint ownership of property in contrast to joint exploitation of the property involved. While in contractual or commercial partnership joint ownership is a necessary element for its establishment. The emphasis is rather on joint exploitation of capital and joint partnership in profits and losses.

The joint ownership is a consequence, and not a pre-requisite for the formation of a contractual partnership.

On close analysis of the above definition, it is clear that the following similarities between the position under Islamic law and that under statutory laws are noticeable viz:-

(1) The need for two or more persons to form partnership.

(2) Carrying on a business jointly or in common within acceptable limits

(3) With a view to profits but with the incidental sharing of losses where they occur

The differences lies in the fact that under Islamic Law, the proportion of the profits and losses must be determined before hand, no room for speculation or presumptions. While under statutory law if the proportions are not stated the presumption is that they are to be shared equally.

Another important distinction between the two is while under statutory laws, the definition expressly excluded incorporated companies of all categories, this limitation is not found under Islamic law, under which partnership is wide enough to cover companies and there is hardly any distinction between the two.

Another peculiar nature of partnership under Islamic law is in the different manner it was understood and recognised by the various schools of jurisprudence, such diversity makes our task in discussing it all the more difficult.

1.11 NATURE AND SCOPE

Partnership under Islamic law is a contract, which may generally be entered into either by words of mouth or in writing. It has been submitted that though Islamic legal theory diverging from an explicit Quranic ruling denied the validity of documentary evidence and restricted legal proof to the oral testimony of witnesses, religious lawyers took cognisance of the indispensability of written contracts to commerce by compiling formularies. Examples cited are the Shurut work of Tahawi and Kitab al-asl of Shaybani, which began with a suggested formula for writing a partnership.[71] Other legal literature are Kitab al-mabsut of sarakhsi, Badai as-sanai fi tartib ash-sharai of Kasani, Al-muwatta of Imam Malik, Al-Mudawwana al-Kubura of Sahnun, Kitab-al-umm of Shafi'i to mention but a few.

It has been argued that writing is one of the sine quo non of a partnership contract. Imam Sarakhsi was among the proponents of this view, he canvassed that partnership is a contract which continued for a period of time, therefore writing of the contract is necessary; that if dispute arises at anytime it may be referred to the deed. He supported his opinion with provisions of the holy Qur'an which states :-

> **O ye who believe! When ye contract a debt for a fixed term record it in writing. Let a scribe record it in writing between you in(terms of)equity. No scribe should refuse to write as Allah hath taught him, so let him write, and let him who incurreth the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof. But if he who oweth the debt is of low understanding, or weak, or unable himself to dictate, then let the guardian of his interests dictate in (terms of) equity. And call to witness, from among your men, two witnesses. And if the men be not (at hand) then a man and two women, if such as ye approve as witnesses, so that if the one erreth (through forgetfulness) the other will**

remember. And the witness must not refuse when they are summoned. Be not averse to writing down (the contract) whether it be small or great, with (record of) the term thereof. That is more equitable in the sight of Allah and more sure for testimony, and the best way of avoiding doubt between you, save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand. In that case it is no sin for you if ye write it not. And have witnesses when ye sell one to another, and let not harm be done to scribe or witness. If ye do (harm to them) ho! it is a sin in you. Observe your duty to Allah. Allah is teaching you. Allah is knower of all things"[72]

It is also supported with the practice of the Holy Prophet of having any purchase of slave by him written down. That once it was written in this way:-

"This is the deed which is mentioned the purchase of a slave by Muhammad the messenger of God, from Udad bin Khalid bin Housa the jew"[73]

It was contended further that when people do any business together they are likely to have disputes and differences of opinion over money matters. It is therefore important that such matters involving money, property or other articles of value, should be written down in form of a contract and signed by both parties in presence of witnesses. That this will eliminate many unnecessary disputes as well as safeguard and protect the right of all concerned[74].

The burning question for our consideration is whether the requirement of written agreement is a necessary ingredient to the formation of a partnership agreement. In our opinion, it is not. The principles with which we are concerned here rests on the rule of evidence, which requires oral testimony, meaning even where the agreement was reduced to writing, the persons that witnessed it need to testify orally in order to give credit to the document. In consequence a written document, in the absence of oral testimony may at best serve the purpose of identification only.

Nevertheless, the importance that underlies a written agreement in the formation of partnership is prominent. Considering the intricacies of contemporary business and industrial

development, especially in reckoning with the provision of the Holy Qur'an relating to having contracts reduced to writing; couple with the advantages of making reference to it for settlement of dispute makes its significance to be scarcely denied.

By and large, in so far as formation of partnership either by words of mouth or in writing is concerned the position under both Islamic and statutory laws are the same save in the case of limited partnership, where formalities are required for registration.

Under Islamic law partnership is generally divided into two broad categories viz:- proprietary partnership and contractual or commercial partnership. For a clear understanding of the nature of partnership under Islamic law we need to consider it from its different categories as enumerated by various jurists.

One of the categories is Mudarabah, its nature dictates that one of the parties provides the capital while the other provides labour and both share profits according to a predetermined proportion. It consists of a few broad and simple principle which may be outlined as follows:-

[1] Unlike master and servant relationship where the employer must pay the salary of his employee, irrespective of whether he gains or loses in his business under Mudarabah the employee is considered as a partner and is entitled to a share in the profits if any.

[2] The capital contribution is one sided, the other partner's contribution is in the form of his labour or skill.

[3] Where there is loss, the partner contributing skill or labour gets nothing and the loss is borne by the owner of the capital.

Another type of partnership is that which one partner provide land or garden while the other provide labour and the produce is shared between them according to an agreed proportion they are known as "muzaraa" and "musaqat" respectively.

In some other instances the partnership may be of such a nature that the partners contribute equally and share both profits and losses equally.

This is more pronounced in Mufawada partnership. The level of the partners' commitment varies according to the different schools of jurisprudence. According to Maliki law the commitment is confined to the partnership with emphasis on delegation of discretionary

authority to conduct trade with the partnership capital. While under the Hanafi complete equality in all financial matters is the sine qua non of unlimited investment partnership (Mufawada) coupled with this, is the requirement that all of the partner's eligible capital must be included[75].

The Shafi'i Jurists argued that Mufawada partnership is null and void, except if the two partners take the term to mean a mingling of the capital trading with it, and then a division of profit. Whatever any of the partner's gains from other transaction not connected to the partnership would belong to him exclusively. If however, the two partners declared that the term Mufawada implies a partnership in profits from any and all endeavours whether connected with the partnership or not then the partnership is invalid[76]

It may also be that the partners neither contribute equally nor share profits equally; this is more pronounced in inan partnership.

Likewise the partnership may be that of artist and technicians or manual labourers who joined force together and share whatever income they derived from such profession.

An another peculiar characteristic of Islamic partnership is that which enables two or more person that has neither capital nor skill to do business on credit and share the profits and losses among themselves.

Like statutory laws, carrying on business under Islamic law does not necessarily require the physical participation of all the partners, by agreement it is possible that many people contribute capital but the business is carried out by one or more of them.

Another important nature of Islamic partnership in contrast to statutory law is the recognition of property partnership within its scope. This type of partnership has to do exclusively with joint ownership of property without joint exploitation. The recognition of this type of partnership is found in the early legal writing of Hanafi jurist[77].

1.12 RULES GOVERNING THE EXISTENCE OF PARTNERSHIP

Under Islamic law there are certain fundamental principles to the existence of a valid partnership. Some of them includes:-

[i] Loss is to be distributed in proportion to the invested capital and will be borne by the owners of that capital. This implies that no partner can escape liability for loss on his proportion of the total capital and any partner who has not invested any capital will not be liable to any loss of capital[78].

This marks a significant difference with the position under statutory laws, where once you are a partner, you are deemed to be liable to the extent of your last kobo irrespective of the status of your capital contribution.

[ii] Profits are to be distributed among the partners in proportion settled by them at the time of the contract, and no fixed amount can be settled for any party[79]. This is necessary to do away with uncertainty and usury since apparently none of the parties can know beyond doubt that profits will result to the extent that he would be entitled to a fixed amount. If it was fixed without regards to whether profits are made or not then it would clearly fall within the ambit of usurious transaction. This is not within the contemplation of statutory laws, the aim of which is to protect the parties agreement irrespective of whether they involve usury or doubt provided the parties agree.

[iii] Profit or losses are determined at the close of the business. This will allow losses to be made good by profits, until the accounts of the business are finally settled. At settlement of account, liabilities are first settled, then followed by the realisation of capital contribution by the respective partners; if there is shortfall it is deemed loss. In other words like the statutory position, the profit or losses is that difference in the amount of capital at the beginning of the business and at the time of settlement of account after the meeting all liabilities and running expenses which inter alia includes capital contribution.

[iv] Under Islamic law, a partner, cannot without the consent of his co-partner procure additional capital from third party under a Sharikah or Mudarabah agreement or supply a part of the partnership capital to a third party for a purpose of another partnership agreement. In other words no partner can introduce another party to the partnership nor

commit his co-partner's to another partnership without their consent. The same applies under statutory laws.

[v] In line with the above no partner during business under Mudarabah or Sharikah agreement can without the express consent of the capital owner lend out or borrow money from or for the partnership business. It is however, permissible for him to make credit sales or purchases except if he is expressly prohibited; provided the value of goods or services so purchased on credit does not exceed the total value of the firm.

[vi] Under Islamic law no partner in the case of Sharikah bear the liability of other partners except where such liability have been accepted by the firm with consent of all the partners. While in case of Mudarabah financial liability of the capital owner is limited to the amount provided by him or where he consented to borrowing or credit purchase; his liability is increased to that extent[80].

1.13 CAPACITY OF THE PARTIES TO ENTER INTO PARTNERSHIP AGREEMENT

For a person to enter into a partnership agreement, he must possess the requisite legal capacity the same with that required for an ordinary contract. That is to say he must be legally competent person capable of disposition of property and giving mandate. In effect he must possess the following qualifications:-

1. ***Adulthood:-*** he must have attained the age of puberty which is determined by attainment of the age of 16 or the ejection of seminal liquid or the growth of coase hair around the private organ. This excludes minors. This position is more or less the same with that under statutory law. Since infants are not legally responsible, any attempt to engage in partnership with them will render the party so doing solely responsible.
2. ***Sanity:-*** he must be sane and of full understanding; this excludes mentally incompetent person. This, when compared with statutory laws position may boil down to the same thing. It is only valid if the other party is not aware of the mental state of mind of the insane person but if it can be proved that the other party was aware then the partnership becomes voidable.

3. ***Corporation:-*** whether a corporation can also join partnership. As already discussed, there is no clear-cut distinction between corporation and partnership. They are more or less one and the same things. It is quite possible for a group of partners to enter into another partnership with another group. This marks an important distinction between partnership under Islamic law and that under statutory laws; in that under the statutory laws there is a clear distinction between partnership and corporation and certainly an incorporated body can enter into partnership with another body or individual

4. ***Women:-*** both men and women are free to engage in partnership. Islamic law has recognised the right of women to own property, they can therefore legally engage in partnership. This position is the same with that under statutory laws.

5. ***Freedom:-*** He must be a free person, this excludes slaves save in the case of a slave that is about to regain his freedom Mukatib, who can with the consent of his/her master engage in partnership. This position does not fall within the purview of statutory laws. This may be due to the adverse position taken against slavery in the contemporary world.

6. ***Religion:-*** It has been recognised to form a barrier for a muslim, he cannot enter into a partnership with non-muslim, except if he does not absent himself from the non-muslim partner in transactions pertaining to purchase, sale, acquisition or exchange and payment of debt. It was contended that this is necessary in order to safeguard the dangers of usurious transaction and the possibility of trading in commodities that are unlawful to muslim[81]. However, according to Abu Hanifa, Abu Yusuf and Muhammed Shaybani a partnership between a muslim and a non-muslim in Islamic state (dhimmi) though not recommendable, is permissible.[82] This also does not fall within the purview of statutory laws. It may be because most states and Nigeria in particular being a secular state, the laws are made to be of general application to both the muslims and non-muslims alike.

7. ***Apostate:-*** According to Hanafi a partnership is not permissible with a male apostate though it is permissible with a female apostate but not recommendable[83]. The

difference in position for male and female apostates might have resulted because of the difference in penalties under the Hanafi School in respect of male is death while in case of female is imprisonment. Unfortunately, this also does not fall within the purview of statutory laws in that there is generally freedom of religion entrenched in the constitution as such the question of apostasy does not arise.

8. ***Bankrupt:-*** Like the position under statutory laws, a bankrupt is equally interdicted under Islamic law. He lost all rights in dealing with his property, as a result can not lawfully have the capacity to enter into partnership with any other person.

1.14 FORMATION OF PARTNERSHIP

As already noted like the position under statutory laws, under Islamic law also partnership may be formed either by words of mouth or in writing though a written contract has been submitted to be most preferable. Other requirement for a legally binding partnership agreement are:- consent of parties, legal competence, subject matter of the agreement, contribution and two competent witnesses.

Though document fulfil no role because it does not constitute competent evidence in the event of litigation. It would certainly play significant role having regards to the intricacies of modern business transaction and may serve the purposes of identification, which is to be verified, and confirmed by the same witnesses that signed it.

Likewise, as it is the position under statutory laws, under Islamic law it is as well ideal for the parties to agree on the following before hand.

[i] The proportion of division of profits

[ii] Duration of partnership

[iii] The type of business to be involved in

[iv] Management aspects

[v] Settlement of dispute by arbitration

1.15 REQUIREMENT FOR REGISTRATION

Ordinarily, there is no law that makes registration a mandatory requirement for the operation of partnership. However it is our submission that there would be nothing wrong to introduce a condition for registration under the doctrine of public policy. Same position applies under statutory laws save for registration of partnership under the limited partnership Act.

From the foregoing discussion we have seen the reasons that informs the choice of comparative analysis of partnership laws and the means through which the work would be accomplished. As a foundation we traced the historical development of partnership laws both under statutory and Islamic laws. We have equally considered the sources of the laws and the definition of partnership including its scope. In the same vein means for determining the existence of partnership have also been considered, we have seen some difference in the consideration of what is partnership. For instance we have seen that under statutory laws co-ownership, sharing gross returns, produce or profit does not on its own amount to partnership but under Islamic law such is recognised and categorised as proprietary partnership. Capacity of parties to enter into partnership have also been considered; there again we have seen some differences and similarities in the capacity of the persons listed and discussed such as that of infant, married women, mental patient, corporation and Bankrupt persons. We have also discussed the requisite issues that should be borne in mind when forming and drafting the partnership agreement.

CHAPTER ONE: NOTES AND REFERENCE

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27 Anson Banks, R.C.I, op cit. P:73
28 Adam v Newbigging (1888) 13 App Cas 308 at 315 per Lord Halsbury
29 Partnership Act 1890 s2(1) Kaduna State Partnership op cit. Section 5(a)
30 Fletcher K.L., op cit., :P:44
31 Partnership Act 1890 S2(2) Kaduna State Partnership Edict op cit. Section 5(a)
32 Anson Banks, R.C.I., op cit. P.77
33 Partnership Act 1890 s.2(3) and Kaduna State Partnership Edict op cit. Section 5(c)
34 Money Lenders Ordinance
35 Fletcher K.L. op cit., PP: 56-57
36 (1878) 7ch D.115
37 Kaduna State Partnership Edict op cit. Section 6 provides that in the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than (one hundred kobo) in the naira, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied. See also Partnership Act 1890 Section 3
38 Fletcher K.L. op cit., P:61
39 Charles D.D. op cit., P:14
40 Lovell & Chrismas v Beauchamp(1894) A.C. 607 per Lord Herschell
41 (1899) 1 Ch 343
42 (1821) 5 B & Ald 147 at 157
43 Blackstone (1766) Commentaries Vol. 1, Pp: 302-303
44 Ibid. at P:304
45 (1849) 4 Exch 17 at P: 19 Pe Patterson J
46 Jones v Noy (1833) 2M & K125

47 Sadler v Lee(1843) 6 Bear 324

48 Kaduna State Married Women Property Edict Cap 96 Laws of Kaduna State 1991 Section 6 provides: Subject to the provisions of this Edict, married women shall:
(a) *Be capable of acquiring, holding and disposing of any property,*
(b) Be capable of rendering herself and being rendered liable in respect of any tort, contract, debt or obligation.
(c) Be capable of suing and being sued either in tort or in contract or otherwise and
(d) *Be subject to the Law relating to enforcement of judgement and others, in all* respects as if she were feme sole.

49 (1980) W.L.R. 135 at P:141

50 Bankruptcy Act (1914) U.K. Section 155

51 *Charles D.D. op cit. P:50*

52 Anson Bank R.I.C. op cit. P:168

53 (1890) Section 24

54 Fletcher K.L. op cit., P:102

55 *Anson Bank R.C.I. op cit., PP:181-182*

56 Anderson v Anderson (1857) 25 Beav 190

57 Limited Partnership Act (1907) Section 5

58 Tarik Tabri P:1128 & Ibn Sa'ad P:83

59 *Sahih Bukhari Vol I: P:521 No:2151*

60 Siddiqi M.N.(1985) Partnership and profit-sharing in Islamic Law, The Islamic Foundation, Leicester, U.K. P. 12

61 Ibid. P:13

62 *Afzal-Ur-Rahman* M.A.*(1980)* Economic Doctrine of Islam, *Vol. 1 Islamic Publication* Limited Lahore, Pakistan pp. 231 - 232

63 Al-Sana'aniy M.I. (N.D.) Sabul-al-salam Sharh Bulug al-maram min Adillatil-Ahkam, Dar al –fikr Vol. II p. 77

64 *Ibid. p. 77*

65 Al-Jazairiy A.J. (1992) Minhaj al-muslim, Dar al-fikr Beirut p. 379

66 Abu Dawud and Hakkim as quoted in Ibid. p. 379

67 Al-Daruqutniy as quoted in Ibid. p. 379

68 *Sahih Bukhari, Ibid. P: 519 No: 2145*

69 Afzal-UR-RAHAMAN, Ibid. P235

70 Siddiqi M.N. op cit. at P:15

71 Udovitch A.L. (1970) Partnership and Profit Sharing in Medieval Islam Princeton *University Press, New Jersey, U.S.A. PP:9-10*

72 Holy Quran 2:282

73 Afzal-UR-Rahaman M.A. op cit. at P:236

74 Ibid at PP:229-230

75 *Udovitch A.L. op cit., P:48*

76 Shafi'i kitab al-umm, cairo as quoted by Udovitch, op cit., PP:29-30

77 Al-Qudauri A.L. Ibid P:151

78 Siddiqi M.N. op cit. at P:16

79 *Ibid :6*

80 Ibid PP:17-18

81 Sahnun, Mudawwanah al-Kubra, Vol. 12, P:70 as quoted by Udovitch A.L. op cit. at P:51

82 Shaybani, Asl Sharika, fol 77 11:17-19 as quoted in op cit. P:126

83 Ibid. at P:126

CHAPTER TWO

2.0 PARTNERSHIP AND OTHER RELATED CONCEPTS

Partnership shares a lot of similarities with other seemingly related business concepts such as Company and Agency. Our task is to examine these concepts and discuss the salient features that marked their differences and similarities with particular emphasis to the concept of legal personality and limited liability as they apply to partnership both under Islamic and statutory laws. The relevant question is whether partnership enjoys the benefits and advantages of legal personality and limited liability like incorporated Companies under the Companies and Allied Matters Act.

Comparatively, Partnership in most cases serve the needs of relatively small or medium business ventures comprising of few groups of people reposing confidence in each other. Whereas incorporated company may consist of large number of persons that need not know each other with large business undertaking hence the necessity of conferring legal personality and perpetual succession. Gower rightly pointed out that partnership law is based on the law of agency where each partner is the agent of the others. It therefore affords a suitable framework for an association of a small body of persons having trust and confidence in each other. A more complicated form of association with a large and fluctuating membership requires a more elaborate organisation, which ideally should confer corporate personality on the association. It recognise that it constitutes a distinct legal person, subject to legal duties and entitled to legal rights separate from those of its members.[1]

The necessity of choosing the type of business enterprise to engage in; whether incorporated company or partnership rests on the scope of membership. The freedom of choice for individual has been posited on the distinction between

partnership and companies which is often merely one of machinery and not of function. If a small number of persons wish to carry on business in common with a view to profit they may either form themselves into a partnership or a company. Normally the only restraint on their freedom of choice is that, if their numbers are too great for that of mutual trust appropriate to a partnership, they must form a company. This is due largely to an arbitrary maximum number of 20 persons imposed by statute for non-professional associations[2]

The above features are more pronounced with the statutory types of partnership rather than with those under Islamic law. Issues of incorporation, legal personality, perpetual succession, limited liability etc are more associated with statutory types of partnership and strictly speaking have no application under Islamic law.

When we turn to the relationship of Partnership to the law of agency, we shall see, as previously observed that partnership law is based on the law of agency. The operation and transaction of partnership business by its members with third parties rest squarely on the operation of principal and agent relationship. This does not however meant that the two concept are identical and indistinguishable, while the elements of agency may be found in partnership, it is not all elements of partnership that can be found in agency.

An agent while transacting business under the law of agency has a single status but a partner under partnership law act in dual capacity viz: as agent as well as principal. The aim of this chapter is to examine these differences and similarities between partnership as a concept and other seemingly related concepts with particular references to incorporated companies and the doctrine of agency.

2.1.0 PARTNERSHIP AND INCORPORATED COMPANY

Both partnership and Incorporated Companies are largely regulated by statutes. As already highlighted, the distinction between the two is largely that of machinery rather than of function. As far as function is concerned, it would be correct to assert that they, to a great extent serve the same purpose. They are employed in trade of various magnitude, where the difference set in, start with the number of people that can come together to carry on the business as a partnership or company. The maximum number of people for non-professional partnership is 20 while a private limited liability is 50 and public company unlimited. Other differences has to do with status, while an incorporated company is regarded as a legal person, partnership does not possess such personality. The legal personality of an incorporated company crowned it with some other distinct advantages, such as perpetual succession, limited liability etc. Which are lacking in partnership.

2.1.1 LEGAL PERSONALITY

Legal personality is exclusively a feature peculiar to incorporated companies only. Partnership lack legal existence separate from its members. It has been observed that a partnership firm as such has no existence, partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity. The registration of the firm was in reality the registration of the individuals trading under the firm name.[3]

Lord Lindley in explaining the dual capacity in which a partner acts i.e. both as a Principal and agent observed:-

> "As a principal (a member of an ordinary partnership) is bound by what he does himself and by what his co-partners do on behalf of the firm, provided

they keep within the limits of their authority; as an agent he binds them by what he does for the firm, provided he keeps within the limits of his authority"[4]

On the other hand, the bedrock of the Nigerian Company law is the fact that every incorporated company is crowned with a legal personality. It is considered as a legal person in its own right quite distinct from the members comprising it. This principle is in other legal fiction referred to as artificial person, this status conferred on a company separate legal existence from its members with some important consequences. It has been submitted that the feature of corporate existence enables the company to own property, to continue in existence despite changes in ownership and, most importantly, to keep the liability of the company separate from that of its members[5] .

The provision of the Act is very explicit on these issues. It provides:-

"As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal ...[6]

This provision may be read in conjunction with the following provisions:-

"Except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorised business or objects, have all the powers of a natural person of full capacity".[7]

The above provisions clearly establish and recognise the legal personality of incorporated companies with the powers to carry on its function or business as a

natural person and even more with perpetual succession, an attribute that is lacking in a natural person.

It has also been put forward that the fundamental attribute of corporate personality from which indeed all the other consequences flow is that the corporation is a legal entity distinct from its members. Hence it is capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members. In other words it has legal personality and is often described as an artificial person in contrast with a human being, a natural person[8]

The leading authority on legal personality of a company, which has proved to be a cornerstone of company law, is the case of

Salomon v Salomon & Co. Ltd[9]

Where the House of Lords held that it is not contrary to the true intent and meaning of the Companies Act 1862 for a trader, in order to limit his liability and obtain the preference of debenture-holder over the creditors, to sell his business to a limited company consisting only of himself and six members of his own family the business being then solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with.

In that case a trader sold a solvent business to a limited company with a nominal capital of 40,000 shares of £1 each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the share holders. In part payment of the purchase-money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase-money. These shares gave the vendor the power of outvoting the six other shareholders. No shares other than these 20,007 were ever issued. All the

requirement of the Companies Act 1862 were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors:-

Held, that the proceedings were not contrary to the true intent and meaning of the Companies Act 1862, that the company was duly formed and registered and was not the mere "alias" or agent of or a trustee for the vendor; that he was not liable to indemnify the company against the creditors' claims; that there was no fraud upon creditors or shareholders; and that the company (or the liquidator suing in the name of the company) was not entitled to rescission of the contract for purchase.

This decision as observed by Gower open up new vistas to company lawyers and the work of commerce. Not only did it finally established the legality of the "one-man" company and showed that incorporation was readily available to the small private partnership and sole trader as to the large public company, but it also revealed that it was possible for a trader not merely to limit his liability to the money which he put into the enterprise but even to avoid any serious risk to the major part of the different existence between the company and the proprietor, the proprietor may even have priority as a secured creditor in case of liquidation.

The aim of this legal devise is to establish that once a company is incorporated, it is in law recognised as a person in its own right with all the rights and obligations of a natural person. However, since it has no flesh and blood as a natural person, it acts through its directors, as such it is termed an artificial person. The disconnection of a company and its proprietors made it possible for the proprietor to be employed by the company and be subject to all rights of an employee. One of the cases that demonstrate the extent of the recognition of the legal personality and

corporate existence of a company following the decision in Salomon's case is the case of:-

Lee v Lee's Air Farming Ltd[10]

In that case Section 3(1) of the Worker's Compensation Act 1922, of New Zealand, provides that if "personal injury by accident arising out "of and in the course of the employment is caused to a worker, "his employer shall be liable to pay compensation "and "worker" is defined in section 2 as "any person who has entered into or "works under a contract of service with an employer "whether remunerated by wages, salary, or otherwise.

The appellant's husband, who had formed the respondent company for the purpose of carrying on the business of aerial top dressing, was the controlling shareholder of the company, and was by its articles of association appointed governing director and employed at a salary as its chief pilot. In his capacity as governing director and controlling shareholder he exercised full and unrestricted control over all the operations of the company. Pursuant to its statutory obligations the company had insured itself against liability to pay compensation in the case of accident to him. While piloting an aircraft belonging to the company in the course of aerial top-dressing operations the aircraft crashed and he was killed. On a claim by the appellant against the respondent company for compensation, alleging that at the time of the accident her husband was a "worker" employed by the respondent company within the meaning of the Workers Compensation Act, 1922, as amended:-

Held, that the deceased was a "worker" within the meaning of the Act. His position as sole governing director did not make it impossible for him to be a servant of the company in the capacity of chief pilot, for he and the company were separate and distinct legal entities which could enter, and had entered, into a valid contractual

relationship, which was not invalidated by the circumstances that the deceased was sole governing director in whom was vested the full government and control of the company and also the controlling shareholder. They were separate legal entities also so as to enable the company to give orders to the deceased. One person may function in dual capacities, and acting in one capacity give orders to himself in another capacity. The contractual relationship was that of master and servant, and a contract of service was entered into and operated and the deceased was a "worker" within the statutory definition.

It is worthy to note however, that the legal fiction of legal personality or corporate soul is not in all case invulnerable. In quite a few cases the corporate shell and independent existence of a company has been disregarded by piercing the corporate shell. This is so especially where fraud is discovered or where the proprietors are discovered to be abusing or using it as front for illegal business or fraud. The court would attribute what would ordinary be the acts or omissions of the company to the shareholders, thus identifying the company with its owners; thereby denying to the company its legal personality and the shareholders the protection for limited liability. This concept is known as piercing or lifting the veil of the corporate soul. Thus in:

Gilford Motor Company Ltd v Horne[11]

The Plaintiff Company bought the various parts of motor vehicles from manufacturers, assembled the parts on the company's premises and sold the products under the name of Gilford Motor Vehicles. They also sold separate parts, which were handed over to the buyers for cash.

An agreement dated May 30, 1929, the defendant was appointed managing director of the plaintiff company for a term of six years form September 1, 1928.

Clause 9 of the agreement provided that: "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit, interfere with or endeavour to entice away from the company any person, firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company". The employment of the defendant as managing director was determined in November, 1931, by an agreement between the parties under which the defendant was to receive a fixed sum payable in instalments. Shortly afterwards the defendant opened a business for the sale of spare parts of Gilford vehicles. In an action by the plaintiff company to enforce the covenant:- the Court of Appeal held that, the Defendant company was formed and was carrying on business merely as cloak or sham for the purpose of enabling the Defendant Horne to commit the breach of covenant that he entered into deliberately with the plaintiffs on the occasion of and in consideration for his employment as Managing director and that in the circumstances the covenant was not wider than was reasonably necessary for the protection of the plaintiff company's trade and was therefore enforceable by injunction.

In contrast, a partnership firm is not legally recognised as legal entity distinct from the partners composing it. Though in taking partnership account, administering of its assets, bringing action by or against the partners, income tax assessment may all be done in the firm's name. The firm cannot however be a tenant in its own right nor can a partner be employed by the firm because no Man can employ himself. Lord Lindley observed that:-

> "The law, ignoring the firm, looks to the partners composing it, any change amongst them destroys the identity of the firm; what is called the property of the firm is their property and what are called the debts and liabilities of the

firm are their debts and their liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of a firm of which he is a member"[12].

The right of a partnership firm to sue and be sued in the firm's name has been conceded. Thus in the case of:-

A.C.B Plc Vs Emostrade Ltd[13].

The court of Appeal held that a partnership or firm can sue and be sued even if it is not a legal person stricto sensu.

A partnership firm acquired the right to sue or be sued in the firm's name not because it is a juristic person. It is rather because of it's status as a juridical personality recognised by law. The law recognise the capacity of a partnership firm to sue and be sued. This position is now clear under the laws of Kaduna State. Thus in the case of:

Peat Marwick, Ani, Ogunde & Co. Vs Okike[14].

The court of Appeal held that generally no action can be brought by or against any party unless such a party has been given an express or implied authorisation by statute. However, actions by and against partnership firms are now regulated by special code of procedure, by order 11 rule 26 of Kaduna State High Court (Civil procedure) Rules, 1987 whereby partners carrying on business within the jurisdiction of the court may sue and be sued in the firm's name.

The recognition of the firm name means the firm is a juridical personality but it does not in any way confers the firm a legal personality, it is only a convenient method of describing a group of persons associated together in business. Lord Lindley observed:-

" The name under which a firm carries on business is in point of law a conventional name applicable only to the persons who, on each particular occasion when the name is used, are members of the firm"[15]

2.1.2 LEGAL PERSONALITY AS IT APPLIES TO ISLAMIC LAW

Islamic law being practical in approach does not recognised legal personality of a business enterprise. Whatever name the parties chooses to call their business, when there is a dispute, individual members are responsible and in particular a plaintiff sues the person with whom he transacted with, who would in turn be indemnified by his colleagues or co-partners.

Strictly speaking, Islamic law principles does not make provision of corporate or legal status of a business. Partners will not be allowed to use a devise with a view to escape liability or to use such a body as a cover. Third parties are always entitled to sue the person they had direct dealings with and such a person will then be reimburse by his co-partner.

2.1.3 LIMITED LIABILITY

Hand in hand with the concept of legal personality is that of limited liability. One of the most important advantages of incorporation following legal personality of the company is the limited liability of its members.

Like legal personality, limited liability is to a great extent; a concept peculiar to incorporated companies alone; with very little significance or application to partnership. It has been canvassed that partnership as a sub-species of unincorporated associations with the exception of limited partnership, has always involved unlimited liability on the part of its members. Each partner has power to bind himself and his

co-partners by acts in ordinary course of the partnership business; notwithstanding any private limitation of authority, which might have been agreed between them. Each partner is liable to the extent of his last kobo to creditors; a consideration, which dictates that, the first canon is to pick one's partner with great care. There can be no doubt that the limitation of shareholders liability to the amount, if any, unpaid in respect of the nominal value of his share is one of the chief attraction of the limited liability company. The unlimited liability of partners, on the other hand, whether joint or joint and several, is a major hazard in the ordinary partnership[16]

Except in the case of limited partnership, which bears a close similarity with incorporated company, where the liability of some of its members is limited. In general partnership the liability of all the partners is unlimited.

Lord Lindley posited the liability of the partners thus:-

> "The partners are agents and sureties of the firm. Its agents for the transaction of its business, its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets"[17]

On the other hand the advantages of limited liability is one of the chief attraction of incorporation. This concept restricts the liability of proprietors of a company in relation to the Company's debts and obligation to the amount of shares they subscribed to the extent of the portion that remained unpaid. If they have fully paid for their shares, they are no more liable to make any payment towards meeting the debts of the company. Where the company is limited by guarantee, the members would agree in the memorandum of association to act as guarantors of the company's liabilities. Even then, the guarantors are bound only to the extent of the amount each

of them subscribed to guarantee in the memorandum.[18] It therefore follows from the fact that a corporation is a separate legal entity, that its members are not as such liable for its debts.

Hence in the absence of express provision to the contrary the members will be completely free from any personal liability. The members' obligation is not to third parties but to the company directly and it is only limited to that portion remaining unpaid in the shares they subscribed[19]

It therefore follows that each member is liable to contribute when called upon to do so, the full nominal value of shares held by him if the shares are issued "at par". Where they are issued at a premium he must meet calls up to that higher value in so far as this had not already been paid. In respect of unlimited liability companies however, different consideration applies, in that members are bound to meet the whole liability of the company because as the name suggest their liability is unlimited.[20]

The above position may be contrasted with unincorporated association like partnership, not being a legal person it cannot be liable. The obligation entered into on its behalf can bind only actual officials who purports to so acts, or the individual members if the officials who acted have actual or apparent authority to bind them. In either event the persons bond will be liable to the full extent of their property. Each partner is an agent of all the others and his acts done in "carrying on in the normal way business of the kind carried on by the firm" binds the partners as a whole. Only if the creditors know of the limitation placed on the partner's authority will the other members escape liability. Moreover an attempt to restrict the partners liability to partnership funds by a provision to that effect in the partnership agreement will be ineffective even if known to the creditors. They will only be able to restrict their

financial liability in respect of acts otherwise authorised by an express agreement to that effect with the creditors concerned. Except in the case of limited partnership[21]

It is therefore clear that one of the major disadvantages of partnership organisation, which may discourage potential investors from it, is the fact that it creates unlimited personal liability for each partner. If the business go bankrupt, the creditors can recover against all or anyone of the partners and the fact that any of the partners can bind the other partners personally to business debts, contracts, or legal actions aggravated the risk and one may become the victim of his partner's action[22].

2.1.4 CONCEPT OF LIMITED LIABILITY UNDER ISLAMIC LAW

When viewed from Islamic law perspective, strictly speaking there is no such a thing like limited liability. Each partner is liable to the debts and obligation of the partnership business in proportion to his share of capital contribution. That is to say each partner may be liable to loss either more or less than his capital contribution depending on the circumstances. It shall not be lawful for the partners to in any manner agree to limit their liability; for loss always follow the capital investment not agreed proportion. This position has been beautifully summarised thus:- The principles that in the case of a loss in joint stock business based either on Sharikah or Mudarabah agreement, the loss will have to be shared in proportion of the capital invested, is universally agreed by all schools of Islamic jurisprudence. Siddiqi quoted sheikh Ali-alkhafif saying:-

> "Shortage or loss will always be distributed in proportion to capital proper. All imams agreed on this in spite of their belonging to different school of thought. Any condition agreed to in contravention of this principle would be declared null and void and would not be executed"[23]

The question of liability arose when there is loss or reduction in capital, in such event the liability is borne by owners of the capital. Thus under Mudarabah the working partner is not liable to any loss except where he is guilty of breach of trust or misdeed. It is therefore illegal to settle any condition in which both capital owner and working partner would be made liable for any eventual loss. Ibn Rushid explains the principles thus: "There is no deference's of opinion among Muslim regarding the validity of Mudarabah and all are agreed that the man actually engaged in business will not be made liable for the loss of any part of the capital proper, provided the loss is not due to misdeed on his part". While Shamsuddean Al-Sarakhsi was also quoted as saying "loss means the part of the capital that is destroyed. There is no difference of opinion regarding the fact that to contract for a ration of loss that is not in proportion to capital investment is a condition that is void. Under Mudarabah, the party working with capital acquired under Mudarabah agreement, cannot be legally made liable for any part of the loss"[24]

The same position was found in Kitab-al-Qirad of Imam Maliki's Muwatta[25]. Likewise both Shafi'i and Hanbali jurists share the same opinion. This calls for extreme piety and fear of God in the transaction; especially in the case of working partner who is not subject to liability for loss, this does not open room for him to neglect the business or perpetrate fraud on the capital. If he does that, God is seeing all that he does and that would amount to breach of the trust reposed on him.

It is however, worthy to note that though the partners in inan partnership are liable in proportion of their capital contribution, the liability is only in respect of transaction within the limits of the business enterprise as agreed by all the other partners. They are not liable for transaction made on personal account. Likewise where a partner transgresses the limits set by the agreement, such transaction would

be considered as his personal one and therefore he alone is liable. Normally, the financial liabilities of the partnership will be within the limits of its capital except where the partners increased it by agreement. The same principles applies to Mudarabah partnership, in that the financial liability of the capital owner may exceeds the invested capital only where he has given permission to working partner to borrow or purchase on credit. In the absence of such permission the working partner would be responsible if he exceeds the limits[26].

Unlimited liability is even more pronounced in the case of Mufawada i.e. unlimited investment partnership. As the name suggest both partners are equally liable for any obligation undertaken by either of them in exchange for something valid within the partnership.[27]

2.1.5 PERPETUAL SUCCESSION

Perpetual succession is the ability of the body to survive changes of individual members either as a result of retirement; transfer of share, death or other supervening circumstances.

Unlike an incorporated company, the death or withdrawal of any one partner automatically terminates a partnership. That not only forces the surviving partners to buy out the deceased partner's interest, but it can also cause problems in reorganising the business and getting it started again. This, along with other unsavoury and excruciating consequences stand, as the major disadvantages of choosing partnership type of association over incorporation of a company.

Other consequences, for lack of perpetual succession in partnership starts with the firm name, which is no more than a convenient means of describing the partners who for the time being make up the firm, thus whenever the partners change the name

must take on a new meaning. This may lead to a number of complications for example:-

An authority given to trustees to lend money to a firm would not, as a general rule, authorise a loan to the continuing partners after one partner has died or retired. Likewise, an authority given to partners to take out insurance in their names does not authorise them to insure in the names of themselves and a third party whom they have subsequently taken into partnership. The same applies to where a testator appoints a firm to be the executors or trustees of his will. Only partners at the time the will was made can act; or where a firm is by name appointed to a particular office, it is the partners at the time of such appointment who will in law, fill that office, since the firm, as such, cannot[28].

Another unsavoury effect of a change in the firm may have to do with existing contractual rights and liabilities. Any change in the constitution of the firm may determined or amount to a breach of the contract, especially where it was framed solely by reference to an existing firm. Thus where a firm of two partners appointed an agent for four and a half years and one of them died before the expiration of that period. It was held that the surviving partner need no longer employ the agent's services, since the appointment was only by reference to the existing partnership. The contract being for a term of four and a half years but only if the parties should live that long[29].

This case may be contrasted with a situation where the contract is not conditional upon the continued existence of the firm, a change in the firm may constitute a breach of contract. Thus in:-

Brace v Calder[30]

A firm of four partners employed the plaintiff as a branch manager for two years, but before the two years expired, two of the partners retired. Though the continuing partners were willing to employ the plaintiff on the same terms as before, the plaintiff declined and sued the four original partners for breach of contract. It was held that the engagement of the plaintiff was for a fixed term of two years and the retirement of the two partners determined the contract and constituted a breach of contract or wrongful dismissal for which the four partners were liable in damages.

These are a few of the disabilities of a partnership for lack of perpetual succession. In contrast it has been submitted that incorporated company, as an artificial person, is not susceptible to the thousands of natural shock that flesh is heir to. It cannot become incapacitated by illness, mental or physical and has not or need not have an allotted life span. Death of a member leaves the company unmoved, members can come and go but the company remained and can go on forever. But on the retirement or death of a partner, the partnership is automatically dissolved, so far at any rate as he is concerned, and he or his estate would be entitled to be paid his share. Though the resulting dislocation of the firm's business may be reduced by special clauses in the articles of the partnership, providing for an arbitrary basis of valuation of his share and for deferred payment but can certainly not be eradicated altogether. With an incorporated company, these problems do not arise. The member or his estate is not entitled to be paid out by the company. If he wished to realise the value of his share, these must be sold, whereupon the purchaser will, only on entry in the share register, become a member in place of the former holder[31]

There are a lot of other advantages in perpetual or continuing existence of company irrespective of change in members or shareholders. It has been observed that if an individual sells his business a difficult question regarding the performance

of existing contracts by the new proprietor may arise. The assignment of a right of personal nature, and the validity of agreement made with customers ignorant of the change of proprietorship may cause lost of confidence. Similar problem may arise on a change in the constitution of a partnership. Where the business is incorporated and the sale is merely of the shares, none of these difficulties arises. The company remained the proprietor of the business; performs the existing contracts and retains the benefits of them; and enter into future agreements. Likewise the difficulties attending vicarious performance, assignments and mistaken identity do not arise[32]

2.1.6 PERPETUAL SUCCESSION UNDER ISLAMIC LAW

Like partnership under statutory laws, as far as the disabilities for lack of perpetual succession is concerned, the same applies to Islamic law of partnership. In fact, Islamic law rejects business transaction on speculation and uncertainties as akin to generating friction. Thus if one of the partners dies, the partnership terminates. Likewise if one partner decided to terminate the partnership, the partnership would come to an end but only after the sale, if any of remaining salcable goods, at the time of the terminations and their conversion to cash. This applies to both Sharikah and Mudarabah with slight differences of opinion, which we shall consider in chapter six and seven. Where the partnership involved more than two partners, the partnership terminates only in respect of the ownership of the deceased and not in respect of the other two or more surviving partners[33].

It has also been unanimously agreed that the contract would terminate in cases of insanity, lack of desecration, necessitating legal restrictions, on appropriation and apostasy[34]. Features, which would ordinarily not affect the existence of an incorporated, company under statute law.

2.1.7 TRANSFER OF SHARES

One of the glaring advantages of an incorporated company is the possibility open to its members or shareholders to transfer their shares to others. This stands as one of the result of the impersonal nature of a company and its standing as a legal person which facilitate the possibility of members coming and going without affecting the existence of the company. A shareholder may transfer his share to another person by surrendering his share certificate and that person submit such to the company for necessary change in the register to be effected. It has been observed that with incorporated company freedom to transfer shares both legally and practically can be readily attained. The company can be incorporated with its liability being limited by shares. These shares constitute items of property, which are freely transferable in the absence of any agreement to the contrary. All it takes is for the transferor to drop out and the transferee to step into his shoe. In contrast to partnership where a partner has a proprietary interest, which he can only assign and the assignment cannot operate to divest him of his status or liability as a partner. It merely affords the assignee the rights to receive whatever the firm distributes in respect of the assignor's share. *Strictly speaking the assignee cannot be admitted into the partnership in place of the* assignor except if all the partners agree, even then the assignor would still be liable for existing liabilities as a partner unless the creditors expressly or impliedly agreed to release him, in such circumstances the equitable doctrine of subrogation will operate to release the assignor of liability[35].

The above inconveniences are not found with incorporated company. Moreover, even where the doctrine of subrogation operates, once a person drops out or a new person comes in that partnership both legally and practically ceased to exist. As a legal devise to circumvent a complete dissolution and winding up, the newly

constituted firm continues with the business of the old firm. By consent of all the creditors, the new firm steps into the shoe of the old one in relations to existing and subsequent right and obligations. It may be observed here that the difficulty of obtaining the consent of all existing creditors and other persons dealing with the firm makes such transfer or change almost impossible.

Likewise, another important factor that makes transfer in the case of partnership difficult is its personal nature, since it is a relationship based on trust and confidence reposed on one another, a fact which may not be the case with regard to the incoming partner; but in the case of an incorporated company the relationship is impersonal.

Another problem facing transfer of shares in case of partnership is the nature of the share itself. It has been submitted that the term "share" in respect of partnership is notoriously difficult to define. It has been understood in common practice as an interest in profit of a business and of capital or equity stake therein. However, in legal terms, such an approach is too simplistic, since the constituent element which go to make up a share are not only infinitely variable but subject to alteration during the continuance of the partnership and thereafter. It is thus concluded that no single meaningful definition is possible and any attempt to use the expression without regard to the context confusion and potential disputes are inevitable[36].

Another consideration in partnership, beside the contractual rights and obligations between the partners is, it usually confers on each partner certain proprietary rights in respect of the partnership assets. Without the concurrence of all the partners, no partner is entitled to claim any particular item of partnership property as his own[37]. While in the case of incorporated company its financial status is

represented in terms of shares. Each member's position is known in terms of the number of shares he hold in the company. Whatever property is bought with the money of such shares belongs to the company, the individual shareholder identifying himself only with the value of the number of shares he holds at every successive moment.

The meaning of shares as per partnership has been summarised by Lord Lindley thus:-

> "What is meant by share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representative, or to a legatee of his shares"[38]

This difficulty in understanding and quantifying what may be term the share of a partner compound the problem of transfer all the more. What in the alternative seems to be possible is an assignment, which by virtue of the provision of the Act either absolute or by way of a mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any account of the partnership transaction, or to inspect the partnership books, but entitled the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed by the partners[39].

Such is the inconvenience of the only possible means of transfer by way of assignment of partnership share, which to say the least is unattractive to potential investors. However, a share in partnership like other assets may subject to the terms

of the agreement, be transferred in any manner authorised by law and whatever, may be the scope of section 31 of the partnership Act 1890, a transfer of share will be valid and affectual[40].

We however submit that, though as conceded by Anson Banks, a transfer of share will be valid and effectual if the terms of the partnership agreement permits. It would nevertheless be defeated by a refusal from the creditors to accept such new substitution and even where the new substitution is accepted by the creditors strictly speaking the partnership as newly constituted marks the end of the former one and the beginning of a new one. Such inconvenience stands as the short fall of the partnership institution over company.

2.1.8 TRANSFER OF SHARE UNDER ISLAMIC LAW

As to the application of this principle under Islamic law it seems that though it is possible with the consent of all the partners to bring in a new party on both Mudarabah and Sharikah agreement[41]. It is however, doubtful whether a partner can transfer his share to a third party without the consent of his co-partner. It seems the possibility of a transfer would depend on the conditions agreed by the parties. If the agreement contemplates and permits a transfer, a partner would be able to transfer since his share is his personal property and he reserved the right to dispose of it, by transfer. Where the agreement did not provides it would depend on the consent of the co-partners. If the co-partner refuse to grant consent certainly the transfer will not be allowed; this is based on the position of Islamic law on avoiding friction. The alternative in such circumstances is to dissolve the partnership.

2.1.9 OWNERSHIP OF PROPERTY

Another important distinction between a partnership firm and an incorporated company is in the area of ownership of property. One obvious advantage of corporate personality is its ability to owned property in its own right quite apart from its members; just like any natural person can do so. While in the case of partnership the property of the firm is the joint property of the partners, that complete distinction noticeable in the case of a corporation's property and its members is absent in the case of partnership.

A change in membership which causes inevitable dislocation to a partnership firm, leave the company unconcerned, the shares may be transferred but the companies property will be untouched. No realisation or splitting of property will be necessary, as it will on a change in the constitution of a partnership firm. Similarly, the claims of the company's creditors will merely be against the company's property and the difficulties, which can arise on bankruptcy of partners, will not occur in the case of bankruptcy of a member of a company[42].

The above demonstrates one of the clear advantages of an artificial person, since the company is considered as a legal person distinct from its members, with power to owned property. It follows that a change in member or transfer of share would not affect the property of the company, since the shareholders right is related to the value of his shares not directly to the company's property. While in the case of partnership the position is different because the firm has no legal personality, as such cannot owned property in its own right; what is term partnership property is in reality the partners property. Lord Lindley has succinctly defined it thus:-

> The expression partnership property, partnership stock, partnership asset, joint stock and joint estate are used indiscriminately to denote everything to which

the firm, or in other words all the partners composing it, can be considered to be entitled as such. The qualification as such is important for persons may be entitled jointly or in common to property for example if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners"[43]

From the above definition, it is quite clear that while all partnership property is the partners property, the individual partners private property does not belongs to the partnership. Unlike in the case of corporation where the property is completely separable from the individual members in case of partnership it is not.

To sum up the distinction between corporation and partnership, it is clear from the above discussion that a corporation being artificial person, is endowed with capacity to acquired rights and incur obligation, this is necessary for it to achieve the objectives for which it was created. It composed of individuals whose rights and obligations is not the same as those of the corporation nor are the rights and obligations of the corporation exercisable by or enforceable against those individuals, either jointly or separately, but only collectively as an artificial entity. Such is the features and character of a corporation in contrast to a partnership firm which is not a legal entity distinct from the partners composing it, nor do the partners collectively have the ability to acquire rights or incur obligations. The rights and liabilities of a partnership are in reality the rights and liabilities of the partners and are enforceable by or against them both jointly and severally. This principle is popularly put in the Latin maximum:- Si qui societati debetur singulis debetur et quad debet societas singuli debent; meaning if anything is owed to the partnership, it is owed to the

individual members, and the individual members owe what is owed by the partnership[44]

As to the application of these principles to Islamic law, we have already seen that the concept of legal personality or corporate soul in the form of company does not apply; as such the question of the association owning property in its own right does not arise. At all times, the property of the business, including all trading stock belongs to partners in proportion to their capital contribution in the case of Sharikah while in the case of Mudarabah it belongs to the capital owner excepting only the working partner's share of profit if any.

At this junction we pose the question as to whether these differences between partnership and incorporated company as crated by statute are really necessary or should the distinction be abolish altogether and the concept of partnership and company harmonised? So as to enable partnership enjoy those right and privileges as enjoyed by company. This is an open question, which is likely to generate differences of opinion. Attempt shall however be made to put forward our position in chapter eight of this work.

2.2.0 PARTNERSHIP AND AGENCY

One of the bedrock to the operation of partnership is agency. The two concepts are alike and inter-related in practice in that partners' actions towards achieving the objectives of the partnership is wholly based on the rules of principal and agent relationship. When a partner acts in the course of the partnership he does so in dual capacity viz: as a principal to himself and as an agent to his co-partners and when his co-partners act they do so as principals in their own rights and as his agents.

2.2.1 PARTNERS AS AGENTS

The underlying principle that dictates the application of agency principles as between partners has been succinctly summarised by Lord Lindley thus:

> "Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is responsible for whatever is done by any of the partners when acting for the firm, within the limits of the authority conferred by the nature of the business it carries on. Whatever, as between the partners themselves, may be the limits set to each others authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people. But no person is entitled to assume that any partner has a more extensive authority than that above described"[45]

This principle is preserved in the partnership Act thus:-

> "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and *the person with whom he is dealing either knows that he has no authority, or* does not know or believe him to be a partner"[46]

The above dictum and provision demonstrates clearly the application of the agency principles to partnership. The essential elements are akin to that of principal and agent relationship it requires partner's act to be within the scope of his authority or in the ordinary course of the firm's business; otherwise the actions would

not bind the firm. The same position applies to agency; where the agent possess the power to bind and entitle his principal while unlike partnership himself dropping out of the transaction and incurring neither rights nor liabilities, though sometimes he may be liable especially where he goes outside the scope of his authority[47]

It has also been put forward that the section sets out the principles of actual and apparent authority of agent as applicable to partners. As a consequence of this general rule, the firm will prima facie be liable for any act done by a partner on behalf of the firm if it was done for the purpose of carrying on the partnership business in the usual way, even though it was not in fact authorised by the other partners or as described by story, law of agency that:-

> Every partner is in contemplation of law, the general and accredited agent of the partnership and may consequently bind all the other partners by his acts in all matters, which are within the scope and objects of the partnership. Hence, if partnership be of a general commercial nature, he may pledge or sell the partnership property, he may buy goods on account of the partnership, he may borrow money, contract debts, and pay debts on account of the partnership he may draw, make, sign, endorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, cheques, and other negotiable paper, in the name and account of the partnership. The restrictions of this implied authority of partners to bind the partnership are apparent from what has already been stated. Each partner is an agent only in and for the business of the firm; and therefore his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm, bind it, when the other party to the transaction is cognisant of, or co-operates in, such breach of duty"[48]

2.2.2 PARTNER AS PRINCIPAL

One of the chief distinctions between partnership and agency is the ability of the partner to function in dual capacity. When he acts for the firm in the ordinary course of business he does so as a Principal for himself and as an agent for his co-partners. While when, the co-partners act, they does so as principals in their own right and as agent for the other co-partner. In the case of agency, the position is one way, and in so far as the agent acts are within the scope of his authority he remain the agent of his principal and the principal is bound by his acts.

Though all the principles guiding the principal and agent relationship under both partnership and agency are the same, there are however some important differences noticeable in terms of function.

[a] While under the agency doctrine an agent cannot delegate his function to another agent except with express or implied assent of his principal and the principal will not be bound by act or conduct of a sub-agent whose appointment he does not sanctioned. The maxim 'delagatus non potest delagare' especially applies where the personal skill of the agent is essential, or where there is trust, confidence, or discretionary power reposed in the agent[49]. In partnership, a partner when acting for the firm act both as principal and agent. Therefore in his capacity as principal, he has an implied authority of his co-partners to employ or dispense with the services of an agent, thus the agency maxim of 'delegatus non potest delagare' does not apply to partnership.

[b] The creation of agency relationship between a principal and an agent is that of employment, it therefore presupposes some form of remuneration or commission as consideration for the services; payable by the principal. In

case of partnership however, except if there is an express agreement to the contrary, it is implied that payment of remuneration for services to the firm by any partner is excluded. In this respect the act provides that subject to any agreement to the contrary no partner shall be entitled to remuneration for acting in the partnership business[50]

The beneficial interest of the partners is basically in term of share in profits which in the words of Lord Lindley, is too obvious to require comment[51]

[c] Liability for Torts and fraud:- Both in partnership and agency the firm as a whole and the principal respectively are liable for Torts and frauds of their co-partners or agent committed in the ordinary course of business. This principle, in respect of partnership is contained in section 10 of the Act[52]

Where however, the tort is wilful and not committed in the ordinary course of business, the firm will not be liable. In agency recourse is frequently had to suing in tort in contract situations. A principal is liable for the torts of his agent in accordance with the normal principles of vicarious liability in tort. But where the tort of deceit is involved, the limitations of the contract oriented rules of actual and apparent authority control also actions against the principal for the agents torts[53]. Likewise the agent will be liable in tort where he fraudulently and negligently represents that he has authority[54]

2.2.3 DUTY OF HONESTY

In partnership in addition to general duty to act in utmost good faith, each partner owes to others duty of honesty in dealing or transacting with third parties, thus a partner should not benefit himself at the expense of his co-partners[55]. Lord Lindley observed that:

"Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transaction affecting the partnership, to do his best for the common body, and to share with his co-partners any benefit which he may have been able to obtain from other people and in which the firm is in honour and conscience entitled to participate:' Semper enim non id quod privatim interest unius ex sociis servari solet, sad quod societati expedit' the invariable practice being not to have regard to the private interest of one of the partners but to the advantage of the firm"[56]

The same principles apply in relations to the duty of the agent to his principal under the law of agency. The relationship of principal and agent like that of partners is a fiduciary one. Thus, the taking of bribe or secret discount or commission or entering into agreements on the understanding that such payment will be forthcoming by an agent would constitute a breach of his fiduciary duty to the principal. Likewise unless the agent fully informs his principal and obtain his consent, he may not use his position as agent nor his principals property or confidential information to make a profit for himself[57]

2.2.4 INDEMNITY

Each partner is entitled to be indemnified by the firm for expenses and losses bona fide incurred in the course of carrying on the business of the firm; or in or about anything necessarily done for the preservation of the business or property of the firm.[58] However, if the partner is guilty of breach of his duty, fraud or culpable negligence, or wilful default resulting in loss, he alone will bear that loss. In

Thomas v Atherton[59]

T, the managing partner of a colliery, received notice from L, an adjoining owner that the workings were being carried on beyond the boundary. T insisted that he was entitled to the disputed ground, and carried on his workings. An action was then commenced against him L, and was referred to arbitration. T's partners were not informed of these proceedings till after the reference to arbitration had been agreed to. They did not object to it, but rated it as a proceeding in which they were interested, and were present before the arbitrator. The arbitrator awarded that there had been a trespass, and assessed the damages at £6000. The partners refusing to contribute, T. filed his bill to compel them to do so. The Defendants set up the case that T had wilfully and knowingly worked beyond the boundary. It was held that the plaintiff partner, had worked beyond the limits of the partnership colliery without proper inquiry as to the limits, and had acted with gross negligence and recklessness in continuing his workings after notice, and without consulting his partners, when it was evident that his right to work in the disputed area was extremely doubtful and that his other partners were not liable to contribute.

The same position applies under agency, unless there is an agreement to the contrary, the principal is under a duty to reimburse and indemnify the agent against all expenses and liabilities incurred in the execution of his authority.

2.2.5 APPLICATION TO ISLAMIC LAW

The above similarities and differences of partnership and agency laws also applies to Islamic law. The partners in the conduct of business act both as Principal in their own right and as agent to the co-partner with the right to buy or sell on his behalf. The difference between the two may however be noticeable in the question of liability. While in Sharikah, the partner whether he acts as agent or principal is liable

for loss by virtue of his capital contribution. In agency, the agent will not be liable for loss, the loss is normally borne by owner of capital, and any party who has not invested any capital will not be liable to any loss. Perhaps the closest associate to agency is Mudarabah, where the working partner is considered a partner by virtue of his share in the profit, but he is not liable to loss because he contributes no capital. Likewise both partners and agents under partnership and agency respectively are entitled to be indemnified for expenses bona fide incurred in the course of business. By and large in the case of honesty, the fact that it is one of the pillars of all transactions under Islamic law is well known and founded to require further comments.

From the above, we have seen the relationship of partnership to other concepts. Particular references have been made to company and agency because of their closer similarities.

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52 Partnership Act (1890), Section 10, Kaduna State Partnership Edict op cit. Section 12 Provides: Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm is liable therefore to the same extent as the partner so acting or omitting to act.

53 A. G. Guest op cit. P.48

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55 Partnership Act(1890) Sections 29 & 30 Kaduna State Partnership Edict op cit. Sections 31 & 32(2) which provides Section 29:-(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connection.

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CHAPTER THREE

3.0 TYPES OF PARTNERSHIP

Partnerships both under Islamic and statutory laws are of various types. Under statutory laws partnership may be broadly categorised into civil and commercial. Civil does not involve much of commercial activities while commercial is further subdivided into two categories viz-general and limited partnerships. Other categories may arise as a result of conduct of the parties or nature of the agreement. Where a party either expressly or by necessary implication makes another to believe that he is a partner in a certain enterprise and on that basis alter his position, then partnership by estoppel arise. While on the other hand the partners may agree to associate only in respect of a particular transaction, in that case the partnership is known as particular partnership. Whereas if the firm as a whole agree to enter into partnership with another person or firm, it is known as sub-partnership. The partnership is term illegal or invalid partnership if it goes against public policy or involved dealing with an enemy. Where two or more companies joined to form a partnership either on their own or along with other individual such partnership is termed corporate partnership. Conversely where a number partnership formed another partnership such partnership is termed group partnership.

On the other hand partnership under Islamic law is also divided into different categories. This is more pronounced, especially because of differences in juristic interpretation and opinion. It is therefore possible that a category or type of partnership recognised by one school of jurisprudence may not have been so under another school and vis-versa.

Putting this differences aside, we intend to identify and discuss the following types of partnership. Broadly partnership is divided into proprietary and contractual. Contractual is further sub divided into commenda, in other words known as Mudarabah; Qirad or Muqarada which is a high breed of both partnership and agency in which an investor or group of investors entrust on an agent his/their capital, for trading in return of a share in profit. Another type is Mufawada in other words known as the general mandate partnership. Where the partner's mandate is restricted, it is known as Inan. Another type is sharikat-al-wujuh in other words referred to as credit partnership. Another category is known as Muzara'a in other words referred to as share tenancy. While a contract between two or more artists, technicians or manual labourers is known as shirkat-al-sanai or taqabbal.

It is these various types of Partnership highlighted above that form the basis of our discourse in this chapter.

3.1 CIVIL AND COMMERCIAL PARTNERSHIP

A civil partnership is one that does not involve a lot of commercial activities such as partnership by farmers, artisans, labourers or other categories of associations that involve manual labour as the sole contribution of the partners. While commercial partnership has as its main object commercial transaction such as trading. This type of partnership is divided into undisclosed, general and limited partnership.

3.2 UNDISCLOSED PARTNERSHIP

This is a normal civil or commercial partnership but its existence is not disclosed to third parties. In this circumstances third parties have no remedy against the firm as a whole since the third parties were not acting under the believe that the

were transacting with the firm nor do they have any remedy against any other partner save the one with whom they transacted[1]. The presumption here is that the third parties has no idea and no believe that he was transacting with a partnership firm, as such his remedy lies with his belief i.e. the person he transacted with.

3.3 GENERAL PARTNERSHIP

This is the normal type of partnership in which all the partners takes active part in the management of the business. Depending on the articles of the partnership the partners may apportion responsibility in the running of the business, in such a way that each partner has a specific function. The liability of each partner to the debts; liabilities and obligations of the firm is unlimited.

The Partnership business is carried on under the firm's name, which bears some general indication that other partners do exist for example the addition of "and co". As observed earlier, subject to the partnership articles, all partners would be entitled to take part in the management of the partnership and the liability of the partners is joint and several[2]

Although this affords people the opportunity to engage in partnership. It seems a lot of people prefer to incorporate their business rather than stop at partnership. This notwithstanding a lot of merchants tends to explore this advantages in trading probably because of the expenses of incorporation or because they are not educated on such possibility.

3.4 LIMITED PARTNERSHIP

Limited partnership is a partnership that consists of two classes of partners one being the general partner and the other limited partner. Its fundamental features lies

in the distinction between the limited partner(s) whose liability is limited to their contributions and the general partner(s) whose liability is unlimited. Registration is necessary otherwise it would be regarded in law as a general partnership; entry in the register specifying the contribution of each limited partner whether in cash or otherwise is also mandatory. The limited partner may not take part in the management or conduct of the affairs of the partnership and have no power to bind the firm.

A limited partner shall not during the continuance of the partnership, either directly or indirectly draw out or receive back any part of his contribution otherwise he shall be liable up to the amount he so draws or received. Death or bankruptcy of a limited partner shall not dissolve such partnership. A limited partner may with the consent of the general partners; assign his share in the partnership and upon such an assignment, the assignee shall become limited partner with all the rights of the assignor[3].

Such type of partners are commonly referred to as dormant or sleeping partners because they take no active part in the management of the business and in most cases though not always their identity is undisclosed.

3.5.0 PARTNERSHIP BY ESTOPPEL

Partnership by estoppel normally arises as results of the operation of the doctrine of holding out or as the name suggest the operation of the rule of evidence principles of estoppel. The act provides: -

"Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented as a partner in a particular firm, is liable as a partner to give any one who has on the faith of any such representation

given credit to the firm, whether the representation has or has not been made or communicated to the person by giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made"[4]

This rule dictates that where any person either expressly or impliedly represent or allow it to be represented to another person, that certain state of facts exists and that other person in belief of that story acted upon it, thereby suffering damage. The person who made the representation or allow it to be made cannot be heard to say in evidence that the representation was not true.

Ordinarily the person who makes the representation or knowingly suffers himself to be represented as a partner is not a partner, but he incurs all the liabilities of an actual partner by the operation of the doctrine of estoppel. The cause of action here arose as a result of the misrepresentation not estoppel, because estoppel is not a cause of action itself but a rule of evidence to be invoked on the basis of misrepresentation.

The essentials for establishing liability under these principles are threefold.

[1] Representation or holding out

[2] Reliance thereon and

[3] Giving of credit.

3.5.1 REPRESENTATION OR HOLDING OUT

Whether or not representation has given rise to the existence of partnership raises a question of both fact and law to be determined taking into account facts and all circumstances surrounding the representation. The representation need not be made directly to the person who acted upon it. It is sufficient if it has come to his

knowledge through any source. However, it has been held that to be liable the person represented must have either expressly or by conduct, authorise the representation.[5] In

Re Fraser, EX P Central Bank of London[6]

It was observed inter alia that: -

"If a man hold himself out as a partner in a firm and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner. The representation may be made either by acts or by words, but the estoppel can be relied upon only by the person to whom the representation has been made in either way and who has acted upon the faith of it".

It follows therefore that in case of retirement or expulsion, the outgoing partner may still be held liable under the doctrine of holding out, unless he gives notice to persons dealing with the firm. It is thus the duty of outgoing or retiring partner to ensure that persons that knows him as a partner are informed that he is no more a partner. Otherwise if there is a misfortune he will be caught under the rubric of the representation on the basis of previous state of affairs. The same principle extend to the firm. It is under obligation to notify its customers of the fact that a partner has been expelled and therefore no longer enjoys the authority of the firm. Otherwise the firm would be responsible if such an expelled partner fraudulently transacted with any of the firm's customers as if he were still a partner.

3.5.2 RELIANCE ON THE REPRESENTATION

A plaintiff must prove that he was aware of the representation or holding out otherwise, he wouldn't be heard to claim that he acted upon it. It is therefore sufficient for the Plaintiff to show that he was aware of the representation and believed that it was true as a result acted upon it[7]

Where a firm name is continued in use by some of the partners either after retirement or dissolution; person who have dealing with the firm previously are entitled to claim under the doctrine of holding out except if they are notified of the change. However, where after a partner's death the partnership business continues in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself makes his executors or administrators; estate or effect liable for any partnership debts contracted after his death[8]

This in a way stands as an exception to the doctrine of holding out since a third party who relies on the fact of the deceased being a partner cannot have a cause of action against the estate of the deceased except if it accrued before the death.

3.5.3 GIVING OF CREDIT

This means entrusting property, delivering goods without payment, accepting promissory or Bill of exchange; entrusting money to solicitor for the purpose of *investment; continuing to deal with a firm because of the belief that a person is a* partner amount to giving credit to the firm.

The general principles underlying liability by "holding out" has been submitted to be twofold: -

Firstly it is confined to persons who have induced others to give credit by a misrepresentation. The rationale of the principles lies on the fact that where the apparent partner represents, or suffers himself to be represented as a partner, and thereby induces a third party to give credit to a firm. He or she impliedly promises the third party that, as a partner, he or she will be personally liable on the transaction, the giving of credit being the consideration for the promise[9]

Secondly, it concerned liability of persons who were actually partners at one time, but who have ceased to be partners at the time of the dealings upon which it is sought to make them liable. Two different classes of dealers are envisaged, namely those who had dealings with the firm prior to the change and persons who had not such dealings. In either case for the retiring partner to be liable on the subsequent dealings he must be apparent partner at the time of those dealings. Such as use of names on letterheads, advertisements and absence of notice of retirement[10]

For notice to be effective or negative liability it must be published either in the gazette or daily newspaper in the case of persons who had no previous dealings with the firm but in the case of person who had previous dealings with the firm the notice must be actual.

3.6.0 CORPORATE PARTNERSHIP

The term "Corporate Partnership" applies to those partnership which either the whole or part of it s members are corporation. This is possible because corporations are by the definition of section 1 of the act, considered, as persons capable of forming partnership just like any other natural person. The only possible constraint is its object clause. If the formation or engaging in partnership is not within the scope of its object then any purported partnership association would be ultra vires. The practice these days is to construct the object clause widely so that it can cover all foreseeable economic and business activities. Therefore once the formation of partnership fall within the object clause either expressly or by necessary implication, then it would be lawful for such corporation to engage in partnership. This may be either with another company or private individuals. It is this type of association that is commonly known as corporate partnership.

3.6.1 ADVANTAGES OF CORPORATE PARTNERSHIP

Corporate partnership in its full form provides an opportunity or a vehicle for two or more companies to pursue particular business objective, it can offer investors the twin attraction of flexibility and limited liability, without the need to comply with the limited partnership Act. Equally the ability to collapse an unsuccessful corporate partnership with a view to gaining full benefit of its limited liability, will not always be acceptable to the directors and shareholders[11]

Likewise the employment of corporate partnership will afford a means of circumventing the rule on restriction of number of members since each corporations consists of many members but count as one member in corporate partnership.

3.6.2 CONTENTS OF A CORPORATE PARTNERSHIP AGREEMENT

Comparatively corporate partnership has almost the same content with a general partnership agreement. It is however advisable to include certain clauses to accommodate the need of the corporate partner. Clauses on death, incapacity and actual or apprehended insolvency of the corporate partner have been submitted to be essential. Others includes possibility for the appointment of a receiver in respect of a corporate partner's asset, administrative orders; winding up petitions, or order made against corporate partner, should be expressly stated not to affect the firm as a whole. In such event the affected partner may be expelled or that the partnership be dissolved[12]

3.7.0 GROUP PARTNERSHIP

This is the type of partnership whose members consist of two or more firms as partners. Since in most cases the liability of members is unlimited each and every member of a constituent firm will be a member of the group firm.

3.7.1 ADVANTAGES OF GROUP PARTNERSHIP

This type of partnership has been submitted to provide a means through which a number of separate partnership firms carrying on business in a certain field of activity can pool their respective skills and resources together while retaining their individual identities and autonomy. Small firms may be able to compete on more equal terms with larger ones[13]

3.7.2 CONTENTS OF GROUP PARTNERSHIP AGREEMENT

The contents of the agreement would largely depend on the scope of the partnership business and the independence to be retained by each constituent firm. Some decisions may be required to be taken at a group level and others at constituent firm's level. In any event it is ideal to adopt the following: - majority vote concept, a block vote system treating each constituent firm as a single partner with weighted vote and a management committee system with each constituent firm represented. Suitable provisions should as well be made for:- retirement, expulsion and dissolution[14]

3.8 PARTICULAR PARTNERSHIP

As the name suggest, it is a partnership in a particular venture or transaction which in most cases is not likely to be repeated once it is completed. Its formalities and that of general partnership are the same. Thus if persons who are not partners in any other business share the profits and losses of a particular trade, transaction or adventure, they will become partners to that extent. For example, if two solicitors who are not partners, are jointly retained to conduct litigation in a particular case, and

they agree to share the profit cost arising therefrom, they will become partners only in so far as the conduct of that case is concerned[15]

As observed earlier, the partnership may be limited to a particular trade or transaction such as development of a parcel of land, sowing, cropping, harvesting, sales etc.

3.9 SUB-PARTNERSHIP

It is a partnership within a partnership, that is to say a partnership in a share of another partnership. This type of association presupposes the existence of a partnership to which it is itself subordinate. It is in essence, similar to an assignment of a partnership, in that a partner by contract or deed, become trustee of the interest for the use of several beneficiaries, usually including the partner. These beneficiaries are not partners with the partners in the principal partnership and have no right to be consulted or to interfere in the conduct of the business of the principal partnership but are recognised as partners inter se in the business of the partnership interest. If the principal partnership makes losses, the sub-partners cannot be sued directly to meet that loss[16]

If a partner agrees with a third party to share his profit, this will lead to the creation of a sub-partnership between him and that third party but not with the principal partnership. Lord Eldon has long settled the basis underlying this principle where he stated the law thus: -

"I take it to have been long since established, that a man may become a partner with A. Where A & B are partners and yet not be a member of that partnership which existed between A & B"[17]

3.10 ILLEGAL PARTNERSHIP

A partnership agreement like any other contract, may be void ab initio because either its commercial purposes is illegal or because it is proposed to carry on an otherwise lawful business in an illegal manner. The essentials necessary to establish a partnership as illegal has been beautifully summarised in -

Swaine v Wilson[18]

"In order to show that a partnership is illegal it is necessary to establish either that the objective of the partnership is one that attainment of which is contrary to law, or that the objective being legal, its attainment is sought in a manner which the law forbids. But proof that a firm has been guilty of an illegal act is not sufficient to bring the firm within the class of illegal partnerships. For if this were enough, every partnership which does not pay its debts, or which commits any tort or is guilty to culpable negligence, would be illegal, which is obviously absurd. Neither does it by any means follow that because one or more clauses in a contract of partnership are illegal the partnership is itself illegal"

Illegality should however, be distinguishing with ultra vires. While a partnership which carries on activities which are beyond the scope of its objects, such activities are ultra vires and therefore void and unenforceable though not illegal.

An illegal partnership on the other hand is that which possess of any of the following characteristic viz:- A partnership that has criminal elements such as smuggling, robbery, theft, bribery, etc. A partnership with sex or racial discrimination, breach of name restriction, it may also be illegal on grounds of public policy, morality or religion and partnership with an alien enemy[19]

As a general rule of procedure such illegality must be specifically pleaded as defence to an action. Likewise a partnership may be illegal if formed for a purpose forbidden by statute. There may be statutory prohibition on the conduct of certain profession by unqualified person for example business of legal practitioners, bankers, estate agents, insurance, medical practitioners, patents agents etc.

Any event which makes it unlawful for the business of a firm to be carried on or for the members of the firm to carry on that business in partnership will cause the firm's immediate dissolution. Likewise where a partnership will once formed, be illegal, any agreement for such formation is itself illegal and unenforceable[20]

3.11 PARTNERSHIP UNDER ISLAMIC LAW

Generally, under Islamic law partnership is categorised into two broad categories viz: -Proprietary partnership in other words known as Sharikat al-milk and *contractual or commercial partnership, in other words known as* Sharikat al-Aqd. *In* the case of proprietary partnership its primary characteristic is joint ownership not joint exploitation. While contractual partnership has both joint ownership and joint exploitation as its main features.

3.12.1 PROPRIETARY PARTNERSHIP SHARIKAT -AL-MILK

A proprietary partnership can occur when two people inherit or purchase anything together. Neither of them is permitted to dispose of the other's portion, except with his permission, Each of them is stranger in regard to the portion of his colleague[21]

It has been submitted that though the notion of proprietary partnership is not explicitly mentioned in any of the early legal works of the Hanafi School. That the

material in the chapter of partnership, is concerned almost exclusively with the commercial application of partnership. A closer look, however, reveals that the term Sharikah was in fact used in designating situation involving only joint ownership and that while this cases receive only scant attention and of minor significance for trade and commerce, they do have some importance in the early Islamic theory of partnership.[22]

Some evidence relating to treatment of joint ownership as falling within the scope of partnership can be found in the legal writing, of Abu Yusuf and Muhammad Shaybani. Muhammad Shaybani is reported to have discussed the case of a man who purchased 20 dirhams (silver coin) for the sum of 1 dinar (gold coin). After the sale was concluded the purchaser found that some of dirhams were either counterfeit or below standard quality. The purchaser was to return the substandard dirhams and exchange them for coins of better quality. That under certain circumstances however, instead of exchanging them, he was to return them and he become a partner in the dinar that he paid proportional to the number of dirhams he returned.[23]

The significant point in Shaybani's treatment of the above problem is his used of the term partners to designate the purchaser's relationship to the seller. There is not contractual relationship between the partners neither is there any indication that beyond common ownership there is any joint exploitation involved. That it is a clear case of inadvertent or compulsory partnership in which nothing beyond joint ownership is in question; and that the partner as used by Mohammed may be translated as "joint owner"[24]

According to a problem reported to have been treated by Abu Yusuf two people undertook to enter into a commercial partnership, the capital of which was to consist of a certain quantity of wheat contributed by each or of wheat contributed by

one and barley by the other. After this agreement was concluded, the grain was intermingled.

The problem was to decide the legal character of this arrangement. According to Abu Yusuf the intended commercial partnership is invalid, and since each party's grain cannot be distinguished, the mixed grain become the joint property of the two investors and the relationship between them is that of a proprietary partnership[25]

It is worthy to note that under the Hanafi School commodities do not constitute a valid form of capital for partnership investment. This would have been different under the law of other school that accepted commodities among others as a valid form of capital for investment.

Furthermore, the term sharikayn (two partners) has been used in the early Hanafi Jurist legal works to designate the joint owners of a female slave[26]

Under the Maliki School evidence of treating joint ownership, as a form of partnership is indeed very minute compared to that of the Hanafi School. Mention of Partner was made in muwatta in connection with problems like the payment of Zakkat, various forms of sale and manumission of slaves. It has been submitted that the context in which it was used suggests the inclusion of non-commercial joint ownership. The term is also found in other Maliki books[27]

In some of the compilation of Al-Washarishi, A case of two men who were co-owners of a ship was reported. One of them wished to load some of his personal belonging in that part of the ship of which he was proprietor. His colleague objected on the ground that nothing outside the category of commercial freight was to be loaded on the ship. The first party counted this objection by claiming that he had the absolute right to dispose of the space in his own share of the ship as he pleased. This last claim was upheld by Sahnun. He maintained that each co-owner had the right to

load his belonging in his own part of the vessel and that neither was obliged to pay any kind of freight charges to his associate[28]

3.12.2 APPLICABLE PRINCIPLES

The term Sharikah was originally conceived to denote common ownership in a particular object by several people in a way that each and every person had a right in every smallest part of the object in proportion to his share. This type of partnership may arise as a result of inheritance, gift, or unseverable combination.

It is however, worthy to note that Sharikah has been construed to be wider in scope than being only proprietary partnership, it also includes commercial partnership.

However, proprietary partnership occurs when two people are partners in the possession of property, it might have been created either without any action from the parties for example in case of inheritance or it may be through their own actions, for example through acceptance of gift or purchase or bequest. Whatever is the mode of the joint ownership, the parties are entitled to share whatever increase or profit accruing from it in proportion to their share of ownership. Each of them is a stranger in respect of his partner's portion[29]

From the foregoing, it is clear, that proprietary partnership is concerned with common ownership of property, which is difficult to divide or distinguish, for example, ships, houses, slave, car, horse, well etc.

There is a consensus of opinion regarding distribution of increase in a proprietary partnership; it is to be distributed in accordance with each partners share of the capital. That in a partnership, the capital of which consists of livestock any

a partnership. It is permissible between two free Muslims, both of age and in possession of their mental faculties. It is not permissible between a freeman and a slave, nor between a minor and one of age, nor between a Muslim and a non-believer. It is contracted with full powers of agency for both partners and with each partner serving as a surety for the others. Except for food and clothing for their respective families, whatever, either of them purchases is on the account of the partnership. Both partners are equally liable for any obligation undertaken by either of them in exchange for something valid within the partnership[33]

Looking at the above features, it is clear that the validity of a Mufawada partnership rest on the equality of wealth, religion and discretion in disposition of property. While equality of religion is very clear and easily ascertainable, the problem however lies with ascertaining equality of wealth in all respect. It may be easy if one is talking in terms of naira and kobo but when one goes to determine assets and skill; family commitment, one would realise that such condition may be extremely difficult if not impossible to attain. This position is in complete contrast to that of partnership under statutory laws, whereby equality has never been taken as a condition for entering into any type of partnership.

Likewise, it is clear that on the basis of the equality, such association is not possible between slave and a freeman, because they are not equal in status. While the freeman may have a right to property and its disposition, a slave have no such right; both himself and his property are the property of his master. In the case of a minor, he is not a competent party and has no right of disposing his property by reason of his age. While in the case of a non-believer his interest and freedom of action are incompatible to that of a Muslim. For example engaging in usurious transaction or trading in commodities that are unlawful to Muslim, this makes it impossible for a

Muslim to entrust the non-Muslim with agency powers in such things as commercial transaction. This type of partnership is accepted only under the Hanafi School. Under the Hambali and Shafi'i School it is expressly rejected. While under Maliki School, it is transformed into an entirely different institution.[34]

The Hannafis defended Mufawada on the basis of juristic preference (Istihsan) while Shafi'i rejected it on the basis that it would not be permissible on the basis of analogy. While Imam Malik said "I know not what Mufawada is" for on the basis of analogy this form of partnership would comprehend the power of agency (wakala) with respect to an unknown subject. The obligation of surety (Kafala) with respect to a thing undefined, and each of those individually is not permissable[35]

The Hanafis defended their exercise of juristic preference on the basis of Prophet's tradition that says: -

"Enter into partnership by reciprocity (fawidu), for it is most conducive to prosperity"[36]

It was also supported by the fact that men have had transactions together in this manner with no person forbidding them. For these reasons analogy, is abandoned. The term Mufawada is said to have been derived from the word "Tafwid" meaning delegation of authority. In relation to partnership it means each partner empowers his colleague to act freely with the entire partnership capital. According to another source, it derives from the word "fada" meaning to disperse or overflow or "yastafidu" meaning widely distributed, in relation to partnership it refers to the dispersal of authority for all transactions and designated as Mufawada. It is also said to be derived from the term "fawda" meaning equality and since the basis of this partnership is equality of investment and profit, it is called Mufawada[37]

3.14 SHIRKAT UL-IMAN-LIMITED INVESTMENT PARTNERSHIP

This type of partnership requires neither equal contribution in capital nor equal share of profits and liabilities. Likewise, it does not require the inclusion of all commercial transactions or activities of the partners' nor demand equality in personal status. Unlike Mufawada where a partner is both agent and guarantor of his colleague, in Inan the relation of the partners to third parties and between themselves are based exclusively on the principles of agency. Each partner is the agent of the other in the areas that relates to their commercial activities. This seems to be the identical of the position of partnership under statutory laws. The main features of an Inan partnership have been summarised thus: -

"As for a limited investment partnership (Inan), it is contracted on the basis of mutual agency, but not mutual surety. It is valid in the case of disparity between each partner's investment, and it is valid when they invest equally, but share the profit unequally. It is further permissible for each of the parties to invest only a part of their property, while the rest remain outside the partnership. The form of the capital with which it is permissible to contract a limited investment partnership is the same as that which was indicated as permissible in a universal partnership (Mufawada) it permissible for one to invest dirhams and the other dinars. The price of whatever, either of the partners buys for the partnership can be claimed from him alone. He may then demand remuneration from the other partner for the latter's share in it. If the entire partnership capital or the capital of one of the partners is lost before anything is bought, partnership is nullified. However, if one of them purchases something with his own share of the capital, and then the other partner's share is lost before anything is purchased with it, the purchased merchandise is common property in accordance with their partnership agreement, and the one who laid out the money

may demand reimbursement from his partner for the latter's share of its cost. The partnership is valid even if the two shares of capital have not been intermingled. The partnership is not valid, however, if it is stipulated that one of the partners receives a specified number of dirhams from the profit"[38]

From the above description of Inan partnership, the following principles are deducible.

[i] The principles of agency applies to govern the relationship of the parties; each partner on the one hand is an agent to the other in the conduct of the affairs of the partnership and on the other hand is a principal, when his colleague was conducting the business on their behalf and vis versa. The same position applies under statutory laws.

[ii] As it is the position under statutory laws, Inan partnership does not require equality of investment, the partners are free to contribute to the partnership investment according to their wish, it is not mandatory for them to commit all their resources to the partnership. A partner may invest part of his resources in the partnership and other part in another business.

[iii] It is also permissible for the parties to agree on different ratio of profits share. Depending on their agreement it need not reckon with the proportion of capital contribution although it shall not be permissible for any of the partners to have a fixed amount as his share of profit. The same position obtains under statutory laws; more so as freedom of contract is available to all parties in any transaction.

[iv] It is equally possible for the investment to be in different type of capital one may invest in dinar while the other in dirhams. Comparatively, the same possibility exists under statutory laws; where the capital contribution can be in the form of any valuable consideration both in cash or in kind.

[v] Unlike the ordinary law of agency, under Inan a partner though an agent of the other when he transact with third party, the third party can only claim from he who transacted with him not from the other partner. However, he may then claim reimbursement from his colleague for his own share of that liability. In contrast, this is the exact opposite of the position under statutory laws, where the third party have recourse to the firm as a whole and each partner of the firm is liable to him to the extent of his last kobo.

Another important point that needs to be examined in addition to the above points is the question of liability to loss. The law though gives a great latitude of freedom to the partners in determining shares of profit, it does not accord the same freedom in determining liability for loss. In case of loss, it is not permissible for one partner to take a share of loss proportionally larger than the other; its distribution is to follow the share of proportion of each partners investment. The position differs with that obtained under statutory laws, one of the aims of which is to give greater latitude to the wish of the parties. Thus if the partners agree that one of them is to take greater proportion of loss the law will enforce such agreement.

Under the Hanafi School Inan partnership may be categorised into two viz:- General and specified. A general Inan partnership implies a situation where the parties form the partnership for the purposes of general trading while specified implies where the partnership is formed for a specific purposes eg trading in clothes, provision stores, transportation etc.

Under the Maliki School Sharikat al-Inan (restricted mandate partnership) is not known to the early Malik jurist. It has however, been submitted that all Muslim jurists agreed on the validity of Inan partnership "even if some of them did not know of this term and even if they differed concerning some of its rules"[39]

Unlike Hanafi School, the Malikis imposed a lot of restriction on the partners' independence of action. It is said that "If it has been stipulated that one partner shall not be allowed to do anything without his co-partner such a partnership is said to be one with limited power(i.e. Inan)"[40]

Unlike Hanafi School, according to Maliki School the partnership requires equality in investment i.e. proportional share in capital, labour and equipment. The same applies to distribution of profits and losses otherwise the partnership is invalid. Where however, a partnership is negotiated with such differences, the imbalance is checked by severing the disproportional features and treating them as a hire contract (Ijara). This is comparable to what maliki states concerning a partnership in which one of the partners invests 100 dirhams and the other 50 dirhams on condition that they share equally in the profits. Imam Malik said "This is not acceptable. They are to divide the profit in accordance with their respective investment, and the larger investor, is to compensate his colleague for the latter's work on 25 dirhams. They both work together on the 50 dirhams in excess of the lesser investor's investment. The greater investor works on the 25. The latter is, therefore, entitled to an equitable compensation for his work. If they do not make any profit, but incur a loss, the loss is to be divided in accordance with their respective investment. The 50 dirhams investor is still entitled to compensation for his work on the 25 dirhams of his colleague"[41] If this condition were to be agreed under the statutory partnership, such agreement would be in order and enforceable.

In case of capital contribution that is partly in cash and partly in consideration other than cash; such as cash and labour, materials or equipment or other forms of machinery the problem for determining the basis of proportionality in profits, increase or loss come to light. In such circumstances the guiding principles was stated thus:-

"Profit and increases, as well as loss, follow any components of the investment which cannot be hired; those components which can be hired are to be equitably compensated for"[42]

In the case of cash and labour contribution, the cash contribution is the basis for determining the share of profits and losses, since the cash is not hireable and any proportionally excess work or labour is to be compensated. In work and equipment partnerships, each partner's labour determine his share of profit and loss while the party contributing equipment is to receive an equitable fee for the use of his equipment. In the case of partnership under statutory laws, it depends on the agreement of the parties, if they so agree that one of the partners shall contribute his labour, skill or equipment rather than money contribution, such would be in order and enforceable.

This goes to show that the underlying principle of proportionality in partnership investment under the Maliki School dictates that there should be at least some percentage of contribution by each partner to all the constituent capital of the investment, that is to say in the case of cash and work partnership, it is only valid if each partner contributes some percentage of both (not necessarily equal share), the same applies to work and equipment partnership, otherwise there will be no partnership but a hire contract.

Unlike the position under statutory laws where partners are free to agree to any proportion in sharing profit irrespective of capital contribution. Under Islamic law where the partners' contribution is equal, it will not be valid to stipulate greater share of profit for one over the other. It has been submitted that if partners contributed proportionally equal share of capital and work; but stipulated greater

share of profit to one of them than his share of investment, the offensive sharing clause is void and profit to be shared strictly accordingly to respective investment[43]

One interesting feature of the Maliki partnership is that, in most cases offensive conditions, renders the partnership voidable at the option of both parties, and once such condition is severed the partnership becomes lawful. Where the situation is not such that can be rectified i.e. where a completely different relationship exist, the law does not render it invalid but only rectify the relationship of the parties by giving it its proper name. That is to say that in most cases it is considered hire contract rather than partnership. While under statutory laws such is not possible because the courts are not to make contract for the parties.

3.15 SHARIKAT-AL-MUDARABA -COMMENDA

This type of partnership involves more of a partnership in the profit of the business than an all out partnership. It is a type of arrangement whereby an investor or group of investors entrust capital or merchandise to an agent manager who manages that property in return of a share in profit.

This type of business arrangement offers opportunity to people who have resources but are unable or lack capacity to invest or trade with it on the one hand. On the other hand some people may posses the necessary skill and analytical ability to interact and compete in trade and investment but lack the capital necessary for its take off. In such circumstances Mudaraba afford these people the opportunity of exploiting each other's resources to their common benefit.

Mudaraba in other words known as Qirad or Muqarada or the commenda is a business relationship that combined the advantages of a loan with those of partnership. Where one party provides capital and the other utilises it for business

purposes under the agreement that profit from the business is to be shared according to a predetermine proportion. It may involve many parties providing capital/resources and many trading with it. The parties share profit, the consideration for which is on the one hand the capital contribution and on the other time and effort. The investor is not directly or jointly liable with the agent in relation to third parties, his liability is limited to the amount of capital he invested. The agent is also completely immuned from liability for loss of capital under normal trading.[44]

The authority for this type of transaction is found in the practise and saying of the Holy Prophet. It is historically recorded that the Holy Prophet acted for Khadija in trade mission to Syria. He was also reported to have unequivocally endorsed and approved of such trade. It has been submitted that:-

"The Messenger of God was sent at a time when people were using the commenda in their dealings and he confirmed them in his practice. He also urge them towards it in his statements - He who has a family of 3 daughters and is a captive, then help ye him, o servants of God, engage in a commenda in his behalf and go into debt on his behalf"[45]

The companions of the Prophet are also reported to have engaged in Mudarabah Umar, Uthman, Aisha, Abudulla bin Umar, Ibn Mas'ud and Abbas b. Abdal-Mutthib among others are reported to have invested in Mudaraba[46]

The term Mudaraba is said to have derived from the expression 'making a journey' (ad-darb fil-ard) and it is called Mudaraba because the agent (al-madarib) is entitled to the share of profit by virtue of his effort and work. And he is the investor's partner in profit and in the capital used on the journey and in its deposition.

The people of Madina call it Muqarada, and this is based on a tradition concerning Uthman, who entrusted funds to a man in the form of a Muqarada. This is

derived from the word al-qard which signifies cutting, for in this contract the investor cuts off the disposition of this sum of money from himself and transfers its disposition to the agent. It is therefore designated by the name Muqarada[47]

Generally any legal tender is acceptable as a form of investment in Mudaraba. However goods are inadmissible. The consideration underlying inadmissibility of goods has been submitted to be twofold. First is the opposition to risk and unjustified enrichment, which permeates the entire Islamic law of obligations. Second is the strict requirement that the object of any contract be determined[48]

In the same limb it has been contended that:-

> "The commanda in goods leads to uncertainty concerning the amount of the profit at the time of division. This is so because the value of the goods is known only by estimation, chance and conjecture and will differ with the difference of those who do the estimating and uncertainty in turn leads to dispute, and dispute leads to discord"[49]

The same reasoning applies to commodities that can be weighed or measured, they are inadmissible because of uncertainty and possible fluctuations in price. Imam Malik is reported to have said-

> "Qirad loan is only good in gold or silver coin and it is never permitted in any kind of wares or goods or articles"[50]

This problem may however, according to both Hanafi and Maliki Schools, be circumvented by a simple legal devise. That is to say, the investor may entrust goods to an agent and instruct him to sell them and apply the proceed of the sale to an investment in a commenda in a mutually agreed proportion of profit[51]

With regard to commenda in non-commercial activities, such as industrial, craft or manufacturing activities opinion of the jurist differs. According to Hanafi it is

possible for a person to entrust money to an industrialist to buy raw materials and turn them to finish products and sell them on the basis of an agreed share of profit. Maliki and Shafi'i rejected this type of commenda.

This type of partnership seems to be a high breed of undisclosed, general and limited partnership under statutory laws. Mudarabah resembles undisclosed partnership because the third party is transacting only with the agent whom does necessarily know of the existence of the owner of capital and the capital owner is not directly liable to the third party. It resembles general partnership because of the commercial aspect involved although in the case of Mudarabah the capital owner does not take active part in the business. It resembles limited partnership because the liability of the capital owner is limited to amount he invested. It is also completely different from statutory partnership because, the trading partner does not contribute any capital. His position is rather that of an agent than a partner.

3.16 SHARIKAT AL- SANAI

This is another type of contractual partnership, it is the type of partnership where artisans, technicians and/or other manual labourers join together in a partnership for the production of commodity or commodities. It is in other words, referred to as abdan or taqabbal meaning to accept. For example a carpenter and a blacksmith join hand together in a partnership on condition that they would accept orders from their customers concerning their profession and jointly share the income.

This type of partnership may be very useful for artisans or labourers that have no capital, such persons have the opportunity through this type of business arrangement to join hand with others either of the same profession or different profession to work together for their common benefit. Depending on the nature of

their contribution they may share in the profits on the basis of their labour and capital contribution in the case of he who contributes both labour and capital. Thus skill and industry is considered as the capital of technician and artisans and industry is the capital of labourer[52]

This type of partnership may also arise when craftsmen form a partnership in the acceptance of work such as tailoring, fulling, dying, weaving etc. The employment of this type of partnership has been justified by Sarakhsi[53] on three grounds:-

(1) On the basis of agency which is the cornerstone of every contractual partnership under Hanafi School. Any commercial transaction in which the appointment of agent is valid, is also valid for the formation of partnership since a craftsman may appoint another to accept work on his behalf, a partnership in which two craftsmen contract to share the income of their work in any mutually agreed manner is also legitimate.

(2) On the basis of analogy, labour is equated with money as a valid form of investment. Like in commenda one party claim of profit is based on his work and that of the other on his money. This shows that the right to profit is secured on the basis of these two investment form i.e. money and labour.

(3) On the basis of historical usage, he submitted that it was practised before and during the time of Prophet and the Prophet did not prohibit it.

According to Shafi'i however, this type of partnership is invalid. Zufar hold the same opinion where the partner's work is different but he allows it where they are of the same profession e.g. two tailors, two fullers, two dyers etc. While according to Hanafi such type of association between two craftsmen of different trade or profession is permissible and valid because the element of agency is realisable in such

relationship and irrespective of the type of work each one contributes, the distribution of profits and losses follows the proportion agreed upon by the parties.

With regards to the basis for the sharing of profit and loss, it is submitted that though labour on the part of each partner is a necessary feature for its validity, it is not the measure of each partner's investment. It is superseded as a basis of profit by the act of acceptance of work. Thus -"the reward in this work partnership derives from the liability for the work undertaken and not from the execution of the work itself"[54]

Regarding the type of work that can be the subject of work partnership it appears from available authorities in the Hanafi School that, it is restricted to skilled work such as tailoring, dying, fulling, legal practice etc thus unskilled and non-sedentary labour are excluded from its scope. Thus a partnership in hay-cutting, gathering firewood, wild berries, nuts and dates is invalid. The same applies to hunting, fishing, or treasure hunting except, if the partners hunt or fish together with the same dog or net respectively, or stumble upon a treasure while in each others company, they can legitimately share the gain resulting from their endeavours. Likewise any partnership in work on resource or raw material belonging to neither of the partners or which are of public domain is invalid, except if the partners jointly purchased the raw materials or leased the land.[55] Going by the definition of partnership under statutory laws as the relationship between person who have agreed to carry on and are carrying on a business in common with a view to profit. It clearly admits of such relationship as that of artisan, technicians or labourers coming together to use their skill with a view to profit. Thus this marks a similarity between the two laws. The only difference being that under statutory laws, it is categorised as civil partnership while under Islamic law it is categorised as contractual akin to commercial partnership.

3.17 SHARIKAT -AL-WUJUH - CREDIT PARTNERSHIP

Where parties desirous of entering into a partnership but have neither capital nor skill, they may start a business on credit and share the profits and losses among themselves. This type of business can only be done by persons of good reputation and integrity (wujuh) who are well known for their honesty and credit worthiness.

According to Shafi'i School, the main purpose and function of the institution of partnership is the augmentation of capital investment. This can only be achieved with a tangible investment such as cash, not with labour or credit on this basis they rejects the validity of both a credit and work partnership.

It has been argued in support of this type of partnership that people have been engaging in them for centuries without rebuke from anyone. That surely the Holy Prophet has said his community would not unanimously agree upon an error, and that the element of agency is operative in these type of partnership and are therefore valid. In response to Shafi'i's position it is submitted that:-

"His (Shafi'i's) statement that partnership was considered permissible in order to facilitate the augmentation of capital implies the existence of some original capital to be augmented. We hold that cash partnership was indeed considered permissible in order to facilitate the augmentation of capital, but as for work and credit partnership these were not considered permissible to facilitate augmentation of capital but for the purpose of creating the capital itself. The need for the creation of capital takes precedent over the need for its augmentation[56]

The position is also the same under statutory laws, nothing stop partners from obtaining loans or taking credit with a view to pursue their common goal i.e. profit.

2.18 MUZARA'A/MUSAQAT - SHARE TENANCY

This is the type of arrangement where a land-owner give out his land to a farmer who is desirous of farming, to farm it in consideration of an agreed share in the produce harvested by the farmer. The contribution of the land-owner here is his land while that of the farmer is his labour, and the partnership is in the produce. Where this arrangement pertains farm, it is called Muzara'a while if it is a garden, it is called Musaqat. Arguments have been put forward for and against the validity of this type of partnership.

The Hanafi School accepted it as a type of partnership; they justify it on the basis that both the elements of hire and partnership are found in it. That is to say at the initial stage of the contract, it is hire, but in the end it becomes a partnership deed. According to Abu Yusuf, share tenancy is lawful, he defended it by way of analogy to the validity of Mudaraba when he said-

"Just as Mudaraba is lawful that is one man gives capital and the other labour and both share in the profits, similarly in my opinion, land is Mudaraba capital, one man owns the land and the other hires it and both share the profit, whether it is a matter of share tenancy or hire"[57]

Another consideration for the validity or invalidity of share tenancy is viewed from the point of economic realities and possibility of abuse by the landowners. Thus where the landowner use it as an opportunity for exploitation and driving a hard bargain on the cultivator, such would certainly not be lawful. On the other hand if it is used as a means of helping the cultivator with good intention and taking a reasonable share that is due, then it would be lawful. In this regard Abdur Rahaman Al-Jazairi is reported to have commented thus:-

"In view of the existing condition of the time, it is possible for us to co-ordinate the two opinions and select the one which is more beneficial and useful to the people. There are some people who look for those moments when the cultivator is helpless and destitute and is hard pressed to seek cultivation for livelihood. And when the cultivator comes to them for a contract of tenancy under these circumstances, they do not give their lands without such condition in the contract that creates hardship for him. When he is forced by extreme necessity to take land for cultivation he is fully exploited by the landlord who manages to reap most of the fruits of his (Cultivator's) labour and forcibly usurps much more of his share of the produce than his rightful share"[58]

Though it was argued that this form of tenancy could in no circumstances be lawful under Islamic law. It may however, be lawful when the parties have good intentions towards each other and when they agree on a share that is proportionate to the land and the labour contributed by them. When the landowner does not show any dishonesty or intent of exploitation and the cultivator is not deceitful concerning labour and capital. This is more so especially when the economic needs make it more compelling.

This type of arrangement is very much in vogue in Nigerian Society. A lot of landowners, give out their lands to cultivators in need of farming land for cultivation and though not in a formal partnership arrangement, in most cases the cultivators pays by way of giving some percentage of the crops they harvested at the end of the farming season. This payment is considered as tribute (galla); the ratio of which defends on the agreement of the parties. In most cases what the cultivator pays or gives is but a token of appreciation for allowing him the use of the land, in this respect the gesture of the Nigerian Society is commendable.

At this juncture however, the need for honesty and high sense of responsibility is called for, as it is not uncommon that some landowners don't even collect anything, they allow the cultivator to use the land gratis. Unfortunately due to dishonesty, there are abundant cases in which some of these cultivators turn back to claim ownership of the land especially where they are allowed to use it for a long period. This is more common in claims by heirs of the original owner, thus often result in protracted legal battle.

Thus if this system of partnership is to be exploited to the best advantage of all parties, the need for transparent honesty and extreme piety among the partners cannot be over emphasised.

A lot of Prophetic tradition have been cited in support of share-tenancy. For example:-

It was reported from Abdullah bin Umar, that when the land of Khaibar fell in to the hands of the Muslims, half of it was made the property of caliphate and the other half was divided among the fighters. The Jews requested the Holy Prophet to allow them to stay and they would be prepared to accept half of the produce of the land. The Holy Prophet agreed but warned them that they would have to vacate the land if they break the contract or the caliphate wanted to take it back. This arrangement continued until the time of the caliphate of Umar when the Jews broke the contract and were asked to vacate.

It was also reported from Abu Hurairah that when the Holy Prophet came to Medina the Ansar (people of Medina) wanted that their gardens be divided between the Muhajirun (immigrants) and themselves. The Holy Prophet did not accede to their request. Afterwards the Ansar asked the Muhajirun to look after their garden and

thereby share fruit crops with them. The Muhajirun agreed to this proposal and the Holy Prophet approved it.

The companions of the Prophet are reported also to have sanctioned and practised share tenancy arrangement. For example Abubakar, Umar, Uthman, Ali, Sa'ad bin Malik, Abdullah bin Mus'ud, Umar bin Abdul aziz, Qasim, Mu'az bin Jabel etc. Ali is reported to have said there is no harm in giving land for cultivation on the basis of half crop-sharing. This preponderance of authorities, established beyond doubt that share tenancy is lawful under Islamic law.

On the other hand some jurist are opposed to share tenancy and consider it unlawful and illegal, among whom are some companions of the Holy Prophet and Imams Abu Hanifa, Malik and Shafi'i. In support of their opinion they cited a tradition of the Holy Prophet reported by Rafey bin Khadij that his family used to buy land and give it for cultivation on share tenancy, taking ½ or ¼ or a fixed quantity of the produce of the land. One day one of his uncles came and told them that the Holy Prophet had forbidden them a business, which was profitable.

Jabir bin Abudullah reported that the Holy Prophet forbade the letting of land on hire or on a crop-sharing basis.

Zaid bin Thabit reported that the Holy Prophet forbade mukhabira which means letting land on a crop-sharing basis by ⅓, ½, or ¼

On the basis of the above tradition, it has been concluded that people who are unnecessarily occupying vast tracks of land should either cultivate it themselves or give it gratis to the needy for cultivation. Otherwise they should be deprived of the excessive portion which they are occupying to the detriment of the society. It was also contended that though share tenancy seems convenient for both the landowner and the cultivator for sharing whatever is cultivated or harvested. If there is no

produce the cultivator would not give anything to the landowner. Practical experience has however shown that the cultivator does not exert enough effort in improving the land under this type of arrangement; since he knows that any increase in production resulting from his increased effort would have to be shared by the landowner also. This consequently discourage him from working to the best of his ability thereby making production to remain static or even decrease[59]

It is our contention however, that this submission is misconceived. The jurists based their opinion on some traditions. We submit that in the face of the preponderance authorities that supports share tenancy type of arrangement and the condition of the society that calls for its continuous utilisation, it is better to incline more on the traditions that permits it rather than those that prohibit it. Moreover, it is not in doubt that the Holy Prophet had sanctioned it and that the rightly guided caliphs and other notable companions of the Holy Prophet practised it. In our opinion it is not likely that these category of people would have agreed upon what is unlawful. By and large, wouldn't it amount to a violation of an individual right to own property which has been guaranteed under Islamic law for anyone to suggest confiscation of such land from their owners? We think it would.

It is also our assumption that the taking of such a stand might have been the result of overlooking the possibility of people having land but lacked the resources (capital and labour) to cultivate it for so many reasons, such as old age, minority, insanity, poverty etc. We submit that in this instance, share tenancy arrangement would be very helpful to both the land owners and the cultivators, for this reason we are inclined to accept the view that favours the validity of share tenancy arrangement.

Based on the above discussion, we venture to suggest that between the two extreme views, it would be more equitable and justifiable to both landowners and

cultivators to adopt a compromise option. That is to say without departing from the general principles, laws may be made to ensure complete compliance to Islamic legal principles in that type of partnership by specifically setting yardstick for determining the shares of the parties concern and prescribing penalties for exploitation and dishonesty. We submit that this will be more in line with economic realities of the contemporary world.

In sharp contrast to the position under statutory laws the position of the lawfulness of the share tenancy can not be question. The contention however, is whether such tenancy amounts to partnership. In the words of Kaduna State Partnership Edict it does not. In determining whether a partnership does or does not exist it provides in Section 5(b) that:-

The sharing of gross returns does not of itself create a partnership whether the persons sharing such returns have or have not joint or common right or interest in any property from which or from the use of which the returns are derived.

Thus the sharing by a landowner of the produce derived from cultivating his land by another person does not make the two of them partners in either the farm or the produce.

From the foregoing discussion we have seen the various types of partnership under both statutory and Islamic laws. It is clear that under statutory laws partnership is broadly categorised into civil and commercial, the basic difference of which is the rate of commercial activities involved. In civil partnership there is less commercial activities in contrast to the commercial partnership whose basic aim is the commercial aspect; comprising of both general and limited partnership. We have also seen other categories like partnership by estoppel, particular partnership, sub-partnership, illegal partnership, corporate and group partnership.

Comparatively, under Islamic law, we have seen that partnership is broadly categorised into proprietary and contractual partnership. Contractual partnership is divided into commenda or Mudaraba, Qirad or Muqarada, Mufawada or general mandate, Inan or restricted mandate, sharikat al-wujuh or credit partnership, Muzara'a or share tenancy, sharikat-al-sanai or partnership of artist, technicians or labourers.

With these categories as a prelude, we have seen the differences and similarities between categories obtained under statutory laws and those under Islamic law. It is clear that there are areas of similarities and differences. For example civil partnership under the statutory law is the equivalent of sharikat-al-sanai under Islamic law; although it has been categorised as a type of contractual or civil. Whereas commercial partnership under statutory law is akin to sharikat-al-mufawada or unlimited investment partnership under Islamic law. In the same vein limited partnership under statutory law is similar to sharikta-al-inan limited investment partnership under Islamic law. While what is termed Mudaraba or commenda under Islamic law is a high breed of general, undisclosed, and limited partnership under statutory laws. Though there is no such a thing as partnership by estoppel expressly categorised under Islamic law. We can say without fear of contradiction that where somebody represents himself as a partner and on that basis made a third party to alter his position, he would surely be estopped from backing out under Islamic law. Likewise under Islamic law no express categorisation of partnership as corporate or group, certainly any partnership formed between one group of partners and another group will be upheld. With regard to corporate partnership, there is no such a thing as corporation as a concept that exists under statutory laws. Rather it is the partnership organisations that stand as or are taken as corporation. We have also discussed particular and sub-partnership under statutory laws, which though not expressly

categorised it, would still be lawful transaction when created under shakirat-al-inan or Mudarabah. There are also some other categories of partnership classified under Islamic law that have no equivalent under statutory law. These include proprietary partnership and share tenancy.

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CHAPTER FOUR

RIGHTS & OBLIGATIONS OF PARTNERS

4.0 PARTNERS RELATION AMONG THEMSELVES

The relationship of partners among themselves plays a significant role in partnership organisation. It involved day to day running of the firm both in terms of business and administration; this calls for effective and efficient co-ordination. This chapter examines the relationship of the partners to themselves especially their level of participation in the management, capital contribution and extent of their interest and duties. While the law that governs the relationship of the partners under statutory laws may either be as agreed by the parties in the partnership articles or orally, but in the absence of any; the relationship is govern by the respective Acts applicable to the parties. Under Islamic law; the parties also enjoy the same degree of freedom for agreeing on how the relationship is to be co-ordinated provided they do not transgress the bonds of the law by going into usurious arrangement. We shall also examine some striking differences between the two laws, such as in the capital contribution and apportionment of liability.

4.1 PARTNERS RELATION AMONG THEMSELVES UNDER STATUTORY LAWS

Relationship of partners among themselves is govern by section 19 – 31 of the Partnership Act 1890 which is the equivalent of Section 21 – 33 Kaduna State Partnership Edict Cap 107 Laws of Kaduna State 1991. This topic presupposes the existence of a relationship based on certain agreed norms by the parties. Generally partners are free to agree on their own as to what principles should govern the relationship, where they do not it is implied that the Act will apply. The same way that parties are free to agree, they are also free to vary the terms of the agreement by mutual

consent. Whatever they agreed is enforceable provided it is free of the vices of the ordinary principles relating to vitiating elements of a contract i.e. duress; undue influence, coercion, misrepresentation, etc. This has been adequately covered by the Act which provides:-

> "The mutual rights and duties of partners whether ascertained by agreement or defined by this Act may be varied by the consent of all the partners and such consent may be either express or inferred from a course of dealing"[1]

This section shows that the rights and duties of the partners are mutual ones, except where the Act applies they can only be arrived at or altered by consent of all the parties. Even where the Act applies i.e. in the absence of an agreement by the parties, they are still at liberty at any time to make alterations or amendments to suit their wish or desire. This flexibility in the partnership relationship has for long received judicial approval in the case of:-

England v Curling[2]

Where in decreeing a specific performance for varied partnership deed, it was observed inter alia:-

> "For with respect to a partnership, it is to be observed that all parties being competent to act as they pleased, they may put an end to or vary it any moment, a partnership agreement is therefore open to variation from day to day, and the term for such variation may not only be evidenced by writing, but also by conduct of the parties in relation to the agreement and to their mode of conducting their business"[3]

The nature of the partners' relationship to one another clearly calls for mutual confidence. Since apparently it was on the basis of the trust they reposed on each other that made them to join hand with the purpose of achieving some objectives, in the

process of which they must rely on the acts of one another. The need, for each partner to act in perfect fairness and good faith cannot therefore be over-emphasised.

4.2.0 PARTNERSHIP PROPERTY

The means of identifying partnership property depends on the agreement of the parties. It has been observed that sometimes a partner's contribution may be in the form of property[4] and sometimes the partners may incidentally own certain property jointly acquired either by purchase, inheritance, bequest etc. In order to avoid unnecessary confusion, it is necessary for the partners to distinguish the assets that is partnership property from personal property. This distinction plays an important role for the following purpose-

1. Partnership property is to be dealt with exclusively for partnership purposes and in accordance with the partnership agreement;
2. On dissolution every partner is entitled as against the other partners to have it applied in payment of the firms debt and liabilities and the surplus assets applied in payment of what may be due to the partners;
3. The partnership property and separate property are exigible for the satisfaction of the claims of partnership creditors and separate creditors.
4. By section 22 of the Act; partnership land is; in the absence of a contrary intention subject to the doctrine of conversion.[5]

4.2.1 WHAT CONSTITUTE PARTNERSHIP PROPERTY

Partnership property may consist of land, buildings, cars, shares, profits, goodwill etc. It is however, worthy to note that not all properties used for the purpose of partnership business are partnership property. Partnership like other businesses, may lease, rent or hire assets which are used in their operation, and that even property used

in partnership business which originally belonged to one or more of the partners is not necessarily partnership property. Whether property of a partner becomes partnership property depends on agreement of the parties. For example an entry crediting partner's account with rent for the property would indicate that they remained the separate property of the partner.[6]

The same applies to a mere use of a partners car, lands, furniture or other implements in conducting the affairs of the partnership without more, does not make it the property of the partnership. North J clearly attested to this position when he observed thus:-

"it is not the law that partners in business, who are the owners of the property by means of which the business is carried on, are necessarily partners as regards that property. That conclusion is expressly negatived by subsection 1 of 1890"[7]

The general rule for determining partnership property has been posited thus;

"Whatever at the commencement of a partnership is thrown into the common stock and whatever has from time to time during the continuance of the partnership been added thereto or obtained by means thereof, whether directly, by purchase or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown"[8]

This can by no means be regarded as conclusive of what a partnership property is. It however, gave some guideline of identifying it. By concluding with a concession of contrary prove; it goes to confirm that in the absence of express or implied agreement regarding the partnership property, its determination would depend on the circumstances of each particular case giving regards to the manner and purposes of acquisition, accounting; records, conduct of the parties in relation to the property etc.

The Act has defined partnership property to be:-

All property, rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.[9]

This definition contemplates two categories of properties viz:- either property, rights and interest in property originally brought into the partnership stock, conceivably by agreement express or implied and acquired property conceivably by the firm or any partner on behalf of the firm by purchase or otherwise in the course of the firm's business.

4.2.2 DEVOLUTION OF LEGAL ESTATE OR INTEREST IN LAND

Unlike an incorporated company, partnership firm not being a legal person can not own legal estate or interest in land. The legal devise employed is for the partners or some of them to hold such interest in trust for and on behalf of all the partners. In this respect the Act provides that legal estate or interest in any land, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rule of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section[10]

Though properties paid or purchased with partnership monies or otherwise on behalf of the partnership belong or are considered as partnership property. Such property where it is land or any interest in land must devolve to the partners, since as has been rightly observed partnership cannot hold realty in its own name, therefore some person must hold title to the land for the benefit of the partners. Where the legal estate in partnership land is held by some or all the partners as joint tenants, there is an equitable presumption, in the absence of express agreement to the contrary, that they

hold in trust for all the partners as tenants in common in equity in the same proportions as those in which they are entitled to share in the partnership assets.[11]

This goes to show that the nature of the devolution of legal estate or interest in land to some of the partners as envisaged by the Act does not really change its ownership to be the sole property of the partners holding it. It is still the partnership property which means all the partners have their respective rights over it, and the holders are only trustees for and on behalf of themselves and the rest of the partners.

4.2.3 POSITION OF CO-OWNERS OF PROPERTY SHARING PROFITS

It is also worthy to note that co-ownership of legal estate or interest in land, which is not partnership property, by partners or otherwise will not change the character of that property to partnership property. This is for the mere fact that the co-owners share profits from its use, even if the profits are used to purchase more land for the purpose of earning profit. That land belonged to them as co-owners not partners except if there is an agreement to the contrary. This distinction is relevant in that it would help to avoid the possibility of misconstruing such property to be partnership property, especially where the partners hold it. Subsection (3) of Section 20 Partnership Act 1890 is very explicit in this respect. It also goes to establish that it is possible for the parties to be partners in respect of profit but co-owners in respect of the property. The mere fact that profits and expenses are shared is in itself insufficient to change the status of an asset[12]

However, property acquired for purpose of trade is more likely to be considered partnership property than the one purchased out of the profits of a co-owned property. Likewise land devised to co-owners for the purpose of trade have been held to be partnership property. In –

Jackson v Jackson[13]

A testator devised his land and business to his two sons jointly, with a view to them carrying on that business after his death. They did so as partners. It was held that the land becomes a partnership property and that the joint tenancy was severed.

Likewise, where property is bought with the firm's monies, such property is presumed to be partnership property unless the contrary is proved[14]

4.2.4 CONVERSION INTO PERSONAL ESTATE OF LAND HELD AS PARTNERSHIP PROPERTY

The Act provides that:-

> "Where land or any heritable interest therein has become partnership property, it shall unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of deceased partner and his executors or administrators, as personal or movable and not real or heritable estate"[15]

The doctrine of conversion is an equitable principle, it applies to land and any heritable interest in land belonging to partnership to the effect that such are considered personal property of the partners. This means the partners owned it in proportion to their share of interest in the partnership property. The partners here include also the representatives of deceased partner. it has been observed that:-

> "From the principles that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity a share in partnership, whether its property consist of land or not, must as between the real and personal representative of a deceased partner, be deemed to be his personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties"[16]

The significance of the conversion to personal not real ors heritable estate has to do with the position of the common law over a deceased person's reality which passed directly to heirs and is not subject to application for payment of debts of the deceased. While on the other hand, the relationship of partners to persons dealing with them is that of unlimited liability, equity therefore as an appendage to the common law applied the doctrine of conversion to partnership reality to ensure that it was available to meet those obligations. Since the partnership assets are held by the partners in trust for sale on behalf of all the partners, any of the partners may insist that the proceeds of such sale are applied in payment of partnership debts[17]

4.2.5 CHARGING ORDER AGAINST PARTNER'S INTEREST IN PARTNERSHIP PROPERTY[18]

As a general rule execution cannot be levied against any partnership property except for a judgement against the firm; in contra-distinction to individual partner. Where a judgement is obtained against any of the partners in his individual capacity however, the share of that particular partner may be subject to a charging order by the Court. The effect of this is that, such partner will temporarily be deprived of his share of profits in account of his shares in the firm, and such would be paid to his creditors pending when the judgement debt is fully satisfied. This order does not in any way affect the continuation of the partnership; it is only the interest or accrued share of profits of that partner concerned that is to be handed to a receiver where one has been appointed. The other partners in the firm are as well at liberty to redeem the co-partners interest and in any case where sale has been directed they are at liberty to purchase; such would be in order; provided there is no breach of fiduciary duty or the debtors has independent advise otherwise the sale would be set aside. In

Parens v Johnson[19]

It was held that, even where the sale of a debtor's interest is by public auction, if a co-partner who purchase that share has concealed information enhancing its value, the sale will be set aside. Likewise, the sale will be set aside if partnership funds are employed to furnish the purchase price, even though the amount so used is debited against the purchasing partner in the partnership account.

4.3 RULES RELATING TO INTEREST AND DUTIES OF PARTNERS

Generally, the partners are at liberty under the doctrine of freedom of contract to set out the rules and guidelines that would determine their interest and duties in the conduct of the partnership. Where the parties did not set out any rule, the relationship would be govern by the provision of Section 26 Kaduna State Partnership Edict which is the equivalent of Section 24 of the Act; which set out the following rules:-

1. Distribution of Profit and Loss: The Edict provides that all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

The application of this rule presupposes absence of any agreement or evidence from, which intention of the parties may be inferred; in such circumstances that rule adjudged the shares of the partners to be equal. This rule has been justified in the words of Lord Lindley thus:-

> "This rule no doubt occasionally leads to injustice, but it is not easy to lay down any other rule, which under the circumstances supposed could be fairly applied. It is sometimes suggested that the shares of partners ought to be proportionate to their contributions, but without in any way denying this, it may be asked how is the value of each partner's contribution to be measured? Certainly not merely by the capital he may have brought into the firm. His skill, his connection, his

command of the confidence and respect of others, must all be taken into account. And if it is impossible to set a money value on each partner's contribution in this respect; it is impossible to determine in the manner suggested the shares of the partners in the partnership. Nor is it unreasonable to infer, in the absence of all evidence to the contrary, that the partners themselves have agreed to consider their contribution as of equal value, although they may have brought in unequal sum of money, or be themselves unequal as regards to skill, connection or character. Whether, therefore, partners have contributed money equally or unequally, whether they have or have not laboured equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into"[20]

This goes to show that capital contribution alone is not the yardstick for determining a partner's share of profit. Other factors may as well be taken into account and agreed upon by the partners. If so agreed, the provision of the Edict or Act will not apply. This leads us to the inevitable conclusion that each partner has a right to a share of profit, it being the sole or one of the aims of establishing the relationship. In the words of Lord Lindley – "the right of every partner to a share of the profits made by the firm to which he belongs is too obvious to require comment".[21]

What constitute profit has been said to be the excess of receipts over expenses. The divisible profits in a given year would be ascertained by comparing ordinary receipts with ordinary expenses. According to Lord Lindley unless some such principles as this were had recourse to, there could be no division of profits, even of the most flourishing business, whilst any of its debts were unpaid and any of its capital sunk.[22]

It is therefore mandatory for the firm to balance its account at an agreed time with a view to ascertaining what expenses had been incurred and what income have

been received. The income received minus the amount expended would give the profit or loss.

It is for the partners to agree at the time of the formation of the partnership what is to be the ratio of profit sharing and the time at which it is to be shared. If such has not been agreed, the partners can still in the course of the partnership agree to it otherwise the provision of Act applies. In this regard Lord Lindley had this to say –

> "with regard to the times of division and quantum to be divided at any given time, it is conceived that the majority must govern the minority where no agreement upon the subject has been come to, for these are matters of purely internal regulation and with respect to such matters a dissentient minority have only one alternative viz, either to give way to the majority, or, if in a position so to do, to dissolve the partnership"[23]

The above observation may only be correct in a situation where the capital contribution of the partners is not in equal proportion. Where it is equal the majority will not have such right to impose their wish as the provision of the law clearly applies. That is both capital contributions, shares of profit and loss are presumed to be equal.

2. The firm must indemnify every partner in respect of payment made and personal liabilities incurred by him.

[a] In the ordinary and proper conduct of the business of the firm, or

[b] In or about anything necessarily done for the preservation of the business or property of the firm.

The rule upholds the elementary principle of the law of agency, which makes the position of each partner in a dual capacity i.e. both as a principal and agent. This rule entitled a partner to be indemnified when he acted in his capacity as an agent of the firm, against bona fide losses and expenses incurred by him in the ordinary course of business. In this regard it has been observed that:-

"The general principles that partners must contribute rateably to their shares towards the losses and debts of the firm is not open to question. Their obligation to contribute is not necessarily founded upon, although it may be modified and even excluded altogether by agreement. For example, where there is no agreement to the contrary, it is clear that if execution for a partnership debt contracted by all the partners, or by some of them when acting the limits of their authority is levied on any one partner, who is compelled to pay the whole debt, he is entitled to contribution from his co-partners, so if one partner enters into a contract on behalf of the firm, but in such a manner as to render himself alone liable to be sued, he is entitled to be indemnified by the firm, provided he has not, as between himself and his co-partners, exceeded his authority in entering into the contract and if, such a case; he with their knowledge and consent defend an action brought against him, he is still entitled to be indemnified by the firm against the damages, costs, and expenses which he may be compelled to pay"[24]

The right has also been upheld by the Supreme Court in the case of : -

Yesufu Vs Kupper International N.V.[25]

Where it held that a partner is entitled to be indemnified by the partnership in respect of payment made and liabilities incurred in the ordinary and proper business of the partnership.

The use of the term proper conduct imports that where the partner, is guilty of breach of his duty, fraud or culpable negligence or wilful default resulting in loss, he alone would bear that loss.

3. A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe is entitled to interest at the rate of five per cent per annum from the date of the

payment or advance. The payment or advance by this rule is treated as a loan, which must be repaid by the firm with interest.

4. A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him, except if there is a contrary agreement.

5. Every partner may take part in the management of the partnership business, except if there is a contrary agreement.

6. No partner shall be entitled, to remuneration for acting in the partnership business. Generally all the partners are bound to work for the progress of the firm, there is no amount of services rendered will qualify a partner for remuneration beside his own share of profit, In this regard Lord Lindley stated that:-

"Under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members. Consequently, in the absence of an agreement to that effect, one partner cannot charge his co-partners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business"[26]

A recognised exception to this rule however, is where a partner wilfully disregard his own duty, thereby leaving the others to perform them, they would be entitled to compensation in such circumstances. In

Airey v Borham[27]

Two partners agreed to devote their whole time to the partnership business, but they later quarrelled, with the result that one of them was left to carry the business on alone. The partnership was ultimately dissolved and an inquiry was directed in order to ascertain what allowance ought to be made to him for so doing.

7. No person may be introduced as a partner without the consent of all existing partners. This is because a partnership is created on the basis of trust and confidence of the partners reposed on one another; therefore none of them can introduce another person as a partner without the consent of all. Nor can one partner by assigning his share to a third party make such party a partner or take his place in the partnership. In this regard it was observed that:-

"When persons enter into a contract of partnership, their intention ordinarily is that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract and it is obvious that persons may be willing enough to trust each other and yet be unwilling to place the same trust in any one else. Hence it is one of the fundamental principle of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. If, therefore; a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them. Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of other members. The assignment, however, is by no means inoperative, on the contrary, it involves several important consequences, more especially as regards the dissolution of the firm and the right of the assignee to an account"[28]

8. Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners. Matters concerning the running of the firm are twofold: Firstly those considered to be ordinary concerning the firm's business, may be determined by

majority decision. Secondly, those matters that are fundamental, such as those affecting the nature of the firm's business, cannot be changed except by a unanimous decision of all the partners.

9. The partnership book are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them. It is the right of each partner to have access and inspect the firm's books and accounts either by himself or through an agent provided it is done in utmost good faith. In this regard Lord Lindley has this to say:-

"It is one of the clearest rights of every partner to have accurate accounts kept of all money transactions relating to the business of the partnership, and to have free access to all its books and accounts[29]

4.4 EXPULSION OF PARTNER

One of the fundamental principles of partnership is the supposition that the partners have equal right to continue being parties till the agreed time for its dissolution. Thus no partner or group of partners can expel another from the firm except if they have contemplated such eventuality from the very beginning and therefore made express provision to that effect. To ensure that partners are not subjected to the capricious decision of their colleague, the Act provides:-

> No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners[30]

Even though such right has been expressly agreed, the expulsion must be in good faith for the benefit of the firm, such as for crimes, fraud, scandalous conduct that is detrimental to the firm's business. Even where such grounds exist, the elementary

principles of audi alteram partem, one of the pillars of natural justice must be observed before the expulsion otherwise it would be invalid. In

Wood v Wood[31]

A case, which concerned the expulsion of a member from a mutual insurance, company. It was held that the audi alteram partem rule was not confined to strictly legal tribunals but was applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequence to individual.

Likewise where the power was maliciously exercised or it was not done in good faith, surely the court will set it aside. In –

Blisset v Daniel[32]

Majority of partners were given a wide power of expulsion which did not require a reason for its exercise nor any prior meeting of the partners to be convened. The power was exercised against the plaintiff and the appropriate notice served on him. At the trial, it appeared that the other partners wished to get rid of the plaintiff not because it will in any way benefit the firm, but because he had objected to a proposal that the firm should appoint one of the other partners, and his son co-managers of the business. That partner issued ultimatum threatening to leave the partnership if the plaintiff remained, and thereby prevailed on them to sign the expulsion notice. Before it was served on the plaintiff, the other partners induced him to sign certain accounts with a view to acquiring his share at a favourable value. The notice was declared void and the plaintiff restored as a partner.

The power of expulsion must be exercised promptly, otherwise it would amount to a waiver. Expulsion where lawful, enables the remaining partners to carry on the business with its goodwill. Where it is unlawful however, the affected partner has two option viz: - either to urge the court to declare it void or treat it as a fundamental breach of contract and ask for dissolution of the partnership.

4.5 RETIREMENT FROM PARTNERSHIP AT WILL

Partnerships at will is where the partners enter into partnership either orally, by conduct or in writing without stipulating the duration or life span of the relationship. In such instance any of the partners has the right to determine the partnership at any time by giving notice to his co-partners. In line with this it is provided that-

1. Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.
2. Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose[33]

This rule also applies where a fixed term partnership is continued after the expiration of the term; this is because by such continuance the partnership turns to partnership at will, but all the other rights and duties remain the same[34] . In –

Essex v Essex[35]

A provision in a fixed term partnership that a surviving partner must acquire the share of a co-partner who died before the end of the fixed term was held to remain in operation after the effluxion of the set term so as to bind the surviving partner.

It is however; prudent for the partnership deed to make provision for the acquisition of the retiring partner's share to avoid dissolution which is one of the inconveniences of partnership at will.

4.6.0 THE FIDUCIARY DUTIES OF PARTNERS

The expression "fiduciary duties" is used to describe the mutual confidence reposed on one another by the partners. In their relation partners are expected to display utmost good faith and fairness in all their dealings with the firm. The scope of these duties would largely depend upon the nature of business as carried out based on

express agreement or course of dealing. It is therefore ideal for the partners to define the scope of such an important obligation before hand.

It has been observed that the duties of good faith and honesty, providing full accounts of all information and assets in one's possession or control, preserving confidence, avoiding conflicts of interest and profiting personally from partnership opportunities and information and the obligation to account for benefits obtained in breach of these duties, form part of implied obligation of a partner, unless expressly varied by agreement[36]

4.6.1 DUTY TO RENDER ACCOUNTS

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives[37]

This section imposes a duty on the partners to render full accounts, it requires utmost good faith in all the partnership dealings and transaction. Where accounts are improperly destroyed, the worst will be presumed against the partner who destroyed them.

The rendering of account requires a partner to disclose all his dealings in terms of purchase and sell on behalf of the partnership. This is to be done with all honesty.

4.6.2 ACCOUNTABILITY FOR PRIVATE PROFITS

This principle dictates that a partner is neither permitted to receive any exclusive benefit or advantage for himself by use of partnership profit or information derived in the course of the partnership business nor derive any exclusive benefit or advantage by engaging in business in competition with the firm. Likewise he is not allowed to in the course of transacting the partnership business, carry on separate trade or transaction for his exclusive benefit, which he would not have been in a position to

do so if not for the partnership, save with the consent of his co-partners. Otherwise he is bound to account to the firm for whatever benefit he derived. The law in this respect provides thus:-

> "Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection"[38]

This section is said to apply also to transactions undertaken after dissolution by reason of death of partner, before winding up. The law also provides:-

> "If a partner, without the consent of other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business"[39]

These provisions outlines clearly the areas of fiduciary relationship, it is now settled that any benefit derived in breach of it is accountable. Thus in

Gardner v M' Cutcheon[40]

One of the two part owners of a ship who were trading with it for their common benefit used it for private trading. He was held accountable for the profits so made. Likewise in

Bentley v Craven[41]

Where a partner employed to purchase sugar on the firm's behalf, unknown to his co-partners supplied the firm with sugar which he had previously purchased on his own account at a favourable price and for which he charged the firm full market value. He was held accountable to the firm for the profits he had made. The position is still the same even where the partners have agreed at a fixed price; a sale in excess is accountable. In

Dunne v English[42]

The Plaintiff and defendant agreed to buy a mine for £50,000, with a view to reselling it at a profit. It was arranged that the defendant should sell the mine to certain person at £60,000 and the defendant and the plaintiff are to divide the £10,000 profit the defendant sold the mine for a sum, by far in excess of £60,000 profit to a company in which he had a substantial interest. The plaintiff was held entitled to half the actual profit made.

The above principle which precludes a partner from retaining for his own exclusive benefit that which he ought to share with his co-partners is equally applicable to benefits resulting from the use of Partnership property. In

Burton v Wookey[43]

One of the two partners purchased some ore from the miner, paying them with goods from his shop. He treated them as being purchased for an amount equal to the sale price in his account with his co-partner. The co-partner contended that in their account the purchase price should be treated as the cost price of those goods and that the partner should account to the firm for the profit. In upholding this argument it was held that the partner holding a position of trust and confidence had placed himself in a situation in which he had a bias against the due discharge of that trust or confidence in pursuit of his own private advantage.

The same position applies to renewal of lease. Where a partner secures the renewal of lease individually, his co-partners has the option of treating the renewed lease to be on behalf of all the partners even though he cannot force them to accept that it was acquired on behalf of the firm. Except if it was renewed with their authority. Any claim in this respect must be brought promptly in order to avoid being caught up by the doctrine of latches. For the co-partners will not be allowed to adopt a dilatory policy of "wait and see" in order that it might be ascertained whether a profit or loss is likely to result[44]

Where the transaction pursued by the partner fall outside the scope of the firm's business or, has no connection whatsoever with the firm business, duty to account does not arise. Though an injunction restraining the partner may be obtained where he has agreed not to engage in any business directly or indirectly, except in account of the partnership.

4.7 RIGHTS OF ASSIGNEE OF SHARE IN PARTNERSHIP

Subject to the terms of the agreement, a partner may transfer his shares in the partnership but the assignee to these shares has no right to account other than after dissolution. His rights are subject to the rights of other partners nor can he interfere in the management or administration of the partnership business or affairs, or to inspect the partnership books.

However, on dissolution, the assignee's right crystallises, he became entitled to receive the assigning partner's share of the partnership assets and for the purposes of ascertaining that share, he is entitled to an account[45]

4.8 PARTNERS RELATION AMONG THEMSELVES UNDER ISLAMIC LAW

The underlying principle governing partners relationship under Islamic law is trust. Like under statutory laws, every partner is an agent of the other and has right to transact on behalf of the partnership, he may lend or borrow on the firm's behalf. This imports that as far as the operation of the firm's business is concerned, the doctrine of agency applies to govern the relationship of the partners to themselves, each represent the other in business transaction and the actions of each would bind the other as well. Though stipulating conditions that are vague, or likely to cause dispute or loss of rights or stating a fixed amount, as share of profit for one of the parties shall not be lawful.

In sharp contrast to statutory laws, Islamic law prohibits usury, gambling, fraud and coercion, it enjoined mutual agreement between the parties in business contract. Various forms of injuries are controlled through the prohibition of uncertainties and vagueness that might lead to quarrels, selling of goods not in possession of the seller, contracts nullifying gains of a party etc.

4.9 PARTNERSHIP PROPERTY AND ITS CONSTITUENTS

There are differences of opinion regarding what is or what constitutes partnership property. It entirely depends on whether the partnership is limited or unlimited.

When viewed from the position of the Shafi'i School, partnership property consist of all the capital contribution of the partners mingled together to such an extent that neither of the partners contribution is distinguishable. This means only investment of a uniform type would be suitable for the formation of a valid partnership. Since all forms of goods were ruled out, this left only currency and that for the requirement of merging indistinguishably it imports that currency must be of the same denomination and value[46]. Whereas under statutory laws, no such restriction. Currency contribution can be in any legal tender and denomination and what constitute the partnership property depends on what was agreed by the partners, which may as well include property.

It has been submitted that the Shafi'i requirement of intermingling of investment would work hardship and make partnership an inefficient instrument for long distance trade. The requirement of uniform currency would be an impediment to prospective partners from different currency areas. It would also make it impossible to negotiate any partnership by letter or through post. It ruled out a work partnership in

which investment does not consist of money but labour and skill of partners, the same applies to credit partnership[47].

According to Hanafi School, however, partnership is divided into limited and unlimited. In the limited partnership only the capital invested by a partner form part of the partnership property while in the case of unlimited partnership, all the partners eligible properties must be incorporated into the partnership property. Thus it is only person of equal wealth and personal status that can form an unlimited partnership. The equality in this sense is centred more on ready cash than property or assets since property in form of assets are not suitable for partnership investment. It follows therefore, that if one of the partners possess property, which is suitable for investment but didn't invest it in the partnership, the partnership will not be a Mufawada partnership since this action precludes full equality. If however; inequality exist with respect to property, which is not suitable for investment, such as goods, real estate and debts then the Mufawada is valid[48].

For the Mufawada to be valid, the balance of equality must be maintained even after the commencement of the partnership. Thus if one of the partners, during the operation of the partnership gets some money from different source, such as inheritance, gift, collection of debt etc equality is breached and therefore invalidate the partnership. Imam Mohammed Shaybani summed up the requirement of equality thus:-

> "A Mufawada can only be contracted by two free Muslim who are both of age, or between two dhimmis. It cannot be contracted between a Muslim and a dhimmi. A Mufawada can only be contracted if the capital of each partner is equal. If one of the partner comes into inheritance, or receive dirhams or dinars the Mufawada is invalidated"[49]

This position is completely different from what is obtained under the statutory laws where partnership property can be anything of value provided it is agreed by the

partners. Such property may even be one of the partners contribution or share in the partnership; that distinguish it with the Hanafis concept of limited investment partnership, the property of which they insist must be the partners capital contribution while the school concept of Muwafada is completely unknown to statutory laws. To insist on that would violate the partners' freedom of contract.

Under the Maliki School there is no requirement of equality in the personal and financial status of the partners nor does the law insist on the inclusion of all eligible capital of the partners. Existence of extra partnership wealth and income does not affect the validity of the Mufawada[50]

From the foregoing discussion, it is clear that joint property comprise of the capital contribution and property bought on behalf of the partnership through any purchase made by one of the partners with the partnership capital on behalf of the partnership; it belongs to all the partners in equal share. Where the purchase is that of personal items, it exclusively belongs to the purchasing partner alone. The same applies to proceeds of any sale of joint property.

When closely analysed, this principle would be more pronounced in Inan partnership rather than a Mufawada. The reason being in case of the former it recognised distinction in partnership property and personal property of the individual partner while in the later all the individual partner's eligible capital is considered to be partnership property. In the same vein any profits from outside investment or wages earned for services rendered by one of the partners to a third party became part of the joint capital.[51]

The Inan position of recognising distinction between partnership property and personal property of partners makes it to be closer to the position under statutory laws which has been clearly defined.

4.10.1 FORMATION OF JOINT CAPITAL

There are differences of opinion among the jurist regarding the rules governing the admissibility of different types of capital as partnership investment. According to Hanafi School, acceptable currency or legal tender must be used in conducting commercial transactions. For example gold and silver, Naira and Kobo, Dollars and cents, pound and pens. It has been submitted that all Muslims legal authorities are in full agreement concerning the acceptability of gold and silver coins for partnership investment. A legal problem however, arose regarding the value of the two currencies. While gold are of a single standard weight and fairness over larger areas, silver varied considerably in both respects. The Simultaneous circulation of different types of gold and silver coins resulted in the establishment of an exchange rate between them, which was known and accepted in the market place at all times. This in relation to formation of partnership capital posed two set of problems: 1. That of "a mixed investment" involving gold and silver. 2. That of a "mixed investment" involving different types of silver. Both of these are permissible under the Hanafi School for all types of partnership. This raised the question of determining the value of each partners investment for the purpose of the distribution of profit and loss. The possibility of fluctuations in value of one or both made it imperative to devise rules by which the value of each partner's investment could be determined. This is especially important in Mufawada partnership where equality of investment is a pre-requisite. The solution to this problem has been stated thus:-

> "For the purpose of the contractual provision of profit, one considers the value of each ones capital at the time the partnership, is contracted. For the distribution of the ownership of goods purchased with the partnership capital, one considers the value of each one's investment at the time of purchase. For the determination of profit on their respective shares, or on the share of only one

of them, one considers the value of the investment at the time of the division because one cannot determine the profit before the investment is deducted"[52]

The above proposition is intended to compensate for any possible fluctuation in the value of currency and at the same time assured stability in the distribution of profit and loss. When viewed from statutory laws position, the above proportion stands as the law rather than the exception as it contemplates the possibility of partners contributing in different types of capital, it is the value of what the partners contribute that determines his share in the partnership.

Looking at the contemporary trend of monetary transaction, banking systems and method of ascertaining exchange rate, it is apparent that the legal problem relating to the value of currencies has been surmount. This would enable investors from various currency areas to engage in partnership.

Like under statutory laws, mere agreement does not amount to partnership, the same position applies under Islamic law. The partnership is said to commence and come into effect from the time of a joint purchase on behalf of the partnership and before then, if one of the partners lost his capital, such lost is borne by that partner alone and not by the partnership.

Whereas, if loss occurs after joint purchase, it is borne by the partnership[53]. Likewise where the other partner had already purchase property with his own shares such property became common property of the partnership but the other partner is to remunerate him for his own share in its cost.

4.10.2 PARTNERSHIP INVESTMENT IN CONSIDERATION OTHER THAN CASH

There are two different opinions regarding partnership investment in consideration other than cash or currency. According to majority opinion it is invalid;

while according to maliki which is the minority opinion on the issue, it is valid. When compared to the position under statutory laws, almost the exact opposite is the case where contribution in consideration other than cash stands as a settled law.

It is contended for the majority opinion that the partnership in goods is not permissible because it leads to ignorance regarding the profit at the time of division, for the amount of the investment would consist of the value of the goods and not of the goods themselves. This value will be unknown except by conjecture and estimation. The amount of profit will therefore be unknown, and this would lead to dispute at the time of division. This will not occur if the investment consist of dirhams and dinars or other acceptable currency[54].

We however share a different opinion, we believed that the same method used in ascertaining the value of different currencies before the partnership investment, may as well be used to ascertain the price of each commodity at the time of the investment. For the purpose of determining the share of profits, the same value be used as a yardstick. Moreover, such a restriction would cause untold hardship to potential partners especially in today's world of commerce and industry. This may be employed in both Mufawada and Inan partnership.

In line with our submission, a legal devise for circumventing the prohibition of goods as a valid means of partnership investment has been conceded. The following dialogue between Shaybani and Imam Abu Hanifa is cited as example.

Shaybani said "What is your opinion of two men wishing to form a partnership with their possessions, one of them has merchandise worth 5000 dirhams and the other merchandise worth 1000 dirhams?". He said: Let the owner of the merchandise worth 5000 purchase 5/6 of his colleague's merchandise with 1/6 of his own. If they do this, they will become partners in accordance with their shares in the investment. The partners whose merchandise is worth 1000 dirhams become a 1/6 owner of the

combined investment and his colleague become the owner of 5/6 of it.[55] The same principle may be employed in an Inan partnership.

4.10.3 LABOUR AS A FORM OF PARTNERSHIP INVESTMENT

Skilled labour has been recognised as a valid form of partnership investment under the Hanafi School. It is acceptable for the formation of both limited and unlimited partnership. The same is obtainable under statutory laws as it is quite possible for lawyers, doctors, architects, surveyors to form a partnership and the contribution of each will be his skill.

This type of partnership investment is different from the commenda because under commenda one party provides the capital and the other labour, in respect labour investment the capital consists wholly of the skill labour of both partners e.g. tailoring, dyeing, weaving, legal practice etc. The importance of accepting this form of investment cannot be over emphasised in the contemporary world of manufacturing and industry.

4.11.1 RULES RELATING TO INTEREST AND DUTIES OF PARTNERS

Partnership under Islamic law like its counterpart under statutory laws is also subject to certain norms that binds the partners in their relationship, some might be based on religious injunction while some may be based on agreement of the parties.

4.11.1 PARTICIPATION IN MANAGEMENT

Generally each partner is bound to perform his duties as stipulated in the agreement, though if he failed to do so either as a result of sickness, absence or deliberately, he would still be entitled to his share of profit as agreed upon. A similar position was reported where a man went to the Holy Prophet and said: While I am

working in the market place, my partner is praying in the mosques". The Holy Prophet replied:" Perhaps your business success derives from him". This implies that the claim to reward or profit is based on acceptance of work and not necessarily on the basis of direct participation[56].

According to Hanafi, each partner must participate to some extent in a work partnership and that a work partnership which provides for one partner to spend his entire time praying at the mosque, while his colleague does all the work in the market is not permissible. Though labour is a necessary ingredient in a work partnership, it is however, not the yardstick for each partners investment, as such cannot be relied as the basis of profit. Thus it is opined that: The reward in work partnership derives from the liability for the work undertaken and not from its execution.

In credit partnership, each of the partners is entitled to buy or sell on credit with or without the permission of his co-partner, except if otherwise stipulated. The partnership may be confined to a specific commodity or it may be unrestricted. It is permissible for two people to enter into partnership on condition that any purchase of fine flour either of them makes is to be their joint property, or on condition that whatever either of them purchases at any time or within a year or month is to be their common property[57]

For the partnership to commence as observed earlier, the Shafi'i School required complete intermingling of investment. While Hanafi School required that one or both partners have to start actual business with the joint capital in the case of cash and credit partnership both limited and unlimited investment and in the case of work partnership, it is the acceptance of work that determines commencement of the partnership.

In the case of Mufawada partnership, each partner has the right to manage the common capital according to his best judgement. Whereas in the case of Inan, this

broad mandate might be modified by restricting each partners mandate to particular goods, transaction or locality.

The position is almost the same with that of statutory laws. Taking part in the management depends on the agreement of the parties although where it is agreed for a partner to take part in a particular aspect, his refusal to do would constitute a breach of contract and would entitled the other partner to compensation for his extra effort; which will be a minus from what the recalcitrant partner ought to get.

Expenses incurred in the normal course of business such as travelling, feeding expenses while travelling, hire, accommodation, taxes, partnership, this includes private expenses as well, even if incurred without the knowledge of the co-partner but the sum is to be deducted at the time of settlement of account from the share of that partner.[58] This position is equally the same with that under statutory laws which provides for partners to be indemnified for payment made and personal liabilities incurred in the ordinary and proper course of the partnership business. This is clear from Section 26(6) of the Kaduna State Partnership Edict.

4.11.2 FIDUCIARY DUTIES OF PARTNERS

One distinctive feature of Islamic law in defining the partners rights and duties on level of participation in management is the fact that the whole relationship is viewed from the concept of fidelity (amana). Each partner is considered to be trustworthy (Amin) in regards to the money of his colleague and cannot be held responsible for any loss occurring in the normal course of business. It is accordingly viewed like a loss while in the owner's possession.[59] Same position applies under statutory laws, which require utmost good faith and fairness from the partner in their dealings with the firm.

It is submitted that the essence of defining each partners rights and duties is to demarcate those uses to which the joint capital can be applied and determine the bounds of each partners relationship to third parties.

Each partner in other words is expected to act in good faith and with the best of intention; where he breached such a duty, he will be held liable to both his colleague and third party.

The liability of the partners as well as their rights, privileges and duties inter se, is governed by two fundamental principles viz:

1. Mutual agency, which is the basis of all contractual partnership, within the scope of their undertaking. Each partner is considered to be the agent of his colleague.
2. Mutual surety; each partner is considered to be the guarantor for the actions of the other in connection to the partnership.

These principles are equally applicable to partnership under the statutory laws.

Generally, no partner has the right to mix his personal business with the partnership business without the consent of his co-partners. This is necessary to avoid suspicion and misunderstanding. In case the mixed business is permitted, strictest probity in line with fidelity must be observed.

In the case of Mudarabah, Maliki hold that it is permissible for the working partner to mix the Mudarabah capital with his personal capital and to run the mixed business together and the capital-owner's permission is not necessary but they were silent on Sharikah. Shafi'i were also silent. To Hanafi is not permissible except with permission of capital owner. Hanbali share same view with Hanafi.

Regarding the right of the working partner to engage in other Mudarabah agreement with other capital owners' opinion differs. Ibn Qudama of Hanbali school hold that it is permissible even without the prior permission of the capital owner

provided the new business is not harmful to the former one. Hanafi shares the same opinion on the ground that the new contract has nothing to do with the first one which in any case cannot take away the freedom of business of the working partner unless he has bound himself to that effect. The Malikis also share the same opinion and added that the working partner is entitled to do business with the subsequent capital mixed with the first one. Shafi'i are silent on this issue.[60]

This clearly shows that, it is not the engaging in further or other business that matters. The most important issue is for the working partner to hold and adhere to the principles of fidelity (amana) and ensure that he did not corner and ambush the accrued profits of either of the capital owners in the guise of his own personal profit from his private investment.

As to the possibility of the working partner using Mudarabah capital for a Sharikah contract with another person, according to Hanafi, maliki and Hanbali Schools, it is quite possible with the capital-owners permission and whatever profits he made is to be shared with the capital-owner according to their agreement.

4.11.3 DUTY TO ACCOUNT

Partnership as a contract of fidelity, imposes upon each partner, the duty to render true account and full information of all their dealings in relation to the partnership; otherwise they would be in violation of their trust. In this respect it has been observed that- the first priority of partnership is the attainment of profit by means of trade and commerce. The extent of each partners freedom to dispose of the common property is determined in the light of profit, and neither partner may use the joint funds to his private advantage or benefit nor have any complete or unfettered ownership over the joint property.[61] Duty to render account under statutory laws also requires utmost

good faith, where a partner fraudulently destroys the book of account, the worst is presumed against him.

One issue, on which there is a consensus of opinion among the four sunnih schools of jurisprudence is that in running business, losses would be made good by profits till the business come to a close and accounts are finally settled. At the time of settlement of account, the original capital would be redeemed first; any balance left would be the profit and in the case of shortage to the original capital, it would be deemed loss. This is the position under both Sharikah and Mudarabah. In Sharikah, each partner owns a share in the invested capital thus if part of the profit is shared before final account, any overpayment would be made good by deduction from the capital contribution to be returned at the time of accounting. In Mudarabah however, the capital belongs to one party. Distribution of profit before final account is settled may lead to dispute, especially where the working partner is given an amount greater than what he ought to receive or the business turned out to incur a loss, where the working partner will not be entitled to any profit. It may be difficult to recover the overpayment made.[62]

In support of the above proposition, it has been submitted that, there is no differences of opinion among muslim jurists on the point that the party working with capital acquired on Mudarabah, would take his share of profit only when all the capital invested in the enterprise had been converted into cash. In case of loss and his continuing to work in the business until it made profit that profit would, first of all be utilised to offset the loss incurred[63]

4.12 DISTRIBUTION OF PROFIT AND LOSS

In distribution of profit, the law neither insists on any strict procedure nor set out any hard and fast rule, it is left to the parties to agree on the modus operendi of such

division. It is quite lawful for a partner in Sharikah partnership to contribute greater capital than his co-partner but receive the same share of profit or even lower or higher share depending on the agreement of the parties. It is as well possible for the partners to contribute equally but receive unequal share of profit. Equality in the share of profit therefore, is not a necessary condition to the validity of an Inan partnership. The differences in the shares of profit may be justified on grounds of superior skill, influence, extra labour, better managerial skill and organisational ability etc. There is consensus of opinion on this principle as far as Mudarabah is concern but in relation to Sharikah, opinion of the jurist differs. According to Hanafi and Hanbali Schools, it is lawful; but to Maliki and Shafi'i Schools, the distribution must reflect the proportion of invested capital. As far as the parties' freedom to agree on proportion of profit is concerned, the position is the same with that obtained under statutory law. Where the parties have not done so, the law presumed that both capital, profit and loss is shared equally among the partners.

It is however, not permissible for the parties to agree on share of loss or proportion larger than the other. The principle for the distribution of loss is that it follows the capital. Thus according to Imam Abu Hanifa:-

> "If the two partners in an Inan partnership agree that the profit and loss follow their respective investments is permissible. If one stipulates for himself a share in the profit proportionally larger than that of the other, this is also permissible, if however, one of them assumes a share of the loss proportionally larger than that of the other; this is not permissible"[64]

Caliph Ali b. Abi Talib was also reported to have said:-

"The profit follows the condition agreed upon, and the loss follow the capital"[65]

It would however, not be lawful for one partner to invest higher and to do all the work on condition that profit be shared equally with the lesser investor and loss follow

the capital. This is so because the larger share assigned to the lesser investor cannot be justified either on grounds of capital or labour. In the words of Kasani - The excess profit corresponds neither to labour or money nor to liability assumed.[66]

Likewise, there is a consensus of opinion among the four sunnih schools of jurisprudence that under both Sharikah and Mudarabah it is not lawful to settle the profit in terms of a fixed amount; e.g. to say one of the partners shall be entitled to $1000.00 or less or more. It is only permissible to settle it in terms of proportion eg 1/2 or 1/3 or 1/4 , or percentage e.g. 50%, 30%, 25% etc

In criticising the maliki and Shafi'i's rigid stand on the distribution of profit as per proportion of capital investment, it was submitted that the Shariah recognised business efforts as an independent ground for earning profit, for example under Mudarabah. Moreover, there is unanimity of opinion among the jurist that a working partner in Mudarabah may, with the consent of the capital owner employ his own personal capital on the business. In which case he would be entitled to profit on his additional capital, as well as his share of profit accruing from the Mudarabah capital. It is contended that in practice this is synonymous to a Sharikah agreement in which all business effort is made by one party only and that there is no reason why business effort under Sharikah should not be given the importance it is given under Mudarabah. It is further, contended that if a working partner in Mudarabah sought the consent of the capital owner, he may employ a third party to run the business and any profit will still be divided according to the terms settled at the time of contracting the Mudarabah agreement. In this case two person have in practice, done business worth the capital invested by one party and the profit is distributed between them. All the profits does not go to the capital owner alone. Thus it became, apparent, that in joint business, to make profit, like loss, subservient to capital, ignoring business efforts, is not consistent

with other business contracts recognised as lawful under the maliki and Shafi'i Schools[67].

This leads us to the question as to when does the ownership of profit passes to the partner in Mudarabah. There are two different opinions on this issue. According to Hanafi and Maliki Schools the ownership of profits passes only after settlement of account and the invested capital returned to the owner. While according to Hanbali and Shafi'i Schools the ownership of profit passes as soon as it accrues; but this ownership is fully established when profit is shared out after final account is settled. The Hanbali and Shafi'i's position seem to be closer to the position under statutory laws where division of profit is possible only after comparing receipts with expenses which can only be done at settlement of account. It is only then the partners will know whether there is a profit for division or not.

According to Hanafi School, any distribution of profit before the capital owner got possession of his capital is void. While Shafi'i School consider it lawful, it does not confer ownership until final settlement of account. Therefore if part of the invested capital is lost afterwards, the loss would be made good from the profit, and the share given to the working partner is to be recalled and the share taken by the capital owner to be deducted against his invested capital. Whereas Maliki School hold that any loss is to be made good from profit and the past profit is to be added to what is left of the invested capital, where they have been distributed, they are to be recalled. While Hanbali School holds that until the working partner repays the original capital, he must not claim any share in profit[68].

When closely analysed the views of the jurists boil down to the same point. In any case the invested capital is fully protected and is to be recovered first before the final settlement of account is recoverable if the business at the end revealed a loss. The restoration of the capital after settlement of account may be de jure or de factor. If the

capital owners decided to enter into another partnership with the same party, he can do so. Such would be regarded as entirely a new contract that has no bearing whatsoever with the first one and in case it ends in a loss, the profit already distributed in the first instance are not recoverable to make good that loss in the second contract.

With regards to loss, we have already noted that under Islamic law partnership is regarded as a contract of fidelity (amana), therefore when something is entrusted to a person, he is not liable for loss except in cases of trespass, violation or breach of trust. Thus only the person who contribute capital suffers loss, in case Mudarabah, if there is a loss, it is borne by the capital owner alone and in case of Sharikah it is borne by all the partners. The lost of the working partner in the case of Mudarabah is his labour.

4.13 EQUALITY IN PARTNERSHIP

Unlike the position under statutory laws, equality of persons in all respect is one of the pre-requisites of a valid Mufawada partnership. This applies to equality in investment, division of profit and loss and personal status of the partners. It is only possible between two free Muslims, is not valid between a free man and a slave or between two slaves nor possible between adult and a minor nor between two minors. Where it was nevertheless concluded, then it would be regarded as an Inan not Mufawada. It is not valid between a Muslim and non-muslim. It is however, permissible between two dhimmis (non-muslims in Islamic State). It is not permissible between a Muslim and an apostate, or between two apostates or between a man and a woman. It is however, possible either between two freemen or women. It also demands complete equality in all financial matters, investment, profit or loss. These requirements however; do not apply to an Inan partnership.[69]

The investment may be in the form of cash like Naira and Kobo movable goods or other property but certainly not things that are unlawful to Muslims. Only capital

actually at hand can provide the basis of share in profit and loss. According to majority view; intermingling of the investment is not a requirement for the validity of partnership. Sahnun however, hold it to be a pre-requisite.[70]

From the foregoing discussion we have seen the partners relation among themselves and comparison of their rights and obligations both under statutory and Islamic laws. It is clear that these may either be as ascertained by the partners or as defined by the Act. Whereas under Islamic law the underlying principles of the partners relationship is trust and the parties are also free to some extent to agree on what they like to govern their relationship; their limits being the prohibition of usury. We have also seen what constitute partnership property under the two laws. The rules relating to interest and duties of the partners have also been discussed. Under both laws we have seen the need for utmost good faith to be observed by the partners in dealing with the firm. The rights of partners to be indemnified for expenses incurred in the ordinary and proper course of business have also been discussed. We have equally seen the extent each partner is required to participate in management and the right of each partner to a share in profit and liability to loss under the two laws. With these, the stage is set for discussing the relationship of the partners to third parties.

CHAPTER FOUR NOTES AND REFERENCES

1 Partnership Act (1890) Section 19, Kaduna State Partnership Edict Cap 107 Laws of Kaduna State 1991 Section 21

2 (1844) 8 Beav. 129

3 Ibid. at 133 per Lord Langdale M. R.

4 Robinson v Ashton (1895) L.R. 20 Eq 25 at 28 Jessel M.R."In the absence of a special agreement to the rise or fall in the value of fixed plant or real estate belonging to a partnership was as much profit or loss of the partnership as anything else. If a man said "I bring in no money capital. I have got no money, but here is a mill and machinery worth £20,000 which I bring in" and if he was credited in the books with £20,000. Then the mill and machinery become partnership property just as if the partner had bring in money, and the partnership had with that money bought the mill and machinery"

5 Charles D.D.(1983) Law of Partnership, 3rd Ed, Sweet & Maxwell, London Pp:145-146

6 Fletcher K.L. (1991) The Law of Partnership In Australia and New Zealand 6th Ed. The Law Book company Ltd Australia P.132

7 Davis v Davis(1894) 1 Ch. 393; at 401

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9 Partnership Act 1890 Section 20(1), Kaduna State Partnership Edict op cit. Section 22(1)

10 Partnership Act 1890 Section 20(2), Kaduna State Partnership Edict op cit. Section 22(2)

11 Fletcher K.L. op cit. P. 139

12 Partnership Act 1890 Section 2(1)

13 (1804) 9 ves Jr 591

14 Partnership Act (1890) Section 21, Kaduna State Partnership Edict op cit. Section 23

15 Partnership Act 1890, Section 22, Kaduna State Partnership Edict op cit. Section 24

16 Anson Banks, R.C.I. op cit. per Lord Lindley at P:539

17 Fletcher K.L.; op cit. P.142

18 Partnership Act(1890) Section 23, Kaduna State Partnership Edict op cit. Section 25

19 65 E R. 720

20 Anson Banks R.C.I., op cit. P:542

21 Ibid. p. 586

22 Ibid. p. 586

23 Ibid. p. 588 – 589

24 Ibid. P: 568 per Lord Lindley

25 (1996) 5 NWLR 17 at 19 part 446

26 Ibid. P:584

27 (1861) 29 Beav. 620

28 Anson Banks. R.C.I. op cit. Pp: 556 - 557 per Lord Lindley

29 Ibid. at P:594

30 Partnership Act (1890) Section 25

31 (1874) L.R. 9 Ex 190 at 196

32 (1851) 10 Hare 493

33 Partnership Act (1890) Section 26

34 Ibid. Section 27

35 (1855) 20 Beav. 442

36 Fletcher K.L. op cit. P:122

37 Partnership Act (1890) Section 28

38 Ibid. Section 29(1)

39 Ibid. Section 30

40 (1842) 4 Reav, 534

41 (1853) 18 Beav. 75

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47 Udovitch A.L. (1970) Partnership and Profit in Medieval Islam, Princeton
48 Kasani 6:61; as quoted in Ibid PP;49-50
49 Shaybani M(1884) Al-Jami'i as -Saghir, Cairo P; 101
50 Udovitch A.L.; op cit. Pp:144-145
51 Ibid PP:55-56
52 Sarakhsi, mabsut P:165; as quoted in Ibip P:58
53 Shaybani, Asl, Sharikah fol.586 ii 18-21; as quoted in Ibid P:60
54 Udovitch, A.L. op cit. P:62
55 Shaybani kitab al-Makharij fil-hiyal (1930)P:58 ed J.Schacht, as quoted in Ibid: P:63
56 Sarakhsi, Mabsut, ii: 157-158; as quoted in Ibid. P.70
57 Shaybani, Asl, Sharika fol. 596; as quoted in Ibid. P:84
58 Shaybani, Asl, Sharika fol.69b, 70 & 73; as quoted in Ibid. Pp:97-98
59 Sarakhsi, Mabsut, ii :157 & 177; as quoted in Ibid PP:97-98
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61 Udovitch. A.L. op cit. P:101
62 Siddiqi M.N.(1985) Partnership and Profit Sharing in Islamic Law, The Islamic Foundation, Leicester, U.K. P. 29
63 Ibn Rushd, Vol 2, P:140; as quoted in Ibid P:30
64 Shaybani Asl Sharikah fol.61 ii 16-18; as quoted by Udovitch A.L. Ibid; P:129
65 Ibid ii 18-19 as quoted in Udovitch A.L. Ibid P:29
66 Kasani 6"63 ; as quoted in Ibid A.L. Ibid P.131
67 Siddiqi M.N. op cit. Pp:26-27
68 Ibid; PP:31-32; also Marghinani Vol 3, Kasani Vol. 6, P.107, sarakhsi vol.22, P.20,
69 Udovitch A.L. op cit. Pp:45-49
70 Sahnun, Mudawwana 12:62-67; as quoted in Ibid. P:152

CHAPTER FIVE

5.0. RELATIONSHIP OF PARTNERS TO THIRD PARTIES

There are two fundamental principles to understanding partners relationship to third parties. Firstly is the operation of the law of agency relating to the liability of a principal to the acts of his agent. Secondly is the fact that in partnership the operation of the agency principle is mutual and reciprocal in nature among the partners; this feature stand as the major distinction of agency and partnership. While this proposition hold good for all types of partnership under statutory laws. It may not always be so for partnership under Islamic law. The position is the same in the case of Mufawada and Sharikah. In the case of Mudarabah however, liability for loss is not mutual, it is borne absolutely by the capital owner although the working partner is also deemed to have lost his time and effort. Our task in this chapter is to examine the extent of the application of the mutual principle and its limits in the partnership dealings with third parties, when and how a partner is liable for the actions of his co-partners and vice-versa.

5.1 PARTNER'S POWER TO BIND THE FIRM

This power presupposes the actions of a partner as an agent of the firm. As already noted, the operation of agency principle constitutes the essential feature of the partnership. Each partner is endowed with general authority to bind the firm, by so doing he acts as an agent of the firm which constitutes both himself and his co-partners as principal. This call for the comparison that:-"The liability of one partner for the acts of his co-partners is in truth being the liability of a principal for the acts of his agent[1]. In this regard the Edict provides:-

"Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partners so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner"[2]

The crucial issue in partner's power to bind the firm depends on whether or not the partner was acting within the scope of his authority and in the usual course of business. If he is, the firm as a whole would be liable for his actions; but if he is not, and the person dealing with him either knows that he has no authority, or does not know or believe him to be a partner, the firm will not be liable. This leads us to determining the scope and usual course of business.

There is no hard and fast rule as to what is the scope of a particular business; it is therefore a question of fact to be determined defending on the circumstances of each case. It is mostly viewed from what was apparent to the outside world in general not ordinarily what was agreed by the partners, provided the act is a like kind to the business in question, which must not only fall within the scope of the business carried on by the firm but must also be executed in the usual way of such business[3]. In

Bank of Australasia v Breillat[4]

It was held that in trading partnership

"Every partners is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is praepositus

negotias societatis, and consequently may bind all the other partners by his acts, in all matters which are within the scope and objects. Hence if the partnership is of a general commercial nature, he may pledge or sell the partnership property, he may draw, make, sign, endorse, accepts, transfer, negotiate and procure to be discounted, promissory notes, bills of exchange, cheques and other negotiable papers, in the name of and on account of the partnership"

For the action of a partner to bind the firm, it must be carried out in the usual course of business. Thus if a partner, without the consent of his co-partners, carried out a transaction which, although it comes within the scope of the kind of business carried on by the partnership, is carried out in an unusual manner; the transaction will not be binding on the partnership because the extraordinary nature should put the other party on inquiry. For example taking a loan at an exorbitant rate of interest; for instance; instead of a usual 6 - 10% rate, a partner takes at over 60%. It has thus been submitted that for an act to be within the usual course of business, it must be reasonably necessary and not merely convenient.[5]

Likewise where a partner acts outside the scope of his authority, within the usual course of the firm's business, his actions will bind the firm if the party dealing with him does not know that he was acting without authority. However, where the party dealing with him knows of the lack of authority or does not know or believe him to be a partner, the action will not be binding on the firm, save if it opt to ratify such action. The ratification may be either express or implied, otherwise such a partner alone would be personally liable for his actions.

5.2 ACTS DONE ON BEHALF OF THE FIRM

Where acts are done or instruments executed for and on behalf of the firm, such actions or instruments will bind the firm provided they are done or executed with express authority of the firm, whether by a partner or otherwise. The Edict provides that:-

> "An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners"[6]

The above section deals with the liability of the firm for acts done and instruments executed on behalf of the firm. A caveat is stated in subsection 2, which excludes the application of the section to other general rules relating to execution of deeds and negotiable instruments. By implication this means; notwithstanding any authority or mandate, transactions relating to deeds or negotiable instruments must conform to the general requirement of their respective laws otherwise it would not bind the firm.

Thus, as a general rule even where a partner has express authority of his co-partners to enter into a deed on the firm's behalf, the form of deed will ultimately determine whether or not the firm is bound. Therefore the requirements set out by the law governing that particular deed must be strictly observed.

For example, the law relating to bill of exchange or promissory notes requires the name of person to be charged therewith to be contained on the instrument. It is thus observed that:-

> "Subject to the qualification that the name of a firm is equivalent to the name of all person liable as partners in it, no person whose name is not on a bill or note is

liable to be sued upon it. In order therefore that a bill or note may be binding on a firm, the name of the firm or names of all its members must be upon it, and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument whatever may be their liability as regards the consideration for which it may have been given"[7]

This goes to show that only Bill drawn in the firm name binds the firm; but if it is in a different name or in the name of a single partner, it will not be binding on the firm. Thus in

Faith v Richmond[8]

Partners in a firm carrying on business under the name of "The Newcastle & Sunderland Wallsend Coal Co." were held not to be liable on promissory note issued in the name of "The Newcastle Coal Co."

Likewise in

Kirk v Blurton[9]

The business was carried on under the name -"John Blurton", one partner was held not to be liable on a bill of exchange drawn and endorsed by the other partner in the name "John Blurton & Co."

With regards to promissory notes; the following rules are formulated[10]

[i] If a partner promises for himself and co-partners this amount to a promise by the firm.

[ii] If a partner promises for himself and not for himself and co-partners he alone is liable even if it is a promise on partnership debt.

[iii] If a partner promises in the name of the firm to pay that which he and not the firm is liable, the promise binds him alone.

[iv] If several partners sign a note in this form - " promise to pay" all that signed are liable jointly and severally.

[v] One partner has no authority, as such, to bind himself and his co-partners jointly and severally. But if some members of a firm make a joint and several promissory notes they will be personally liable, although they may have signed only on behalf of themselves and co-partners.

Where a firm benefited from a contract entered into by one of its members and the circumstances tends to show that the member entered into the contract as agent of the firm, the question of liability or otherwise of the firm would depend not on the basis of the benefit obtained but on whether the firm can be taken to have entered into the contract by the acts of one of its partners. In

Emly v Lye[11]

A partner had drawn bills in his own name, had them discounted and then applied the money for the benefit of the firm. The firm was held not liable.

Likewise if a partner borrowed money without the actual or implied authority of his co-partners, he and not the firm will be liable, even if the money has been applied for the firm's benefit. The same applies where goods or services are supplied at the request of a partner who is acting either on his own account or outside the scope of his authority. Though the lender is entitled under the equitable doctrine of subrogation to repayment by firm for the amount it benefited, he stand partly in place of those creditors whose claim

have been settled by his money and partly on the right of the borrowing partner to be indemnified by the firm for liabilities incurred bona fide for the benefit of the firm[12]

5.3 LIABILITY OF FIRM FOR UNAUTHORISED ACTS

Where a partner, without authority pledges the credit of the firm for his private purpose, the firm is not bound by such actions. Provided it is apparent to the creditor, or the circumstances are such that he should have been aware, that such a transaction is unconnected to the partnership business. The Edict provides that:

> "Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner"[13]

The firm is only liable for authorised acts, where a partner pledges the credit of the firm for an apparently private purpose, unless it can be shown that he was specifically authorised by his co-partners, the firm is not bound, rather he alone would be personally liable. The incidences of the liability or otherwise of the firm was beautifully stated thus:-

> "So long as one partner does nothing beyond the scope of his apparent authority... so long is the firm responsible for his conduct, although he may have acted beyond or in direct violation of the authority within which his co-partners may have attempted to confine him. Restrictions placed by the partners upon the powers which each shall exercise do not affect non-partners, who act bona fide and without notice of the restriction. But when it is sought to make the firm liable

for some act not prima facie authorised by it, an actual authority by it must be shown; and if this cannot be done, no case is made out against the firm"[14]

Conversely, where a partner acts in fraud of his co-partners or beyond his mandate, the firm is liable, if he has not exceeded his apparent authority and the person dealing with him has no notice of the fraud. The burden is on the firm, if it wants to escape liability to notify parties' dealings with them of any restriction of authority or power of a partner. Thus-

"If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firms, no act done in contravention of the agreement is binding on the firm with respect to person having notice of the agreement"[15]

The most effective method of invoking the protection of the above section has been submitted to be by way of giving express notice of any restriction on partners implied authority to bind the firm. As seen above it may also be implied from the surrounding circumstances of transaction, such as where the partners in attempting to secure some purely personal benefits. Thus persons who knows that a partner is using the name and assets of the firm for a private purpose of his own, knows that he is prima facie committing a fraud on his co-partners.[16] Therefore they can not be heard to claim that they were mislead by the partner's apparent authority. In

Galloway v Mathew & Smithson[17]

One partner "S" published an advertisement warning all persons not to give credit to his partner "M" on his ("S's account), and stating that he would not be liable for any

bills or notes issued by "M" in the firm name. It was held that the firm was not bound to a third party that accepts bill of exchange from "M" in the firm's name.

Likewise in: -

Bignold v Waterhouse[18]

A special favour was granted to a consignor of goods by one partner in a firm of coach proprietors operating between London and Norwich. It was held that where a customer in a trading firm stipulates with one of the partners for a special advantage in the conduct of their business with him for a consideration which is good as between himself and that partner, but of no value to the firm, the firm is not bound by this agreement and incurs no obligation in respect of any business done in pursuance of it.

5.4 PARTNERS LIABILITY FOR DEBTS AND OBLIGATION OF THE FIRM

Partners are jointly liable for all partnership debts and obligations and in the case a deceased partner, his estate is severally liable. In respect of all debts and obligations, the partners are jointly liable but not several except in the case of the estate of a deceased partner. This is because when a partner contract on behalf of the firm, he does so as agent of all the partners and therefore he cannot be severally liable. Thus if a creditor elect to sue some members of the firm, he cannot later sue the others because the liability is not several. The best devise is to sue the partners in the firm name, by so doing, the creditor make all the partners severally liable for the judgement debt.

Lord Lindley canvassed that: - "a partner who enters into a contract on behalf of the firm is not liable on that contract except as one of the firm. In other words the contract is not binding on him separately, but only on him and his co-partners jointly.

One partner may render himself separately liable by holding himself out as the only member of the firm, or by so framing the contract, as to bind himself separately from his co-partners as well as jointly with them, but unless there are some special circumstances of this sort a contract which is binding on the firm is binding on all the partners jointly and on none of them severally[19].

The same position is found under the Act which provides:-

"Every partner in a firm is liable jointly with the other partners...for all the debts and obligations of the firm incurred while he is a partner and after his death, his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject ... to the prior payment of his separate debts"[20]

It is worthy to note that same position has been taken in a decided case long before the coming of the Act talk less of the Act that comes of recent. It has been submitted that the doctrine rests not upon an election by the creditor but upon the merger of the obligation to pay in the previous judgement, which is justified based on convenience and the avoidance of unnecessary litigation[21] Thus in: -

Kendall v Hamilton[22]

A & B were sued in respect of a loan by the plaintiff to the firm in which A & B were partners, and judgement was signed against them but remained unsatisfied. Discovering that C, a solvent person, had been a partner in the firm at the relevant time, the plaintiff brought a second action against C in respect of the same loan but failed on the ground that judgement in the previous action even though unsatisfied, extinguished the obligation.

The above position is however, no more the law in UK whose position now under Section 3 of civil liability (contribution) Act makes the partners both jointly and severally liable. Same seems to be the position in Nigeria as well. Thus in the case of

Yesufu vs Kupper International N.V. [23a]

The Supreme Court held inter alia that it is settled that in partnership, each of the partners is in law jointly and severally liable with his co-partners for the debts and liabilities of the partnership.

5.5 FIRM' S LIABILITY FOR WRONGFUL ACTS OF A PARTNER

Primarily a firm may be liable for the wrongful acts or omission of one of its partners, this may be so even if the act is not authorise by the other partners provided it is committed in the ordinary course of the firm's business. The basis for the liability of the firm to third parties therefore is twofold viz:-

1. For acts or omission committed in the ordinary course of business, and
2. For acts or omission authorised by the other partners.

The Edict is explicit in this respect. It provides:-

> "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act"[23b]

The extent of the firm's liability is comparable to the liability of a principal for the acts of his agents. Since a principal is liable not only for the authorised acts of his

agents, but also for unauthorised acts that fall within the scope of the authority apparently conferred upon the agent so is also the firm liable for the acts of any of its partners. It is worthy to note that cases that fall within the purview of the section are essentially within the scope of torts such as negligence and carelessness. In

In Lloyd v Grace, Smith & Co.[24]

It was held that "a Principal must be liable for the fraud of his agent committed in the course of his agents employment and not beyond the scope of his agency, whether the breach be committed for the principal's benefit or not.

This principle, though deals with a case of agency but it is perfectly applicable to partnership liability by virtue of their semblance which we have already noted. In

Byth v Fladgate[25]

Funds, subject to the trusts of a settlement, were invested in Exchequer bills, on the sale of which the proceeds were paid to the account of a firm of solicitors - F;S., and F.- at their bankers. The funds were afterwards advanced on a mortgage of house property in a new neighbourhood, and of inadequate value. At that date there were no trustees of the settlement and the mortgage was taken in the names of S. and two other persons who were then proposed, and shortly afterwards appointed new trustees, and never repudiated the transaction. S. was the member of his firm who acted for them in all the matters, and for the work which he did the firm, by arrangement, received, at the time when the money was advanced, payment of their bill of costs out of the funds. The mortgage proved to be an insufficient security, and in an action against the trustees it was held that they were jointly and severally liable to make good the loss sustained. The property not having been sold, or the trust funds replaced, beneficiaries sought to make

the firm of solicitors liable for the loss of funds on the ground of negligence, though S.'s partners had not had any personal knowledge of the property at the time when the mortgage transaction was completed:-

Held, that in all that S. had done in the matter of the mortgage, he acted within the scope of his authority as a partner, that his firm must be taken to have had knowledge that the security was, for trustees, improper, and that, consequently, they were implicated in and jointly and severally liable for the breach of trust; and furthermore that the judgement which had been recovered against S. as one of the trustees, had not discharged his partners from liability:

Held also, that, though there had not been an express retainer, the relation of solicitor and client might be inferred from the acts of the parties, that it subsisted between the firm and the trustees, and that the firm were liable in damages for the negligence of S. for failure in discharge of the duty which had been undertaken to the clients:

Held, also, that the liability extended to the estate of a member of the firm since deceased.

The liability of the firm may equally extend to fraud and fraudulent misrepresentation committed in the course of business. In

Rapp v Latham[26]

Perny, who was the active partner in a firm of wine and spirits merchants, had received a substantial sum of money from a customer to be applied in the purchase and sale of wine. He falsely and fraudulently represented that he was carrying out various transactions on customers' behalf and accounted to him for the supposed proceeds. There was however, a considerable sum unaccounted for, which parry alleged had been invested

in the purchase of wine. The customer sought to recover this amount against parry and his partner Latham. Notwithstanding an attempt by Latham to argue that he was not affected by parry's fraud, on the basis that the fictitious purchases and sale were not made in the ordinary course of trade and were, therefore, not partnership transactions, it was held that Latham was liable to the customer.

Where the liability of the firm is upheld, it by implication means all the partners in the firm are jointly and severally liable. This position has been affirmed by the Edict.[27]

5.6 LIABILITY FOR MISAPPLICATION OF MONEY OR PROPERTY RECEIVED FOR OR IN CUSTODY OF THE FIRM

The firm may be liable for the misapplication, by a partner of money or property received for or in the custody of the firm. Provided in the case of a partner who received and misapplied the money or property from a third party does so within the scope of his apparent authority. While in the case of money or property in the custody of the firm, misapplied by one or more, the liability of the firm is absolute. This principles are enshrined in the Edict which provides:-

> Where a partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it, and where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss[28]

The liability of the partners under this section is joint and several. In

Blain v Bromley[29]

Money was paid into the joint account of a firm of solicitors for investment. One partner represented it to have been invested accordingly, but he had in fact appropriated the money for his own use. It was stated that it was within the ordinary course of the business for a solicitor to receive money for investment in specific security, and the court held the innocent partner liable for the misappropriation of the money by his co-partner and for the latter's representation that the money had been invested.

The same position applies where one partner absconds with the money. In –

Earl of Dundonald v Masterman[30]

A firm of solicitors was retained to manage and settle the affairs of a client who was being pressed by his creditors. The partner that was responsible for looking after the clients affairs absconded with moneys received, it was held that the innocent partners were liable.

The liability of the firm under this section is limited to acts, done in the cause of business, where a partner acted in his personal capacity or in acts that are not within his apparent authority or the firm ordinary course of business, the firm would not be liable. In –

Plumer v Gregory[31]

A solicitor borrowed money from a client without the knowledge of his co-partners, saying that the firm wanted to lend it to another client on mortgage. The other partners were not held liable even though two of them had in fact previously borrowed money from the same client.

5.7 PARTNERS LIABILITY FOR BREACH OF TRUST

Where a partner being a trustee, improperly employs trust property in the business or in the partnership business or in payment of partnership debt, it seems the beneficiary may only have recourse against such partner not the firm, save if the other partners have notice of the breach of trust.

Likewise the beneficiary may have remedy under the equitable doctrine of tracing, that is if the trust property is still in possession or under the control of the firm. This position is well founded under the Act and Edict, which provides: -

"If a partner being a trustee improperly employs trust property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:

> Provided that this section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and
>
> Provided also that nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.[32]

The section as we understood is referring to a situation where the Trust is completely severable to the firm that is where the partner is a trustee in his individual capacity. In –

Exp Apsey[33]

A Trustee in Bankruptcy applied part of the bankrupt's estate towards his own firm's debt. On that firm's bankruptcy, the amount misapplied was held not provable against the joint estate.

As already noted, the beneficiary has a remedy of tracing the misapplied property if it is still in the possession of the firm. The problem with this doctrine however, lies in a situation where money rather than tangible property was involved or if it was a tangible property, it has been converted into money, and has been paid into the firm's account or has been mixed up with other trust monies in the firm's account. In such circumstances the rules in Hallet's and Clayton's Cases applies. Thus in –

Hallet's Estate[34]

It was held that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands.

Likewise in –

Devaynes vs Noble - Clayton's Case[35]

A case involving a very complex deal in securities, the rule was laid that all sum drawn out of the account be debited against the sum paid into the account in the order in which they are presented i.e. the sum first paid in will be the first extinguished, in whole or in part by later withdrawals.

These decisions may be contrasted with the House of Lords decision in –

Sinclair v Brougham[36]

Where it was held that the balance in the account must be shared pari passu by claimants who had equal equities.

5.8 LIABILITY BY "HOLDING OUT

This concern non partners whom either by words spoken or by conduct represents themselves or allow themselves to be represented as partners to a third person. Where

such third person believed and acted upon the representation, to his detriment, such person would be estopped from denying himself to be partner. This position of law has already been considered in chapter two. What amounts to holding out has been seen to involve question of mixed fact and law. It has been summarised thus:-

> "The holding one's self out to the world as a partner as contra-distinguished from the actual relationship of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of authority that his name has been used. Thus in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop door or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner"[37]

The same position is stated under the partnership Edict, which provides thus: -

"Every person who by words spoken or written or by conduct represents himself or who knowingly allows himself to be represented as a partner in a particular firm is liable as a partner to anyone who has on the faith of any such representation given credit to the firm whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or allowing it to be made.

Where after a partner's death the partnership business is continued in the old firm name the continued use of that name or of the deceased partner's name as part thereof

shall not of itself make his executors, administrators, estate or effects liable for any partnership debts contracted after his death".[38]

5.9 FIRM'S LIABILITY FOR ADMISSION AND REPRESENTATION OF PARTNERS

An admission or representation by a partner made in the ordinary course of business, concerning the affairs of the firm, is evidence against the firm. In this respect, the Edict provides: -

"An admission or representation made by any partner concerning the partnership affairs and in the ordinary course of its business is evidence against the firm".[39]

Before an admission or representation of a partner can be used against the firm, it must have been made in the ordinary course of business. This is because the liability is inferred as a result of the partner's apparent and usual authority. Thus his co-partners are estopped from denying the truth of the statement.

In –

Parker v Morrell[40]

It was held that an answer put in by one of several partners, after dissolution of the partnership, containing an admission of a representation having been made by such partner in a partnership transaction, prior to the dissolution not admissible as evidence of such admission against his co-partners, on the ground that since the dissolution of the partnership the party whose answer it was has become bankrupt and obtained his certificate, and had therefore at the time of putting in the answer no common liability with the co-partners.

This case may be contrasted with the following cases where representation was admitted against the other partners. In –

Blair v Bromley[41]

A & B, having for many years been partners in business as solicitors, dissolved their partnership in 1834, and the business continued to be carried only by A alone until 1841, when he became bankrupt and it was then discovered that a sum of money paid by a client into the joint account of the firm at their bankers in 1829, for the purpose of investment, and which A had shortly afterwards represented to have been invested accordingly, and on which he had regularly paid interest on that footing had, instead of being invested, been appropriated by him to his own use. Upon a Bill filed by the client against B, it was held that, even though the Dependant have been personally ignorant of the whole transaction, and to have derived no benefit from the fraud, still he was bound by the representation of his partner, such representation relating to matter within the limits of the partnership business, and amounting therefore to a guarantee by the firm to the parties concerned that they should be placed in the same situation as if the fact represented were true.

The same position was reached in –

Rapp v Latham & Perny[42]

5.10 EFFECT OF NOTICE TO ACTING PARTNER ON FIRM

Generally, notice to one partner of any matter connected with the business of the firm is deemed as notice to the firm, except in the case of fraud on the firm committed by or with the consent of that partner. In this respect, the Edict provides: -

"Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm except in the case of a fraud on the firm committed by or with the consent of that partner".[43]

The above rule has been justified on the analysis that if a firm claims the benefit of a transaction entered into by a partner or is otherwise bound by his acts, it cannot use its own ignorance of what that partner know to place itself in a more favourable position than could have been achieved by that partner if he had been acting on his own account. That when it is necessary to prove that a firm has notice of some facts, all that is required is to show that notice was given to one of the partners who habitually acts in the partnership business[44]

Where two different firms have a common partner, notice, which is imputable to one firm, is also imputable to the other, so long as it related to the latter's business. This is because as put by Jessel M.R. as a general rule the equitable doctrine of "constructive notice" does not apply to commercial transaction and accordingly has no place in the law of partnership[45]

It is however, doubtful, whether notice to a dormant partner would operate, without more, as notice to the firm.

Likewise in the case of fraud on the firm by one of the partners or committed with his consent or where he acted outside the scope of his authority or beyond his powers, in such circumstances, his notice of that particular transaction is no notice to the firm. In –

Bignold v Waterhouse[46]

A partner in a firm of carriers had entered into an agreement to carry valuable parcels free of charge in fraud of his co-partners, so that they were not bound thereby. A

particular parcel, which only the partner who had made the agreement knew to be valuable, was sent and lost. The other partners were held not to have had notice of the parcels true nature and were not liable for its loss.

5.11 LIABILITY OF INCOMING PARTNERS

The position of an incoming and an outgoing partner in respect of the firm's debts and liabilities is govern by the Act. It provides in effect a reminder that while the business of a firm may continue any change in the composition of the members' marks the end of one relationship and created a new one. The rights and liabilities of the members of the separate firms remained separate and distinct. Thus as the section envisage, a new partner admitted into an existing firm is not liable for the firms existing liabilities before his admission. While a retired partner still remained liable to partnership debts and liabilities incurred prior to his retirement, save if there is a joint agreement between himself, the continuing partners and the creditors to the contrary. In respect, the Edict provides: -

"A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and firm as newly constituted".[47]

Generally, under the above rule outgoing partners remain liable for the partnership debts and liabilities contracted while he was a partner. Except as noted, where there is an agreement in which the creditors agree to look into the newly constituted firm in place of the old one for their debts, where such is agreed between the three partners, such agreement discharges the outgoing partner: This principle is known as novation.

On the other hand, the outgoing partner's liability is deemed to continue regarding all those who have knowledge that he is a partner until such a time when they are duly notified of his retirement.

With regards to the liability of a newly admitted partner to the pre-existing liabilities of the firm, it also depends strictly on the operation of the above principle. By a new person admitted into the firm, the firm as formerly known ceased to exist and a new one is constituted. The new partner is not liable to those pre-existing debt, save if there is an agreement to the contrary between the new partner, the old firm and the creditors. The agreement may be express or implied. In –

Rolfe v Flower, Salting Co.[48]

Partners took two of their clerks into partnership but continue trading under the same name. The assets and liabilities of the firm were transferred to the new firm using the old books of accounts and the creditor was paid part of his debts from the assets so transferred. These circumstances together with other acts and admissions and the creditors continued dealing with the new firm, were held to afford cogent evidence that a novation was intended.

It seems the principle may operate in all cases, whether the events happen contemporaneously or not. That is to say whether as one partner retires, a new one was admitted into the firm in the stead of the retired one or not; or where no partner retires but a new was admitted or where one retires and none was admitted. In all cases three effects are noticeable i.e. (1) it marks the end of the pre-existing firm and (2) it creates a new firm and (3) the principle of novation may apply if there is an agreement between the parties concern express or implied.

5.12 REVOCATION OF CONTINUING GUARANTEE BY CHANGE IN FIRM

The liability of a guarantor in a continuing guarantee, in the absence of an agreement to the contrary, ceased or is deemed revoked by any change in the constitution of the firm to which the guarantee was given. This revocation is as far as future liabilities are concern, but with regard to pre-existing liabilities the guarantor's, liability still holds, the same position applies to any change in the creditors firm. In this respect, the Edict provides: -

"A continuing guaranty given either to a firm or to a third person in respect of the transaction of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty was given".[49]

The rationale of the above rule lies in the fact that the guarantor has guarantee a particular firm for its transactions or dealings with another firm or third party. Where any of such parties change, it implies that the former with which the guarantor has confidence or understanding ceased to exist and in its place comes a new one. Therefore except an agreement to the contrary can be inferred, the position is that guarantor has no business

with all the subsequent liabilities of the firm as newly constituted, the same applies to any change in the firm to whom the guarantee was given.

5.13 RELATIONSHIP OF PARTNERS TO THIRD PARTIES UNDER ISLAMIC LAW

Unlike the designation of limited and unlimited partnership under statutory laws, which denote the extent of each partners liability towards third parties. For instance in unlimited partnership, the partners are liable to meet the obligation of the firm in proportion to their shares in the firm's assets or in accordance to terms of the partnership contract relating to profits and losses. Whereas in limited partnership, the liability of some of the partners is limited to the amount subscribed by them. Under Islamic law, the liability in all partnership is unlimited the partners are liable in proportion to their share of capital investment. The liability in this respect is comparable to the liability of partners under general partnership. The only difference lies in the means of commencing action. While under statutory laws, any of the partners or the firm as a whole can be sued, under Islamic law, it is only that partner with whom the third party had transacted can be sued, who would then be indemnified by his co-partners. Except in the case of Mufawada, where the same position applies with that of statutory laws, in that any of the partners can be sued.

Likewise, unlike statutory laws under Islamic law the liability of partners to third parties is several not joint. Except in the case of Mufawada where it is both joint and several; this is as a result of two fundamental principles - mutual agency and mutual surety (which makes each partner an agent as well as a guarantor of the other); for actions in connection with the partnership. Perhaps in this regard Mufawada partnership shares a

lot of similarities with the position under statutory laws per contrast with Inan partnership in which the partners relationship to third parties are based exclusively on the principles of agency (each partner is an agent of the other but not a guarantor).

The main features that characterised partners relationship to third parties under Islamic law are:- prohibition of fraud, coercion, uncertainties, vagueness and control of injury. This can be supported with prophetic tradition that says "Do not harm others and others should not harm you".

5.14 PARTNERS RELATION TO THIRD PARTIES IN SHARIKAH AND MUDARABAH

Generally, a partner in Sharikah agreement may, with the permission of other partners procure additional amount of capital from other persons under an agreement of Sharikah, or Mudarabah, he may also supply a part of the partnership capital to a third party on the basis of Sharikah or Mudarabah. The same applies to the party engaged in business under a Mudarabah agreement, may either with the general or express permission of the capital owner, employ his own capital in the Mudarabah business or obtain additional capital from some third parties on the basis of Sharikah or Mudarabah and is also entitled with the permission of its owner to supply the Mudarabah capital to another party under a Mudarabah or Sharikah agreement. Likewise, except with express permission no partner or a working partner in Mudarabah can lend out or borrow money in connection to the business; though he is entitled to make credit sales except when he is expressly prohibited from doing so. Where there is permission to do so, the value of goods or services purchased on credit should not exceed the total value of the partnership except with express permission to that effect of the co-partners otherwise the party may

be personally liable to settle the excess, but if permission was given, the co-partners would be equally responsible for paying the debt.[50] This in contrast to the position under statutory laws where each and every partner is considered an agent of the firm and his other partners for the purpose of the partnership business and his actions binds the firm and his partners provided they are done for carrying on in the usual way business of the kind carried on by the firm. Although to some extent the position boiled down to the same thing for a partner under statutory laws will be personally liable if he does something to which he has no authority to do and the person dealing with him knows he has no such authority. Where the third party did not know of the above fact, the action will still be binding on the firm; while in the case of Islamic law no such extension have been made; once there is no authority, it is the agent that will be liable. What stands, as the similarity between the two laws is the need for authority to act.

5.15 RIGHT TO SUPPLY JOINT CAPITAL TO THIRD PARTY ON SHARIKAH

There are two different opinions regarding the right of a partner to supply joint capital to another party for Sharikah agreement. According to majority jurist a partner can not supply the joint capital to third party for Sharikah without the consent of his co-partners. According to Maliki on the other hand, he may do so even without obtaining permission of the other partners. Provided he is entitled to use a certain part of the joint capital to enter into an agreement with third party on the principles of Sharikatul-Inan or Mufawada so long as the third party is entitled to do only such work as assigned to him by the partner. If this third party draws on the total wealth of the partnership without the partner's permission, it will be illegitimate[51]

According to Al-Dardir, he is entitled to enter into a Sharikah with third party to the extent of a specific assignment, provided that the third party has no say in the affairs of the old joint enterprise[52]

According to Hanbali jurist, joint capital can not be supplied to a third party except with the permission of the co-partners. They opined that a partner has no right to enter into Sharikah contract with third party, nor is he entitled to give the capital to any third party on Mudarabah because his doing so establishes new rights on the joint capital giving others a claim on profit from it. A partner has no right to create such claims. However, if his co-partners permits him to do business according to his own desecration, all types of business transaction will become legitimate for him. For example, getting some business done by others without any payment to them, giving from the joint capital on Mudarabah, entering into a Sharikah agreement with it, merging it with his own capital for business purposes, embarking upon a journey with it, keeping it as a trust and selling goods on credit.[53]

The Hanafi jurists share the same opinion with Hanbali but the Shafi'i jurist are silent on this issue.

The end result where such investment was made extends the partnership prospects of profit and liability. Where there is a profit it goes to the firm as a whole, the same also where there is loss it goes to the firm as a whole.

Where however, the partner has entered into a Sharikah agreement on his private capacity or account, it is lawful and except if that new agreement affect or is likely to affect his participation in first business, he don't need to secure the consent of his co-partners thereof. This is the majority view, shared by Maliki, Hanbali and Shafi'i. Under

Hanafi consent of the co-partners in a prerequisite. The position taken by Hanbali and Hanafi in contrast to that of Maliki seems to be the nearer to the position under statutory law for which such action has to be backed by authority of the co-partner otherwise the action might not bind the firm. Except if the third party transacting does not know of the limit of such partner's authority.

5.16 RIGHT TO SUPPLY JOINT CAPITAL TO THIRD PARTY ON MUDARABAH

Opinion of jurists differs also on this. According to Hanafi School, every partner has the right to give the capital to a third party on the basis of Mudarabah, the reason being that Mudarabah is a contract lower in status than Sharikah. This implies that any of the partners may give the Sharikah capital to a third party on Mudarabah with or without the permission of his co-partner[54]

Maliki adopted a slightly different opinion from that of the Hanafis. They opined that he has a right to give a part of the Sharikah capital to any third party on the basis of Mudarabah, provided the volume of capital is sufficient to make this possible otherwise he would not be entitled to do so without the permission of his partners.[55]

Hanbali adopted a different view completely, accordingly to them no partner is entitled to give a part of the Sharikah capital on Mudarabah to any third party without the permission of his co-partners express or implied, such as general permission to make business transactions[56]

Shafi'i on the other hand permits every partner to make business transactions as are in consonant with the interest of the joint business. This implies that if giving the

capital to a third party on Mudarabah serves the best interest of the partnership, a partner would be entitled to do so.

Whereas under statutory laws such transaction can only be enforceable against the firm if the partner so acting has authority otherwise the firm will not be liable except if the third party dealing with the partner does not know of the lack of authority.

Where however, the partner obtains a Mudarabah capital on his own separate account, he is entitled to all the profit and except if the business affects his performance in the Sharikah business, he don't need to secure the consent of his co-partners. This is the opinion of Hanafi and Maliki. Shafi'i and Hanbali are silent on this point. It seems under statutory laws, same would be the position, as partners are not ordinarily tied down to the service of the partnership alone.

5.17 RIGHT OF WORKING PARTNER TO SUPPLY MUDARABAH CAPITAL TO THIRD PARTY ON A MUDARABAH OR SHARIKAH

There is consensus of opinion among the 4 sunnih schools of jurisprudence that a working partner cannot without the permission of the capital owner mixed the Mudarabah capital with his own or give it on Mudarabah or Sharikah to a third party.

Accordingly to Shafi'i the working partner cannot, even with permission of the capital owner, engaged in partnership with a third party nor give the Mudarabah capital to any other party on Mudarabah.

While the Hanafi are of the opinion that working partner is not entitled to do business by mixing up the Mudarabah capital with his personal capital nor give it on Mudarabah or enter Sharikah with it except with the permission of the owner. In such

case a general permission to work at his discretion will surfice.[57] Hanbali share the same opinion.

Likewise, if it is the customary Practice of merchant in a particular locality for the working partner to mixed his personal capital with the Mudarabah capital in order to carry on business, then the working partner shall have the right to do so even without special permission of the capital owner.

According to Maliki, the working partner is entitled to give out the Mudarabah capital to third party on Mudarabah only with the permission of the capital owner; otherwise if there is a loss he will be personally liable and if there is a profit, the capital owner is entitled to a share in it according to the conditions settled beforehand. The third party who actually did the business, will get his share from the remainder i.e. the working partner's share according to condition settled by them beforehand[58]

It is as well valid to mix the Mudarabah capital with others. If the working partner carries out business with this capital mixed with his personal capital, it is permissible, unless the capital owner has made it incumbent upon him not to do so by prior condition; or that the working partner admits a third party as partner in the Mudarabah capital without the capital owners permission even if the third party is working on Mudarabah for the very same capital owner. The working partner will be liable (for loss) in such a situation because the capital owner had not pinned his faith on any other person in this matter[59]

According to Shafi'i School, the working partner does not have the right to enter into a Mudarabah agreement with another party without the permission of the capital owner. Even where the capital owner consent, there are divided opinions in the Shafi'i

School. According to some jurist where the capital owner consents it is legitimate but if it was done without his permission it is void. According to another view even with the capital owner's permission, the working partner is not entitled to give the capital provided to him under certain conditions, to another party on Mudarabah. It is further opined that where the working partner in a Mudarabah agreement of « profit sharing with the capital owner, contracts a Mudarabah agreement with a third party and this third party purchased goods on his personal responsibility, paying from the Mudarabah capital and makes profit. According to Imam Shafi'i all the profits goes to the capital owner but according to Muzani the capital owner will get 1/2 and the other 1/2 will be shared between the two working partners on 50-50 basis. Abu Ishaq shares the same view with Muzani[60].

5.18 RIGHT OF THIRD PARTY TO A SHARE IN PROFIT

Where a working partner gives out the Mudarabah capital to another working partner on Mudarabah, the business activity of the first working partner is said to consists of the selection of the second working partner from whose business efforts according to his judgement he expect to earn a profit. Therefore the profits that accrued as a result of the efforts of the second working partner would be distributed among the parties - capital owner, first working partner and second working partner according to, the conditions settled by the parties. It may be based on the profits the first working partner made or it may be based on the profits made by the business as a whole. The implication of this is that in case of the former the capital owner would be entitled to a share from the share of the first working partner e.g. if the business made a profit of $1000.00 and the first working partner is entitled to $500. Then the capital owner gets his share from the

$500.00 belonging to the first working partner. While in case of the latter the capital owner gets his share from the $1000.00 as a whole; what remains will be shared among the first and second working partner according to their agreement. This type of arrangement seems to be peculiar to Islamic law alone although under the of freedom of contract such agreement if carefully analysed and agreed upon by the partners will be binding on the firm as a whole.

The Hanafi jurist justified and defended the first working partners entitlement to a share even though he might not have done anything himself on the basis that the business activities performed by the second working partner was done on his behalf, as if he has done it himself[61] .

It has been submitted that the main consideration is the assumption of responsibility by the working partner. It does not matter who does the work or discharges the responsibility, it could be by him personally or by someone employed by him in that regard. He would still be entitled to his share of profit as agreed with capital owner and would share it with his own employee - the second working partner according to condition they agreed.

According to Maliki Mudarabah is lawful with the permission of the capital owner but where the working partners does so without the capital owners permission, he forfeits his right to profit, and in case of a loss he alone is liable. It is opined that in such instance any profit would be shared between the capital owner and the second working partner who utilises the capital and that the first working partner gets nothing because by giving the capital to the second working partner he has transgressed his limit[62] .

Shafi'i jurist hold that Mudarabah under Mudarabah is valid and the first working partner is entitled to profit according to predetermined condition.

According to Hanbali, the first working partner will do the work as agent of the capital owner, therefore if he gives the capital to a third party without defining any share of profit for himself, the contract will be valid. If he has neither invested any capital nor done any work but has determined a part of the profit for himself, it will not be valid, because profit can be accounted only on the basis of either of these two.[63]

The Hanbali view has been submitted to carry less weight because business activities does not necessarily involved physical exertions but also important business decision which was performed by the first working partner in deciding to engage the second. Moreover, the second working partner has no direct relationship to the capital owner, he is only the agent of the first working partner. On this basis the views of the Hanafi, Maliki and Shafi'i is submitted to be preferable.

The same position applies to profit made in Sharikah partnership with Mudarabah capital, if it is done with the permission of the capital owner, the profit will be divided according to predetermined proportions.

5.19 RIGHTS AND LIABILITIES IN RESPECT OF CREDIT AND OTHER TRANSACTION

Generally credit selling is allowed even without securing the permission of co-partners or capital owner in both Sharikah and Mudarabah respectively; the jurist are unanimous on this. In relation to credit purchase however they differ.

According to Hanafi every partner or working partner has the right within certain limits to purchase on credit, that is provided he has ready cash to pay. If he has not and

he purchased on credit, what he purchased will be his personal property, distinct from the joint property, the reason being to add such property to Sharikah account would constitute borrowing which the partner has no right to do without permission. The same applies to Mudarabah.[64]

It follows therefore that the partner that made the purchase would be personally liable to the creditor.

The position under statutory law is that partners are jointly liable for the debt and obligations of the firm provided it is done with authority.

As to the application of the above principle to Mudarabah according to Abu Hanifa the right of the working partner to sale on credit is automatic but Abu Yusuf and Muhammad hold that it has to be with permission of the capital owner. Regarding credit purchase they are unanimous that it is not legitimate except with express permission otherwise he would be personally liable.

With permission however, goods may be purchased in any quantity on credit. Under Sharikah it will be a joint property with joint responsibility for the loan; the same applies under Mudarabah, according to Hanafi, it will be a joint property for the capital owner and working partner on joint responsibility for the loan. It cannot be deemed property or personal loan of the capital owner because Mudarabah contract cannot be made on the basis of loan. Both will be responsible equally for paying the price.[65]

Maliki share the same opinion with Hanafi on the right to sell on credit, but required working partner in the case of Mudarabah to secure permission of the capital owner. With regard to credit purchase, they hold that a partner in case of Sharikah may do so only with the consent of his co-partner otherwise he would be personally liable.

While in case of Mudarabah the working partner has no right to purchase on credit even with the permission of the capital owner, nor can he buy in excess of the Mudarabah capital, where he does both profit and liability in respect of the excess goes to him personally.[66]

However, Ibn Hajib; Ibn Rashid and Sahnun descent, they opined that the partner has the right to buy as well as sell on credit even when not expressly authorised, as Sharikat al-mufawada includes a general permission to purchase goods.

According to Shafi'i School, the permission of co-partners and capital owner is necessary for credit sales, in both Sharikah and Mudarabah respectively. With regards to credit purchase, a working partner cannot purchase goods in excess of the principal capital without the permission of the capital owner where he does, he shall be personally liable, while in the case of Sharikah it is possible only with the permission of the co-partners.[67]

According to Hanbali School, there are two views, according to one view it is legitimate for a partner and working partner to sell on credit even without the permission of his co-partner or capital owner respectively. According to another view however; express permission is necessary. With regards to credit purchase, they share the same views with Shafi'i.[68]

It therefore follows that where an authorised credit purchase resulted in a loss, in the case of Sharikah all the partners would be equally responsible irrespective of the volume of their respective investment. In the case of Mudarabah, there are two views, one view is that the capital owner would be responsible but another view, that of Hanafi

is that both the capital owner and the working partner would be equally liable. Hanbali and Shafi'i are silent on the issue, but Maliki consider such a transaction to be unlawful.

From the foregoing, it is worthy to note that unlike statutory laws where the firm can sue and be sued in respect of its rights and obligation or where a creditor has the right to sue any of the partners in respect of the firm debts. Under Islamic law debts owed to and by each individual partner in respect of the partnership business cannot be collected from his co-partner. Thus if one partner bought something for their trade and found a defect in it, the other partner does not have the right to return it. This is because, the return of goods is a right pertaining to the party directly involved in the transaction; a co-partner does not possess that right because there is no privity of contract between him and the seller.

Where however, one of the partners grant an extension of time to a debtor for the payment of debt owned to the partnership; such would not be binding on his co-partner, and the latter can demand payment of his share either from the debtor or his co-partner. Likewise each partner has the right to rescind a purchase or sale made by the other before the transaction is completed. Furthermore, each partner has the right to give or take pledges, but only the partner conducting sale, can receive a pledge as a guarantee of payment and only him can take action upon it in case of non payment, he would also be liable to compensate his co-partner for the latter's share.[69]

In cases of incidental expenses, such as those dictated by custom and necessities of trade, like hiring of services, equipment, transportation, etc. they are independent rights possessed by both Inan partners, and in the case of any misfortune, the loss is borne by the partnership as a whole[70]

The above characteristics of an Inan partnership stands as its main distinction with a Mufawada partnership and partnership under statutory laws. While an Inan partner is not bound to pay for services hired by his co-partner whether it was on private account or in connection to the business. The hired person can only claim his fees directly from the partner that hired him, who would in turn be indemnified by his co-partner for the latter's share. In Mufawada and partnership under statutory laws, the other partner or the firm as a whole is bound.

5.20 PARTNERS RELATIONSHIP TO THIRD PARTY IN MUFAWADA

Mufawada partnership bears close relation to the concept of corporate entity under statutory laws, the partners from business viewpoint are like one and same person, each partner is fully liable for the actions of the others in any transaction related to the partnership. A claim can be made against any of the partners and any of them can institute an action against third party on behalf of the partnership, whether or not he was involved in the transaction.

As we have noted earlier in Mufawada like other Islamic partnership, the liability of the partners is unlimited. In Mufawada unlike other partnership, the liability towards third party is joint and several. The liability is governed by two fundamental principles viz:-mutual agency and mutual surety. Each partner is considered as an agent of the other as well as a guarantor for the actions of his co-partners committed in the course of business.

5.21 LIABILITY FOR LOST GOODS ENTRUSTED TO A THIRD PARTY (IBDA)

A Mufawada partner has the right to hand over partnership property or money to a third party jut like his right to invest in commenda with a view that the third party will take care of it on his behalf. This practice is considered as business favour or commercial co-operation and does not attract any remuneration. In such circumstances, if any loss occurs neither the partner who entrusted the property nor the third party or quasi agent bears any special liability, the loss is borne by the partnership. This position also seems to be peculiar to Islamic law. Although if such situation where to happen under statutory partnership, it seems, the firm will take the responsibility basically because of the absence of consideration to the third party. If he were paid a consideration for keeping the property he would be liable to make good the loss to the firm.

Likewise a Mufawada partner has the right to deposit the partnership property with a third party. Accepting of deposit is a trust contract and therefore involves no payment of fees, the ownership of the property and risk remained with the partnership. The third party accepting deposit may only be liable in cases of negligence or breach of trust. Any of the partners can retrieve the property or bring action for negligence or breach of trust. It seems same will apply if such is to happen under statutory laws.

The same rules applies to pledge, any of the partners may pledge the partnership property as guarantee of payment for credit extended to the partnership or take a pledge from third party as security for the payment of debt owned to the partnership.[71]

Likewise in Mufawada; a partner is entitled within limits to grant loans for use, and to take loan and the partnership as a whole would be responsible if it was used for the purpose of the partnership business. Where the partner borrowing put it to his private use,

he alone would be liable. As far as purchase and sale in the course of business are concerned, the partners are like one in the face of a third party.[72] Same applies to partnership under statutory laws.

5.22 INVESTMENT WITH THIRD PARTY

A Mufawada partner may take part in all commercial transactions relating to the partnership agreement, he can without prior consultation with this co-partners invest cash or goods in a commenda or Inan partnership and may as well receive investment from third parties on that basis. Any profit or loss resulting from such transaction is borne by the partnership but cannot contract another Mufawada partnership except with the express consent of his co-partner otherwise it will be void and will be treated as an Inan.[73] This is also a peculiar situation and can only be possible under the statutory partnership. If the partners consented to such transaction otherwise he alone might be liable.

5.23 LIMITS OF MUTUAL SURETY IN MUFAWADA

As a general principle each partner is a surety of his co-partner in all matters and liability incurred in the course of business. This by juristic preference is extended to include or cover other activities that have no direct connection with business activities, such as household and personal expenses, but is not extended to criminal responsibility whether or not it took place in the course of business.[74] This is clearly beyond the scope of the agency created under statutory partnerships.

As for the criminal responsibility however, the position is the same with statutory law, since criminal responsibility requires mens rea, the other partner may not have the necessary mens rea to be held liable for the criminal actions of the co-partners.

From the foregoing discussion we have seen clearly how the law makes provision governing the partners action as it affects third parties. We have seen the extent of each partner's power to bind the firm or his co-partners under the two laws. The catchword in determining the liability of the firm is: - "the authority to act". Once the partner acted within the scope of his authority the firm is liable, this issue is more pronounced under statutory laws than Islamic law; the power of action in most cases is more of presume rather than express authority. We have also seen that sometimes the firm may be liable for unauthorised acts where the third party lacks knowledge of the want of authority on the part of the partner he transacted with. Although where he has or the circumstances are such that he should have been aware of that such transaction is unconnected to the partnership business, the firm will not be bound. This is in contrast to the position under Islamic law where the third party generally cannot hold anybody responsible but the person that transacted with him directly. The same position applies to the debts and obligation of the firm; although under statutory laws each partner is liable jointly with the others; same is also the position in the case of liability for wrongful acts of a partner. This is to mention but a few.

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CHAPTER SIX

6.0 DISSOLUTION OF PARTNERSHIP

Dissolution is the process of bringing an existing partnership relation to an end. It may also be referred to as that moment of time when the ongoing nature of the partnership relation terminates, even though the partners may continue to be associated together in a new partnership or merely for the purposes of winding up the partnership's affairs. Perhaps that accounts for two types of dissolution viz:- Technical and General[1]. A technical dissolution occur as a result of change in the composition of the firm which does not cause a complete break in business. For instance, retirement or expulsion of one of the partners, admission of another person into the partnership etc. This technically marks the end of the former firm and the beginning of a new one with all the rights and obligations of the former firm transferred to the new one with the consent of the firm's creditors. Thus where a firm survived after a change in the composition of its members; legally such a firm transformed into a new firm though without an apparent change in the nature of its business but it becomes a new firm solely because of the change in the liability of members; thus in other words is referred to as technical dissolution. On the other hand where a dissolution involve a full-scale winding up of the affairs of the partnership and settling of account, it is known as a general dissolution.

Partnership may be terminated or brought to an end through various ways ranging from the intervention of the court to instances that does not need the intervention of court. Our task in this chapter, is to examine these various ways of dissolution both under Islamic and statutory laws.

6.1.0 DISSOLUTION OTHERWISE THAN BY COURT

For the purpose of dissolution without the aid of the court, partnership is categorised into: - Partnership for a fixed period of time, for an unspecified duration and for a particular adventure. Whatever category the partnership is, it may be terminated in the following ways:-

6.1.1 BY MUTUAL AGREEMENT

Partnership being the result of mutual agreement of the partners may as well be brought to an end by a mutual agreement notwithstanding whether the purpose for which it was established has been accomplished or not. Thus, whatever duration may have been agreed at the outset, the partners can, if they so wish, bring the partnership to an end at an earlier date. However, in the absence of some enabling power in the agreement, not one partner or group of partners can unilaterally bring about such a dissolution. As the term 'mutual' suggest unanimity is a prerequisite[2]. This can be seen in the case of.

Yusuf Vs Kupper International N.V.[3a]

Where in a meeting of the partners with official of Bendel State Government, the first Appellant who is the managing Director of the second Appellant was recorded as saying that he no longer needed the services of the respondent because "it lacked the technical know-how which he earlier thought they were in a position to contribute" and that there was no longer any room for co-operation between them. As a result of this firm's decision taken by the 1st Appellant which was accepted by the respondent, the latter formally withdrew from the partnership. It was held that the parties to the partnership mutually dissolved same and it was validly done.

6.1.2 EXERCISE OF RESERVED POWER

Where the partners, at the time of formation of the partnership contemplate a situation where one or more partners may, at any time bring the partnership to an end and reserved such a power, whether conditionally or unconditionally, then any of the partners may at any time or upon occurrence of such condition exercise his power to bring the partnership to an end by calling for dissolution. Any condition can be imposed provided there is no duress or coercion.

6.1.3 BY RESCISSION OR REPUDIATION

Rescission or repudiation is one of the remedies available to either party in the event of breach of contract.[3b] Thus partnership like any other contract agreement may be terminated or brought to end by any of the partners where he discovered a fraud or misrepresentation or a breach of the partnership terms; from that moment the partner is entitled to treat the partnership contract as discharged and to rescind it altogether.

6.1.4 BY BREACH

Like any other contract, in partnership also one of the acceptable ways of bringing the partnership to an end is by breach. This takes places where any of the partners without any fault of the others decided to terminate the partnership. This is permissible and acceptable but the partner breaching will subject himself to payment of damages should his action occasion any.

6.1.5 BY FRUSTRATION

Frustration of contract has been defined as the premature determination of an agreement between parties lawfully entered into and in the course of operation at the time

of its premature determination so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. It may surface in various ways ranging from destruction of the subject matter; intervention of law, supervening illegality etc.

It has been contended that the doctrine of frustration does not apply to partnership agreement, basically because a number of frustrating events are catered for by the Act. We however, submit that frustrating events are not wholly exhaustive and may surface in a variety of ways, thus should other factors that are not covered by the Act, arise, the doctrine of frustration should properly operates to bring the agreement to an end as regards both partners.

6.1.6 BY RETIREMENT AND EXPULSION

Ordinarily retirement and expulsion are regulated by the partnership agreement and where they occur they lead only to a technical dissolution. Where they are not regulated however, they will lead to a general dissolution.

6.1.7 DISSOLUTION BY EFFLUXION OF TERM/CONCLUSION OF ADVENTURE

The Act provides that subject to any agreement between the partners, a partnership is dissolved:-

(a) If entered into for a fixed term, by the expiration of that term;

(b) If entered into for single adventure or undertaking, by the termination that adventure or undertaking;

(c) If entered into for an undefined time, by the partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice[4] .

A partnership formed for a stipulated period of time or for a particular adventure terminates automatically at the effluxion or expiration of such time and the conclusion of the adventure without the need of any positive or formal act, by the partners. If it continues after that it automatically turns to partnership at will with the same terms and condition save that of duration which does not apply to partnership at will. A joint adventure has been submitted to resembles a fixed term contract for which the parties thereto are expected to persevere "for better or worse" to end it[5] Thus partnership for a fixed term encompasses fixed term, a single adventure or undertaking and also arrangement for dissolution of the partnership at the occurrence of some future events of uncertain date. In all cases, they terminate at the expiration of the fixed term or completion of the adventure save if there is any contrary agreement. If there is; then the future of the relationship would be governed by the agreement of the parties otherwise it continues as partnership at will. The Act provides:-

(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement of liquidation of the partnership affairs, is presumed to be a continuance of the partnership[6] .

Though the above section expressly applies to partnership for a fixed term, it is however by analogy said to apply to partnership for a single adventure. Save that by its nature partnership of adventures, unlike fixed term partnership, once another one is started, by implication it cannot be terminated until that adventure is completed. In other words the incidences of partnership at will, does not apply to a fresh adventure undertaken by the partners thus they are taken to have intended the partnership to subsist until the completion of that adventure,[7] with the same terms and conditions as the previous one.

6.1.8 DISSOLUTION BY NOTICE

Where a partnership is formed for an undefined period such as where the partners either make no provision concerning the duration of the relationship or expressly recognise the capacity of any one of them, to at any time by notice terminate the relationship, such partnership may be dissolved by notice. This type of partnership is in other words referred to as partnership at will[8] . In this situation a partner giving notice will not be regarded as breaching any term of the partnership agreement as per contrast to repudiation.

The Act makes two provisions for dissolution of partnership by notice. One of the sections provides for retirement without having regard to whether there is a contrary agreement by the parties and it empowers any partner to determine the relationship by notice. It provides:

> "Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners."[9]

While the other section empowers the partners in the case of a partnership for an undefined period, subject to any contrary agreement to determine the partnership by notice. It provides:

"If entered into for an undefined time, by the partner giving notice to the other or others of his intention to dissolve the partnership"[10] .

The inference deducible in this circumstance, is that in the case of the later section, where there is a contrary agreement, such will change the status of the partnership from that of partnership at will or undefined term, to one as contemplated by the parties in the agreement. At best it may be a partnership that cannot be determine save by agreement of all the parties or by death of either of them.

Notice can serve to dissolve the partnership once communicated to all the partners, it may be given at any time and may be stated to take effect at any time without regard to the concept of reasonable time. It was observed in

Crawshay v Maule[11]

Although the partnership is entered into for a term of years, it is previously dissolved by the death of either of the partners, unless there be express stipulation's to the contrary.

The only possible condition to be observed in exercising such right is that it must be bona fide and not for the purposes of deriving an undue advantage or perpetrating a fraud or with a mola fide intention or for an improper purpose otherwise it will not be upheld. Lord Lindley observed that:-

"It is apprehended that the Court can restrain an immediate dissolution and sale of the partnership property, if it appears that irreparable mischief will ensure from such a proceeding"[12] .

Generally where partnership for an undefined time was constituted less formally; any conduct that results in the other partners being informed of one partner's intention to determine the partnership will be sufficient. It can be orally; in writing or by conduct such that inference can be drawn that the partner does not wish the partnership to continue;[13] like quarrel[14] etc. The legal position has been stated by the Supreme Court in the case of Yesufu Vs Kupper International N.V[15a].

> *Where it held inter alia that the legal position is that any member of a partnership,* the duration of which is undefined is at liberty, subject to any agreement between the partners to determine the whole partnership at any moment he pleases. The right must be exercised bonafide, and not for the purpose of an undue advantage from the state of the partnership's engagement.

Where however he partnership was formally constituted; such as by deed or in writing, a notice in writing is desirable and the Act provides:-

> "Where the partnership has originally been constituted by deed, a notice in writing signed by the partner giving it, shall be sufficient for this purpose"[15b].

The dissolution would then follows either from the date the notice is communicated or if a date has been specified, on that date. It is worthy to note that the date specified in the notice may be superseded by a subsequent determining event, such as death of any of the partners[16]. It may as well be withdrawn with the consent of all the partners before the time of its expiration. In

Finch v Oake[17]

Though this case concerns a voluntary trade protection society, the principles set out are perfectly applicable to partnership. In that case, though the rule of the association contained no provision on retirement, it was held that a member was entitled to retire at

anytime without any consent of the other members. That on the receipt by the society of a letter from a member stating his wish to retire he at once ceased to be a member, without the necessity of acceptance by the society of his resignation. That he could not before acceptance withdraw his resignation, and that he could not become a member again without re-election.

As observed earlier the principles perfectly apply to partnership but its application *is without prejudice to a date, if any specified by the partner for the retirement to take* effect and the right being reserved in the partnership agreement.

6.1.9 DISSOLUTION BY BANKRUPTCY, DEATH OR CHARGE

One of the various ways of dissolving a partnership is by the death of any of the partners, the Bankruptcy of one of the partners which operates like death and possibly a charging order issued against the share of a partner. The Act provides:-

> "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner"[18] .

The mere fact that the partnership was initially entered into for a fixed period does not, of itself prevent dissolution caused by the untimely death of a partner. This provision has been submitted to be reasonable, in that the death has render it impossible for the contract to continue, since its continuation presupposes the continuing existence of all the partners. Lord Lindley observed:

> "Obviously reasonable, for the death of one of the members it is no longer possible to adhere to the original contract, the essence of which is(in the case supposed), *that all the parties to it shall be alive*"[19] .

The partnership terminated from the time of death irrespective of whether the co-partners are aware of it or not.

Query:- What would be the position where notice of dissolution has been given but before the appointed date death sets in? It seems the death overtakes the notice and the partnership dissolve forthwith. This was the position in:-

McLeod v Dowling [20]

Where it was held that a partnership had been ended by death and not by notice where a partner who sent notice of dissolution died before such notices was received by his co-partner.

The same applies to Bankruptcy of a partner. Bankruptcy though not a complete extinction of a partner, it impose an interdiction in his financial dealings and therefore such partner lost the capacity to carry on the partnership as initially contemplated thus necessitating a dissolution from the date of the Bankruptcy Order.

Where corporate partner is involved, it seems doubtful whether an order for the winding up of such a partner or a resolution for a voluntarily winding up may cause dissolution of the partnership. It has been submitted that giving regards to the fact that where a corporate partner is involve the relationship between the partner will inevitably be of less personal nature, thus neither an order nor resolution to wind up such a partner would per se dissolve the firm.[21]

We however contend that the winding up or dissolution of a corporate partner, strictly speaking incapacitate such partner's continued existence as partner and would inevitably force the realisation of its share from the firm as part of its assets. Thus except *if there is an agreement to the contrary, such as the enabling of the individual partners* remaining to acquire and pay for the corporate partners share, the winding up or

dissolution of corporate partner would unavoidably cause dissolution of the firm. In fact even where there is such an enabling provision for the acquiring of the shares in such circumstances, there would still be at least a technical dissolution.

On the other hand, an ordinary charging order in a partners share would not cause an automatic dissolution except if the other partners opt to have it dissolve for that reason. The Act provides:-

> " A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt."[22]

Where the other partners decides to exercise the option, they must do so promptly without undue delay and in an unequivocal manner[23]. As regards to the construction to be given to the phrase 'other partners' it has been submitted that it refers to all the other partners jointly and not by either of them. Lord Lindley observed:-

> "As a general rule, if several persons have an election the first election made by any one of them would seem to determine the election for all, but this rule can hardly apply to the case referred to in this section. The majority would not, it is conceived, have the power to dissolve the partnership against the wishes of the Minority. The meaning apparently is either that all the other partners must be unanimous, or that a separate option is given to each of the other partners, so that any one of them can dissolve the partnership, whether the others have or have not expressed their intention of not doing so".[24]

6.1.10 DISSOLUTION BY OPERATION OF LAW

Where a partnership that is legally constituted for carrying on 'lawful business but because of change in factual circumstances, or legislation, it becomes illegal for the firm to continue with such business, the partnership is then said to dissolve by operation of law. For example outbreak of war between two countries in which the various partners are residing and carrying on business, inability or failure of member to comply with statutory requirement e.g. in professional partnership like that of legal practitioners etc. The Act provides:

> "A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership".[25]

The import of this provision is two:-

(a) it render the partnership illegal it if become illegal to carry on the business of the firm and

(b) if it becomes illegal for the members of the firm to carry on the partnership business: for example failure of a legal practitioner to renew his practising certificate. In

Hudgell Yeates & Co. v Watson[26].

It was held that a partnership of solicitors was automatically dissolved when one partner inadvertently failed to renew his practising certificate and that the partnership was reconstituted less the offending partner during the period that he lacked practising certificate and was then reconstituted as before when the omission had been corrected.

The implication of this decision is that the statutory requirement of practising certificate applies to the individual and not to the firm. As a nature of partnership,

whatever affects the capacity of member affects the firm as a whole. It was for that reason that the incapacity of one partner to practice for lack of renewing practising certificate works at least a technical dissolution of the firm, however, since the overall object of the firm remain legal it is reconstituted as per the remaining practitioners who are not incapacitated.

On the other hand if it is the firm's business, that by a later law becomes illegal to carried out, the firm dissolve by operation of law. Lord Lindley's observation on this area is relevant. He wrote:-

> "If by change in the law, it becomes illegal to carry on a business, every partnership formed before the making (of) the law for the purpose of carrying on that business, must be taken to have been dissolved by the law in question. So if, the law remaining unchanged, some events happens which renders it illegal for the members of a firm to continue to carry on their business in partnership, such event dissolved the firm. For example; if a partnership exists between two persons residing and carrying on trade in different countries, and war between those countries is proclaimed, a stop is thereby put a further intercourse between the partners, and the partnership subsisting between them is consequently dissolved."[27]

Query :- What would be the position, where the firm is involved in more than one business and it is only one of the business that becomes illegal to be carried on?. Though the Act does not envisage such situation, it seems the firm will not be dissolve if it merely continues to carry on those business which are legal[28] save if the illegality of the one business taint the others or if the legal business will not remain viable independently of the illegal business[29] .

6.2.0 DISSOLUTION BY COURT

The Act has set out certain grounds upon which a partner may apply to the court for dissolution of the partnership. These grounds are:- mental incapacity of a partner, permanent incapacity; prejudicial conduct, wilful and persistent breach of the partnership agreement, when the business can only be carried on at a loss and upon other grounds the court consider just and equitable to order dissolution of the partnership[30].

6.2.1 MENTAL INFIRMITY

The court's power to order a dissolution of a partnership one of whose members has become insane is now governed in U.K. by the Mental Health Act[31]. The Act makes insanity purely discretionary grounds of dissolution. The discretion to be exercised giving regards to the patient's requirement and the interest of his creditors a secondary importance. The judge may order dissolution where he is satisfied upon consideration of medical evidence that the patient is incapable by reason of mental disorder of managing and administering his property and affairs. It is more likely for the court to exercise its discretion where the insanity was discovered to be of permanent nature. Thus in

Jones v Noy[32]

It was observed that:

"It is clear upon principle that complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity, but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner therefore is affected with insanity, the continuing partner may, if he thinks

fit, make it a ground for the dissolution he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether incapacity of his partner may not prove merely temporary".

Where the affected partner is a dormant partner, his insanity is not likely to be a ground of dissolution save if the court consider it to be in the best interest of the patient.

6.2.2 PERMANENT INCAPACITY

The Act provides that on application by a partner the court may decree a dissolution of partnership:-

"When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract.[33] "

The wordings of the act are perfectly clear and referred to permanent incapacity but as to what may be considered as a permanent incapacity it is a question of fact that will vary depending on the circumstances of each particular case. For example as was rightly observed, a gradual and imperceptible diminution in powers which is a man's lot, that is to say, normal senescence as opposed to senility would not ordinarily provide a ground for dissolution as would confirmed and incurable insanity[34]. Any form of incapacity may suffice provided it is proved to be permanent in nature, where it is proved to be of a temporary nature; the court will not grant a dissolution. Thus in

Whitwell v Arthur [35]

One of two partners was unable to perform his duties as a partner following an attack of paralysis but the medical evidence showed that his health was improving and a

probability that the incapacity was only of a temporary nature on that basis a dissolution was refused.

6.2.3 PREJUDICIAL CONDUCT

A court may also decree a dissolution where the conduct of a partner is calculated to be prejudicial to the firm's business. The Act provides:-

> "When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business[36] "

Prejudicial conduct are various, they may be directly connected to the partnership business or may be unconnected but their repercussion likely to affect the partnership. It may be criminal conduct, immoral behaviour, professional misconduct etc. The conduct need not occur in the course of business, thus a criminal offence of a violent or dishonest nature would suffice. In

Essel v Hayward[37]

It was held that a partnership should stand dissolved where one partner had rendered himself liable to prosecution by committing a fraudulent breach of trust by embezzling trust money. Likewise in

Carmichael v Evans[38]

The conduct of the expelled partner was quite unconnected with the firm's business but the publicity attendant upon his criminal conviction was, nevertheless, held to be calculated to injure the firm's reputation in the eyes of its customers.

As regards immoral behaviour such as sexual promiscuity and other immoral conducts it is doubtful whether it will apply in all cases as a ground for dissolution; for example it may have little or no significance in a trading partnership. In

Snow v Mulford[39]

Which involved banking firm, the court refused a dissolution based upon a banker's adultery with various persons declaring that "the Court is not a censor Morum".

Where however, the business is of such a nature that demand, integrity and moral uprightness, such as Doctor/patient relationship, notorious sexual promiscuity may have prejudicial effect on the business when it came to the knowledge of customers and thus should warrant dissolution.

6.2.4 PERSISTENT AND WILFUL BREACH OF PARTNERSHIP AGREEMENT

Where partner wilfully and intentionally breach the terms of the partnership agreement or where his conduct in relation to the partnership business makes the continuation of that business impracticable, a court may grant a dissolution, this position is contained in the partnership Act which provides.:-

> "When a partner, other that the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relation to the partnership business that it is not reasonably practicable for the other partner of partners to carry on the business in partnership with him".[40]

Generally the court may not be willing to be dragged into trivial differences between the partners. Unless if the other partners are excluded from the business concern or the misconduct is of such nature as to destroy the mutual confidence that must subsist between the partners, thereby rendering it impossible and impracticable for the partners to

conduct the business together according to their agreement. Such lost of mutual confidence would surely be a good ground for granting a dissolution. In

Leavy v Shout[41]

An order dissolving the partnership was made on the ground that the respondent had been violently abusive to his partner had persistently refused to communicate with him, until after the bill had been filed, and had made serious allegations against him to a stranger, to whom he had also disclosed the partnership account.

It has been submitted that what is in essence required is conduct which leads to a serious and irretrievable breakdown in the relationship between the partners. Needless to add a physical assault even if provoked would justify a dissolution as would a personal vendetta visited on a co-partner as well as groundless accusation of fraud, use of partnership money for private purposes, keeping of erroneous account and failure to enter receipts into partnership books, conduct which disrupts the partnership business[42] etc or as put forward by Lord Lindley:

"continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation[43] "

6.2.5 BUSINESS RUNNING AT A LOSS

One of the main purpose of partnership is the making of profit, therefore where it appears that for all intent and purposes the business can only be carried out at a loss, that would justify a decree of dissolution. The Act provides that upon application by a partner the court may decree a dissolution of the partnership:-

"when the business of the partnership can only be carried on at a loss[44] "

In the circumstances where it is practically impossible for the business to make a profit, per contrast to a special circumstances of a temporary nature that may be curable or overcome, any partner is entitled to apply to have the partnership dissolved. In

Jeanings v Baddeley[45]

The capital in a mining partnership had been exhausted and the business could only have continued to make a profit if the partners contributed further funds, which some of them were unable or unwilling to do, a dissolution was ordered to relieve the partners from what is more or less a certain loss.

6.2.6 JUST AND EQUITABLE GROUND

The Act provides that upon application by a partner the court may decree a dissolution of the partnership.

"Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved[46] "

This ground gives the court a wide desecration to dissolve the partnership upon what appears to it to be just and equitable. What is a just and equitable ground may depend on the circumstances of each case. It has however been opined that an order is likely to be made if, for whatever reason, the objects for which the partnership was formed can no longer be attained, either at all or in the manner originally contemplated by the partners and dissolution cannot be obtained on any other ground[47]

Though the section enables any partner to apply; it is however unlikely for the court to exercise its desecration in favour of a partner who is himself guilty of misconduct. However refusal to meet on matters of business, continued quarrelling and such state of

animosity as precludes all reasonable hopes of reconciliation and friendly co-operation has been held to justify a dissolution[48]. Lord Lindley also observed:-

> " It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary, is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it[49] "

In conclusion, we venture to observe that strictly speaking there is hardly any difference between the just and equitable ground and the other preceding grounds set out in section 35(a)-(e) at best, all of them can qualify as a just and equitable ground for dissolution. The only difference is possibly the wider scope of what may be term just and equitable; it may be employed in variety of circumstances that have not been expressly mentioned. Perhaps, that informed the reason Anson Banks refers to it as the "catch all" grounds[50]

6.3.0 DISSOLUTION UNDER ISLAMIC LAW

Partnership under Islamic Law may be dissolved, terminated or brought to an end through various means. It may be by repudiation or termination or by reason of death of either of the partners, lost of mental capacity, lack of discretion, necessitating legal restrictions on appropriation and apostasy; by frustration by mutual consent of the partners, accomplishment of purpose, expiration of term etc.

6.3.1 DISSOLUTION BY REPUDIATION, RENUNCIATION AND MUTUAL AGREEMENT

The position under Islamic law is slightly different. The difference results from the various opinions regarding the validity of a fixed term partnership. According to Hanafi, Hanbali and Shafi'i Schools it is lawful to make a Sharikah or Mudarabah agreement for a fixed period while Maliki School hold it to be unlawful. Thus the issue of termination before appointed time does not arise under the Maliki School, since time stipulation is not recognised it means the partnership may be determine at any time by either party by giving notice or by mutual agreement. This goes to show that the incidences of partnership under the Maliki School is more in line with the incidences of a partnership at will. According to the Hanafi, Hanbali and Shafi'i Schools, which recognised fixed term partnership, any of the partners may terminate the Sharikah or Mudarabah partnership at any time by giving notice to the other. If the partners are more than two, the remaining partners may continue with the partnership agreement. It follows therefore that the partnership may be terminated by mutual agreement at any time before the expiration of the specified time. This suggest that though they recognised fixed term partnership to be valid, its implication and consequences are the same with partnership at will since either of the partners may back out any time he so wished.

When compared to the position of partnership under statutory laws it is clear that the parties may terminate the partnership before the appointed time by mutual agreement, the position of the two laws are similar in this respect. However, with regard to the ability of one of the partners to bring the partnership to an end before the appointed time, the position differs. Under statutory laws it is not possible for one partner, in the absence of an enabling power in the agreement, to lawfully do so, while under Islamic law all the jurist are unanimous that he can do so. This position may perhaps be, because of the

recognition of partnership, under Islamic law to be a non-synallagmatic contract. Thus any of the partners is entitled to terminate the contract at any time but the decision to terminate is only valid when taken in the presence of the co-partner[51] or when he is informed of such decision.

The slight point of differences among the jurist however, is in relation to the remaining saleable goods at the time of the notice of termination' in this situation when does the termination takes effect? Is it after the goods have been sold and converted into cash or immediately?

It has been opined in respect of Mudarabah, that it is not permissible to terminate until the goods have been sold and converted into cash. According to Tahawi this condition applies to both Sharikah and Mudarabah but according to some jurist if the goods are in the form of merchandise, a decision to terminate can still be taken in the case of Sharikah but not Mudarabah[52]

According to Hanafi School, all the jurist agreed that in the case of Mudarabah, either of the partners has the right to terminate the contract provided the other party is aware and all goods have been sold and converted into cash. While in the case of Sharikah, they agreed that it could be terminated at any time.

In the Maliki School, opinion differs in respect of Sharikah. One opinion share the same views with the Hanafi that Sharikah is a non-synallagmatic i.e. not reciprocally binding and can be terminated by any of the partners at any time; this is the views of Ibn Rushid in Bidyatul-Mujtahid in his commentary on mudawwanah. According to the views of Al-Khafif, Al-Dardir and Al-Sawi, Sharikah is a synallagmatic contract, thus cannot be terminated until the business for which it was made is completed[53]. In the case of Mudarabah, all the Maliki jurist are unanimous that any partner may terminate the contract

at any time except where there are unsold goods or certain acts initiated but uncompleted, in such situation the partnership is terminated only after the goods are sold or act are completed[54] .

Under the Shafi'i School any partner can terminate the contract at any time both in respect of Sharikah and Mudarabah[55]. Hanbali share the same opinion, they opined that Sharikah is one of those non-synallagmatic contracts which is nullified by one of the partners terminating it and that Mudarabah is one of those valid contracts which expires by one of the partners terminating it, whoever he might be. It has been further submitted that it is illegitimate to lay a condition that no party can dismiss the other till a certain time[56]

Unlike under statutory laws where the exit of one partner brings an end to the partnership, under Islamic law, where the partners are more than two, the exit of one of them may not necessarily bring the partnership to an end. It is quite possible by mutual agreement, for the remaining partners to continue the business and clear the account of the terminating partner, thus the contract terminates only in respect to him. This is possible in the case of the terminating partner, thus the contract terminates only in respect to him. This is possible in the case of both Sharikah and Mudarabah. It has been submitted that:-

> "when many partners enter into a contract and one of them terminates the contract or the other partners decides to expel him, this decision will apply only to his share in the business and the partnership, shall continue as normal for the remaining partners according to the predetermined condition".[57]

It has however, been observed that the above principles are not absolute and that were different situation demands different verdict, the jurist gave different verdict. For instance the verdict of the jurist on share-cropping Muzara'ah and Musaqat contract, the

nature of which requires that, if it is conducted jointly it cannot be terminated until the crop is ready for sale. That this gives a good ground for reconsidering the whole position in the light of modern industrial and business enterprises. It is therefore suggested that it would be ideal for fixed term Sharikah and Mudarabah to carry conditions restricting right of termination before an agreed period except by mutual consent. This suggestion is justified on the ground that it does not conflict with any injunction of the Shariah[58].

We submit that the above proposition is sound and more in line with the prophetic tradition that called upon Muslims to fulfil their obligation and those that says that Muslims are bound by their conditions. Thus if a partner agrees to joint business for a fixed term or adventure he is bound to completely comply with the terms of the agreement.

Comparatively, for the purpose of dissolution, partnership for fixed period or for an unspecified duration or for a particular adventure may be terminated under both statutory and Islamic law before the expiration of the agreed period or completion of the set adventure either by mutual agreement, by rescission, repudiation or by notice. The only differences between the two laws being; under Islamic law the right to terminate by either party is inherent in the agreement, to the extent that any condition that restrict such right is invalid. While under statutory laws the right is not inherent, it has to be reserved in the agreement otherwise any purported repudiation would amount to a breach of the agreement, which leaves the remaining, partners with a lot of options.

6.3.2 DISSOLUTION BY REASON OF DEATH

Like the position under statutory laws, death is one of the factors that can bring a partnership to an end; the jurists are unanimous on this. It has been submitted that whenever, a partner dies, the contract terminates to the extent of his share in it, as that

share goes to his heirs. This is the injunction in the matter of the death of the capital owner or working partner under Mudarabah. That according to the same principles if the Sharikah was between three partners and one of them dies, the contract will end only in respect of the share of the deceased partner and not in that of the surviving two[59] .

The above position has been rationalised on the basis that the capacity of a partner to own and transact business ends with the death irrespective of whether the co-partners is aware of the death or not and his property immediately pass to his heirs. According to Hanafi School this principles applies to Mudarabah also. This position has been justified on the basis that Mudarabah entails agency and the agency ends with death of the agent or the principal, irrespective of whether the surviving partner is aware of the death or not because its legality is not dependent upon knowledge and information. However, if the capital is in the form of merchandise, the agent has the right to sell it off so that it takes the form of cash.

Maliki also share the same opinion in respect of Sharikah, the jurist are unanimous that the Sharikah contract does not continue in the case of heirs of the deceased partner.[60]

Under Shafi'i School, Sharikah terminates with the death of either partner. In the case of Mudarabah however, it terminated by one of the partner's death, but if the capital-owner dies, his heirs has a right to demand the sale of the goods and if the goods is in the form of cash, they have the right to renew the contract[61]. Hanbali share the same view[62].

Death as one of the various means that bring about dissolution seems principally the same both under Islamic and Statutory laws. It is also the same under the Roman law which seems to be a bit rigid than the former, was based on the fact that partnership contract is founded on the principles of delectus personae. However, unlike the Roman law which dictates that a partnership was dissolved by the death of either of the partner;

"solvitur adhuc societas etiam morte soci'i" which was so rigidly enforced to the extent that admitting the heir of the deceased into the partnership was void; even if there is an agreement to that effect. Islamic laws and Statutory laws adopted a much more relaxed attitude; by recognising the possibility of a contrary agreement. That is to say under statutory laws if there is an agreement to the contrary, the remaining parties may continue the partnership while under Islamic the right of the remaining partners where partnership has more than two members, to continue the partnership if they so desire is inherent.

6.3.3 DISSOLUTION BY REASON OF APOSTASY

Where both partners are Muslims, the apostasy of one of them and his immigration to a non-muslim territory terminates the partnership.[63] The rule relating to dissolution by reason of apostasy is peculiar to Islamic law which view seriously the denouncement of faith by a muslim. Whereas statutory laws careless about the religion of the parties, what is important is free consent of each partner and partnership can subsist right from the beginning between parties of different religion or of no religion at all.

6.3.4 DISSOLUTION BY REASON OF MENTAL INFIRMITY, LACK OF DISCRETION AND BANKRUPTCY

Where either of the partners lost his mental competence the partnership terminates,[64] this is because by reason of his mental infirmity he lost capacity of disposition of his property and of conferring mandate. The position under Islamic law is slightly different with that under statutory law on this point. While under statutory laws the dissolution is to be pronounced by court at its discretion, under Islamic law the lost of the mental capacity ipso factor terminates the partnership. Likewise where either of the

partners is interdicted or legally restricted or his property is appropriated by reason of bankruptcy, the partnership terminates.

6.3.5 DISSOLUTION BY LAPSE OF EQUALITY

The operation of Mufawada partnership lies largely on the equality in eligible capital of the partners. Thus where one of the partners gets additional property either through inheritance or gift and such property is eligible for the purpose of partnership investment, this would result in inequality between him and his co-partner and therefore leads to the termination of the partnership.[65]

This condition is peculiar to Islamic law alone and in particular the Hanafi School, under statutory law there is no such a thing as strict equality in any partnership investment, contribution in all cases is based on competence and capability of each prospective partner.

6.3.6 DISSOLUTION BY EFFLUXION OF TERM/ACCOMPLISHMENT OF PURPOSE

Where the partnership is formed for a stipulated period of time, it terminates at the effluxion of such time. The same applies to partnership set for a particular object, it terminates at the accomplishment of that object. In sense the position is almost exactly similar to that obtained under statutory laws.

Based on the foregoing discussion, we have seen the method of bringing partnership to an end both under Islamic and statutory laws. We have seen that partnership *may be dissolved by mutual agreement of the parties, by exercised of a reserved power* where such has been agreed at the time of formation of the partnership by rescission as repudiation in case of breach as found from the other parties; by breach, by frustration, by retirement, by effluxion of term. Most of these means are common to both Islamic and

statutory laws. Other means of dissolution considered include dissolution by Notice, Bankruptcy and Death. We have also considered dissolution of partnership by operation of law that is where a lawfully existing partnership is rendered void by operation of law. We have also examine instances where the partnership may be dissolve by court, These include dissolution by reason of mental incapability, permanent incapacity, prejudicial conduct by a partner, or when the business is running at a loss and in a situation where the court found that it is just and equitable for the partnership to be dissolved. We have in process examined the areas of differences and similarities between the two laws.

CHAPTER SIX NOTES AND REFERENCES

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CHAPTER SEVEN

7.0 CONSEQUENCES OF DISSOLUTION

Partnership as seen in the preceding chapter may be dissolved for various reasons and in various ways. Such as: effluxion of time, death, bankruptcy which in effects operates like death, agreement, accomplishment of purpose, permanent incapacity, retirement, expulsion etc. In no one of these instances can it be said; that for all intent and purposes the partnership is forthwith dissolved, the connection still remains, until the affairs of the firm are finally wound up. Thus dissolution per se does not ipso facto put an end to rights and obligations instead it give rise to certain rights and obligations pending the winding up and final settlement of account. The process therefore, of winding up to the final settlement of account is principally what constitutes the consequences of dissolution.

7.1 RIGHT OF PERSONS DEALING WITH THE FIRM AGAINST APPARENT MEMBERS OF THE FIRM

We have seen previously that under the doctrine of holding out, person who is not a partner may incur liability as a partner to third party if by his actions such as direct dealings with the firm or public notoriety, he made the third party to believe him to be partner and thereby acted upon that belief to his detriment.

The same principle applies to the continuing liability of a retired partner who failed to give notice of his retirement. Thus a person dealing with the firm is entitled to treat all persons he knew to be members of the firm responsible for any transaction he made with the firm save where he has notice of the change.

The Act provides:-

> "Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change."[1]

A third party however, cannot hold the estate of a deceased or bankrupt partner responsible for any debt contracted after the partners death or bankruptcy. The same rules applies to a partner who, not having been known by the third party to be a partner, retires from the firm prior to the transaction in question. In this respect the Act provides:

> "The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively".[2]

The purposes of this section is to clarify the categories of people responsible for the partnership debts and obligation following dissolution; for a third party dealing with the firm to know whom to hold responsible beside the firm as a whole.

7.2 RIGHT OF PARTNERS TO NOTIFY OF DISSOLUTION

It is the right of every partner to make notification of dissolution or retirement, this is to ensure a freedom from liability; in the case of a retiring partner for any subsequent transaction by the continuing partners on the one hand and on the other it save the continuing partners from holding out by the retiring partner. Otherwise both the continuing and retiring partner in the case of retirement or all the partners in the case of dissolution may be caught under the doctrine of holding out in case of transaction by any of their member. In other words the need for notice is for the good of all, if each is to be

immune from the operation of the holding out doctrine. On the requirement of notice the Act provides:-

> "On the dissolution of a partnership or retirement, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence"[3]

For the purpose of liability by holding out the firm creditors are classified into 3:

[1] Creditors that have had previous dealings with the firm - They are entitled to treat all those whom they know to be members as remaining members until they are in receipt of actual notice to the contrary.

[2] Creditors that have no previous dealings with the firm, but knew who the firm members were, they are entitled to treat such members as continuing members until they either received actual notice or such notice is published.

[3] Creditors that have not had any previous dealings with the firm or knowledge of its members, they are not entitled to hold a retired partner liable for debts incurred after his retirement lack of notice notwithstanding since the issue of holding out does not arise in the circumstances.

Likewise it is worthy to note that as seen previously the estates of a deceased and bankrupt partner are not liable for debts incurred after the death or bankruptcy lack of notice notwithstanding.

7.3 WINDING UP

Winding up process involve the continuing authority of the partners to complete any work that was already in progress prior to dissolution, they are however, not to take

new work, thus the real effect of the dissolution in relation to the business is, as observed by Anson Banks to put it into an unsatisfactory "limbo" state; this, the author contends does not put an end or terminate the employment of the firm's employees until the winding up is concluded.[4]

The partners right and obligation to complete uncompleted transactions is adequately covered and protected by the Act. It provides:

> "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations or the partners, continue notwithstanding the dissolution as far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."[5]
>
> Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

The section vest each partner with the authority to perform all acts necessary for winding up the affairs of the firm and to complete transaction already commenced. It has been contended that the continuing authority of the partners raises some ambiguity in the meaning of the term "dissolving the partnership". The term, has been submitted to be in contrast, somewhat ambiguous in that it may denote:

(a) the termination of the mutual authority of the partners to bind each other in future dealings;

or

(b) the dissolution of any joint ownership of property, its realisation and distribution[6].

Ordinarily therefore, the term dissolution will carry the first of the above meaning and be followed in point of time by distribution of the assets realised. A bankrupt partner is however excluded from taking part in the processes necessary for winding up.

The partners acting for purposes of winding up the affairs of the firm or completing unfinished transactions may perform any of the following acts: sell the whole or part of the partnership; property in order to pay off the firm's debt; draw upon partnership bank account, endorse bill previously drawn and accepted during the partnership; receive debts due on behalf of the firm, issue a bankruptcy notice in connection with a judgement given in favour of the firm prior to dissolution. The continuance of the rights and obligations of the partners may as well involve them in liabilities in respect of transactions begun but not completed before dissolution of the firm[7]

The above process stands as a prelude to the application of the assets realised to the appropriate categories of person in order of priority.

7.4 RIGHT OF PARTNERS TO APPLICATION OF PARTNERSHIP PROPERTY

Following the realisation of assets, it is the right of each partner to have the assets so realised applied to the payment of the partnership debts and liabilities. The surplus if any be repaid to the partners in accordance with their entitlements taking into account what is due to and from each of them to the firm. The Act has given a direction as to how the assets is to be applied, it provides:

> "On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect

of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm"[8]

The right as outlined by the Act is available not only against the co-partners, but also against those claiming an interest through them, such as assignees, personal representatives of a deceased or bankrupt partner. It has been submitted that the partners who continue the business for the purpose of winding up may alienate, mortgage or pledge partnership property notwithstanding the partner's lien and provided the third party has no notice of actual want of authority on the part of that partner, he can overreach equitable interest.[9] In

Re Bourne[10]

A surviving partner carried on the business after the death of his co-partner and granted an equitable mortgage by deposit of title deeds with the bank in order to secure an overdraft for the partnership. It was held that the surviving partner was entitled to carry on the business in order to wind up the affairs of the partnership and that the mortgage was valid and took priority over the general lien held by the personal representatives of the deceased partner.

7.5 PARTNERS RIGHT TO GOODWILL

Goodwill is also considered as a partnership assets and each partner has a right to have it sold in the same way as any other property or asset and the proceed to be applied or distributed per each partners entitlement.

Goodwill of a business has been variously defined. In

Inland Revenue Commissioners v Muller & Co. Margarine Ltd[11]

It was defined thus:

> "It is the benefit and advantage and connection of business. It is the attractive force, which brings in customers. It is the only thing which distinguishes an old established business from a business at its start" In

Crutwell v Lyle[12]

It was described as:

> "Nothing more than the probability that the old customer will return to the old Place"

What then, is the yardstick to be used in determining the value of the goodwill? It seems the value may sometimes be purely nominal while sometime nothing is to be paid and sometimes it may be sold along and with the undertaking. In

Jennings v Jennings[13]

Stirling J. while interpreting a compromise between two partners whereby one of them was to retain "the assets" concluded that the partner was entitled to an injunction to restrain the other partner from soliciting the old customers of the firm on the basis that assets was a compendious expression for the aggregate of the several items of property belonging to the partnership.

Where however, upon dissolution the business is sold without mentioning anything in relation to the goodwill, the following presumption applies, except if expressly excluded or modified by agreement.

1. The goodwill passes to the purchaser and he alone may represent himself as continuing or succeeding to the vendor's business.[14]

2. The vendor may subject to the above; carry on a similar business in competition with the purchaser, if need be next door.

3. The vendor may publicly advertise his business provided he does not canvass customers of the old firm. In

   Trego v Hunt[15]

   A distinction was drawn between a former partner who "sets up in business on his own account and appeals generally for custom" and such a partner who "specifically and directly appeals to those who were customers of the previous firm". To sanction the latter would in the words of Lord Macnaghten allow him to "sell the custom and steal away the customer"

4. The sale carries the exclusive right to use the name of the former firm provided the vendor is not exposed to the liability or represented as still part of the business.

Where on the other hand, the business has not been sold, the question is: Does the goodwill survived in favour of the continuing partners.? It seems it does not, as each of the partners is at liberty to carry on a business of the same nature as the one previously carried on by the partnership. Provided he does not do so in such a manner as to represent the former partners to be associated in the new venture, he may even solicit for the former customers of the old firm.[16]

It is apprehended that the same position applies even where there was an express agreement on goodwill or where an agreement that the surviving or continuing partner is to have the benefit of the goodwill is inferred from conduct, the goodwill still remains with the retiring partner. This was the ratio of the decision. In:

Menendez v Holt[17]

Where it was observed inter alia that:

> "When a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business and the future conduct of the business by them under the old name, the goodwill remains with the latter as of course"

It has been submitted that what this in effect means is that the goodwill ceases to have any separate value thus even if the retiring partner expressly agrees to assign the goodwill, he is not thereby compelled or bound to abstain from business of the partnership kind in that neighbourhood[18] .

What would be the fate of the goodwill where a partner is expelled? It seems the answer will depend on the validity of the expulsion. Where it is valid, the goodwill remains with the continuing partners subject to three exceptions:-

The expelled partner can circularise clients for:-

(i) whom he was currently acting or

(ii) who were particularly attached to him, or

(iii) in whose wills, deposited with the firm, he was executor[19]

Where the purported expulsion is invalid however, it would amount to repudiation of the partnership and non of the partners have exclusive right to the goodwill.

Having highlighted the problems associated with the passing of goodwill, we venture to suggest that a way out of the tangle is for the purchaser or surviving partner to take an express covenant from the seller or retiring partner respectively restricting the latter's freedom from competition with the business sold. Such a covenant would be enforceable provided they pass the test of reasonableness in terms of area duration as not to be caught under the rubric of conditions in restraint of trade.

7.6 APPORTIONMENT AND RETURN OF PREMIUMS

Premium may be defined as a sum of money paid by a person to the partners of an already existing firm or to another person already established in business, as a consideration for being admitted into that established firm or business as a partner in contra distinction to the price for purchase of partnership assets or shares or capital contribution to the firm. It has been observed that in the first case, the premium become the separate property of the person or partners receiving it whereas in the latter case, the person paying retains an interest in it which upon dissolution is to be paid in accordance with availability of funds after settling creditors. That midway, there is a sum paid for goodwill on entry or joining a partnership; this is neither a premium nor capital contribution and the partner is not entitle to refund but is entitled to a share in the value of goodwill where it is realised on dissolution.[20]

Lord Lindley commenting on premium prior to the partnership Act 1890 wrote:-

> "It frequently happens, when one person is admitted into partnership with another already established in business, that it is agreed that the incoming partner shall pay the other a premium, i.e. a sum of money for his own private benefit. The consideration for the premium is not only the creation

of a partnership between the person who takes, and him who parts with, the money, but also the continuance of the partnership".[21]

This comments leaves us in no doubt that once a premium is paid, the person paying is entitled to the benefit of his money by way of not only the creation of a partnership but also the subsistence of such a relationship till the expiration of the agreed period. Thus where the partnership was dissolved prematurely, the issue of apportionment and returns of premium arise. In such circumstances, the Act provides us with guidance, it provides:-

"Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(a) the dissolution is, in the judgement of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium or,

(b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium"[22]

The Act seems to aim at curtailing fraud and protecting the legitimate expectations of an incoming partner from the dubious privilege of admission into a partnership which can end at any time as is the case with a partnership at will. It therefore makes some part of the premium recoverable where the partnership is prematurely dissolved.

The right to recover part of the premium however depends on the circumstances leading to the dissolution. If it is the partner who had taken the premium that brought

about the dissolution, he will certainly be ordered to return part of the premium. Where however, it is the person who paid the premium that calls for or brought about the dissolution, he is not likely to recover any part of the premium. In

Atweed v Maude[23]

A solicitor who had taken a premium of £800 from an inexperience person and who now, after only two years of the seven years agreed of the life of the partnership had run was seeking dissolution because of his co-partners incompetence was held not entitled to retain the whole premium. Lord Cains at page 373 observed:-

> "If the partner who has received the premium should afterwards commits a breach of the partnership article, and himself dissolved the partnership or render its continuance impossible, the court will not allow him to take advantage of his wrongful act, but decrees a restitution of a proportion of the premium paid, having regard to the term of the contract, and to the length of time during which the partnership has continued. But on the other hand if the partner who has paid the premium is guilty of a like breach of the partnership articles and is himself the author of the dissolution, the court will not allow him to found a claim to the restitution of the premium on his wrongful act".

Where however, the claimant is guilty of misconduct leading to the dissolution, he will not be entitled to the return of any portion of the premium. In fact it is likely that if there is any portion of the premium yet to be paid the court will readily order the payment of such unpaid portion. For to allow a claimant's own misconduct to entitle him to return any portion of the premium, would amount to allowing him to avail himself of his own wrong.

This is in contradistinction to situations where the partnership comes to an end without the fault of either of the partners or where there was misconduct on the part of both partners or where the recipient of the premium had himself brought about the dissolution. In such situation certainly the court is likely to order a return of premium or part of it. In

Bluck v Capstick[24]

It was held that when a partnership is dissolved before its natural expiration in consequence of the misconduct of a partner who has paid a premium, he is not entitled to a return of any part of the premium. And in such a case, if the premium agreed upon has not been actually paid before the dissolution the partner who has agreed to pay it would be ordered to pay the whole of it, notwithstanding the dissolution.

The Act also excludes possibility for recovering premium or any part thereof where the partnership was dissolved by reason of death or bankruptcy. The rationale for this may be because the parties are taken to have within their contemplation and purview, the possibility of death. In regards to bankruptcy though not expressly mentioned by the Act, it is a situation that is equated with death, thereby govern by the same consideration. In

Akhurst v Jackson[25]

A premium was paid to a person, who subsequently becomes bankrupt. The premium was held to be irrecoverable on the grounds that an 18-year term could not be made proof against the vicissitudes of death and bankruptcy.

Query: What would be the fate of premium where no time duration was stipulated for the partnership?

The Act seems to make reference only to a fixed term partnership; thus it is apprehended that where no term has been fixed, it will be considered as a partnership at

will to which all the incidences of a partnership at will applies. The partnership may be terminated at any time and in the absence of fraud, no portion of premium is recovered.

Lord Lindley observed:

> "Where a partnership is entered into for no specified time, and there is no agreement for a return or an apportionment of the premium in the event of an unexpected determination of the partnership; no part of the premium is returnable on the happening of such event. A case of fraud must be dealt with on its own demerits; and a person taking another into partnership for no definite time cannot, as soon as he has received the premium, dissolve the partnership and retain what has been paid as the consideration for it. But laying aside fraud, and supposing there to be nothing except a partnership created for no specified time and determined soon after its creation, it is difficult to hold that it was in fact entered into for a longer time, and that the person who came in paying a premium, has not got all for which he stipulated"[26].

By and large it is also clear from the provision of the Act that no amount of premium may be returned where the partnership was dissolved by agreement of the parties which did not mention anything in relation to the return of premium. Or as Lord Lindley put it: If a dissolution agreement:

> " ...is silent with respect to the premium, the inference is that the parties did not intend to deal with it, nor to vary their rights to it under the original agreement for its payment"[27]

Likewise in line with the decision in:

Lee v Page[28]

No order for repayment of premium will be made where the partnership was dissolved by an agreement which contains no provision for a return of premium. Whether the omission is deliberate or not, the court cannot cure the casus ominous.

In the same vein, whatever the partners agreed in relation to the return or non-return of premium will in the absence of fraud be given effect to.

7.7 AMOUNT OF PREMIUM RETURNABLE

The Act only makes general provision in relation to the return of premium but it does not categorically provides the modus operendi of assessing the exact amount returnable. There is therefore no hard and fast rule for deciding the amount returnable. Nevertheless, except there is a total failure of consideration, the court will normally take into account the terms of the partnership agreement, the length of time it subsist and the length of time it ought to have lasted. The court will then apportion the amount paid pro-rata to the times the partnership actually lasted and the unexpired period. This proposition may be supported with the observation of Lord Lindley thus:

> "There is no definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered; but other circumstances must often been taken into account in order to decide what is fair between the parties. At the same time, the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership"[29].

7.8 RIGHT WHERE PARTNERSHIP WAS DISSOLVED FOR FRAUD OR MISREPRESENTATIONS

Where a party was induced to enter into a partnership by reason of fraud or misrepresentation, such a partnership contract is voidable at the option of the innocent party, he may opt to affirm the contract and go for damages or rescind the contract. In

Adam v Newbigging[30]

A partner who had been induced to enter into a firm by substantial misstatement was held entitled to have the contract set aside even though the financial condition of the firm has deteriorated to such an extent as to make the firm practically valueless at the time when the rescission was sought.

Where the partner chooses to rescind the partnership, the following provision of the Act applies to govern the relationship of the parties.

"Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled…

(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(c) to be indemnified by the person guilty of the fraud or making representation against all the debts and liabilities of the firm[31]

The section conferred on the innocent party the following rights: -

[i] Right of lien on surplus assets for his capital contribution and all payments made by him in discharging the firm's liability.

[ii] Right to be subrogated to the position of creditors for any payment made by him in terms of capital contribution or discharging the firm's liability. This gives him priority above the other partners in the remaining assets.

[iii] Right to be indemnified against all debts and liabilities of the firm. This right is based on the supposition that the innocent party though has right of rescission, his right exists only as per his relationship to his co-partners. It does not affect or relieve him of liability to the firm's creditors for debts incurred while he was a partner. His only consolation is the right to be indemnified by the partner guilty of the misrepresentation or fraud for any amount he might have settled or expended towards meeting the firm's liability.

Right of rescission however, like any other equitable remedy has to be exercised within reasonable time from when the misrepresentation or fraud was discovered, otherwise it may be too late to do so in that it may constitute a waiver.

7.9 RIGHT OF OUTGOING PARTNER TO POST DISSOLUTION PROFIT

Where continuing partners continue to use or employ the share of a deceased or retired partner without settlement of account, the Act crowns the retiring partner or the estate of a deceased partner with two options. Either to claim a share of profit or interest at the rate of five percent per annum on the amount of his share employed in the partnership business.

The Act provides:-

> "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representative to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent, per annum on the amount of his share of the partnership assets.
>
> Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased partner, or the outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of the profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."[32]

The above provision clearly confers upon the retiring partner or personal representatives of a deceased partner two options i.e. to elect between a share of profit and interest at the rate of 5 percent not both.

Where the retiring partner or personal representatives of a deceased partner elect to take interest, the interest will be calculated on the assessed value of shares at the date of death or retirement as the case may be. If the election was for a share of profit, it appears

profit is allowed on the basis of proportion of the total profit per the ratio of the deceased or retired partner's share to the total capital at the time of death or retirement; less such amount as may be allowed as the personal contributions of the continuing partners. Instead of an assessment of the profits attributable to the use of the retained capital being made which if adopted may bring about a lot of problems regarding the taking of account of subsequent profits, so far as they are attributable only to one particular source. Thus in

Manley v Sartori[33]

A share of profit was awarded to personal representative of a deceased partner whose partner continued with the partnership business without settlement of account and the share awarded was held to be proportionate to the deceased's share of assets less an allowance for the management of the business after dissolution. The broad principles was put by Romer J at page 163 thus:-

> "You must ascertain what profits have been earned by the utilisation of the assets of the partnership as a whole. Once you found that, then having ascertained what the deceased partners interest in those assets was, you can easily ascertain his share in the profits earned by them"

Part of the problem that may be associated with the profit option is the fact that the profit made may not necessarily be related either directly or indirectly to capital. A lot of factors and considerations may account for profit such as nature of trade, manner of carrying it on, business connection, the capital employed; the state of account between the late partnership and the deceased or former partner at the time of dissolution, and subsequent conduct of the parties.[34]

In any case it is for the surviving partner to prove that the profits have been earned by means wholly or partly unconnected to the partnership assets. The problem of ascertaining the real and exact source of profit has been highlighted prior to the Act thus:

> "It is very easy to say (the share of profit to which the executors are entitled) can be calculated by the rule of three- as the whole capital is to the whole profits, so is the late partner's share in the capital to his share of the profits - but this assumes that the profits in question have been made by capital only. Profits, and very large profits, may be made by skill, and an extensive connection, with the little or no capital; and even if there be capital, the profits may be attributed less to it than to other matters, and it may be impossible to determine with any precision the extent to which the capital has contributed to the realisation of the profits obtained. Special inquiries on this subject, therefore, are almost always necessary, and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his prima facie right to share such profits will be effectually rebutted."[35]

The same principles form the basis of the decision in:

Wedderburn v Wedderburn[36]

The surviving partners, to whom the goodwill passes under the articles, do not attempt to realise the business at the time of their co-partner's death because of its perilous financial state, but by dint of skill and the infusion of extra funds, the business manage to make great profits so that the firm's liabilities may be met and the assets realised; it was

held, that the deceased partners estate was not entitled to a share of such profits beyond the interest already credited to them on the estimated value of the deceased partner's share.

As the preceding authorities are in vogue prior to the 1890 Act, it is doubtful whether they still have any meaningful application. The provision of the Act did not leave us in doubt as to the right of a retired or deceased partner's estate in relation to whatever profit made after dissolution without final settlement of account. We submit that the provision of the Act is fair enough and the views posited by Romer J to be a preferable authority. To our minds the ideal test for the entitlement in the profits should be as the Act provides - utilisation of capital or assets; the meaning of assets is extensive and may include goodwill, therefore whatever profits made, if they can properly be said to be made in the course of business, in the firm's name, they should be taken to belong to the firm and apportion as per the ratio of capital. The employment of business skill, personal connection etc. may be compensated adequately by making an allowance from profit.

Option to purchase share given by partnership contract: The operation of the section is however, excluded where the surviving partner exercised an option to purchase the deceased or outgoing partners interest within the time and strictly in accordance with its terms. The proviso as can be deduced is conditional upon completely complying with the terms of the option if any, otherwise he will be liable to account.

7.10 RETIRING OR DECEASED PARTNER'S SHARE TO BE A DEBT

The Act provides:

> "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the

representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death".[37]

The retiring or deceased partner's share by virtue of the provision of this section is treated as a simple debt from the date of dissolution or death notwithstanding the fiduciary nature of the relationship between the parties. This in effect means that the normal period of limitation applicable to simple debt applies except if there is a contrary agreement between the parties. We however, contend that the relationship between a surviving partner and the estate of a deceased partner is fiduciary in nature and ought by inference not to be subject to the limitation.

7.11 RULE FOR DISTRIBUTION OF ASSETS ON FINAL SETTLEMENT OF ACCOUNTS

In the absence of any agreement to the contrary, the Act applies to govern the relationship of the partners in settling accounts following dissolution of their partnership. The Act provides:-

> "In settling accounts between the partners after a dissolution of partnership the following rules shall, subject to any agreement, be observed:
>
> **(a)** Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:
>
> (b) The assets of the firm including the sums, if any, contributed by partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

(1) In paying the debts and liabilities of the firm to persons who are not partners therein;

(2) In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

(3) In paying to each partner rateably what is due from the firm to him in respect to capital;

(4) The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible[38]

The effect of the above section is that following dissolution, the partners; without prejudice to the rights of creditors which is to be given priority are entitled to settle the partnership assets in whatever way they so wished. They may agree that continuing partners take over the business and undertakings of the firm or that the assets be distributed in a particular way. Subject to any special agreement or arrangement between the partners, the broad procedure to be followed has been outlined thus:-

1. It may be necessary to "get in" the partnership assets, such as outstanding debts owed to the firm either by debtors or by the partners themselves;
2. The realisation by the sale of such assets as can be sold. Every partner has right to insist on sale, subject to agreement[39a]
3. The application of proceeds of sale to:
   (a) The liquidation of the firm's debts and liabilities
   (b) Repayment of advances by partners – This includes the right of the partner to be indemnified for expenses incurred by them on behalf of the partnership. In Yesufu v Kupper International N.V[39b].

It was held that where a partnership is dissolved, whether mutually or by court's decree, a partner is entitled to be indemnified for expenses incurred by him genuinely on behalf of the partnership in the ordinary and proper course of its business or necessarily incurred for it's preservation.

(c) Payment of administration cost where court's assistance has been enlisted

(d) Repayment of capital to partners, and

(e) If there is any balance remaining, it is to be divided between the partners in accordance with their proportion in share of profits

Where there has been an overall loss, but the firm is liquid enough to discharge its liabilities to its creditors, the rule provides that outside creditors are to be given priority, then followed by partners creditors for advances they made to the firm in contrast to capital contribution. If there is anything remaining, it be applied to settling capital contribution to each partner in proportion to his contribution.

Where the assets is not sufficient to discharge the firm's liability to its outside creditors, the partners must contribute the differences. The writings of Lord Lindley prior to the Act clearly illustrate this principle. He wrote-

"If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contribution inter se. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners, instead of a stranger. If, after paying all the debts and liabilities of the firm and the advances of

the partners there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses to be met like other losses."[40]

The above clearly illustrates the operation of Section 44(b) of the Act. It is clear that where the firms assets is not sufficient to meet or discharge its liabilities, the responsibility for such loss or shortfall is to be met by the partners, where they share profit equally, each must contribute equally towards meeting the loss or shortfall in capital. Where they share profit in unequal proportion, each partner is to contribute in proportion to his share of profit. It has been observed while rejecting the idea that loss of capital should be borne by the partner providing it, "the head, I win: tail you loose" argument that in the absence of any agreement to the contrary: "the community of profit involves like community of loss."[41]

The above proposition may be illustrated thus:

(i) A and B contribute ξ10,000.00 each in the partnership for profit to be shared equally. If there is a loss of ξ6,000.00 each of them must contribute ξ3000.00 towards meeting the loss.

(ii) Where they share profits in unequal proportion for example:-A- 40% and B-60%, it follows that if there is a loss of ξ6000

A-is to contribute 40% of the loss which is ξ2,400.00 and

B -is to contribute 60% of the loss which is ξ3,600.00

Likewise where the partners contributed capital in unequal proportion but share profits and losses equally, any loss of capital must be shared equally. For example:

A - contributes ξ15,000.00 while B- contributes ξ10,000.00 they share profit and loss equally; at winding up the surplus remaining is ξ19,000.00 meaning there is a loss of

ξ6,000.00 which is to be shared equally. A- ξ3,000.00 and B- ξ3,000.00 loss. Meaning A will receive his capital contribution less ξ3,000.00 i.e. ξ15,000.00 - ξ3000.00 = ξ12,000.00. B also will receive his capital less ξ3,000.00 i.e. ξ10,000.00 - ξ3,000.00 = ξ7,000.00.

The same principle applies even where the surplus is not sufficient enough to be met within the limit of capital contribution e.g. where the surplus in the above example is ξ4000.00 it means there is a loss of ξ21,000.00 (total capital contribution ξ15,000.00 + ξ10,000.00 = ξ25,000.00 - ξ4000.00 = ξ21,000.00. In this circumstance both A and B shares the loss equally meaning each will bear a loss of ξ10,500.00. It means B who has only ξ10,000.00 capital contribution will have to contribute ξ500.00 to A. Meaning A will receive the surplus ξ4000.00 + ξ500.00 additional contribution from B.

Where however the share of profit is in an unequal proportion for example A=60% and B=40% each partner is to contribute as per his share of profit. It means A will share 60% of the loss which is ξ12,600.00 while B will share 40% which is ξ8,400.00. In effect A will receive his capital ξ15,000 less ξ12,600.00 leaving him with ξ2,400.00 and B will be ξ10,000.00 less ξ8,400.00 leaving him with ξ1,600.00.

We however, submit that where the partners' true intention is that, once the debts have been settled, any surplus is to be divided between them in their normal profit sharing ratios or in proportion to their original capital contributions or in some other manner, effect must be given to the agreement of the parties. This will be in accordance with the intention of section 44 of the Act, which makes its rule effective subject to contrary agreement of the parties. Thus, in such circumstances the parties with largest capital contribution will suffer more loss or disadvantage. Thus like in the above example where

A contributes ξ15,000.00 while B contributes ξ10,000.00 and only ξ4,000.00 surplus is left for distribution. A share in accordance with profit sharing ration will leave A with ξ2,400.00 and B with ξ1,600.00 as in the above example. While a share in proportion to original capital contribution will leave A with 3/5 of ξ4000.00 = ξ2,400.00 and B with 2/5 of ξ4000.00 = ξ1,600.00. This means the profit sharing is in the same proportion to capital contributions since they end up at the same amount. The principles generally apply where there is need to contribute more capital.

Where one of the parties is unable to settle his proportion of loss for reason of bankruptcy, the situation become more complex, the rule to be applied is the rule in:-

Garner v Murray [42]

G., M. and W. went into partnership under a parol agreement that the capital of the business should be contributed by them in certain unequal shares, but that profits should be divided equally. Upon a dissolution, after satisfying all liabilities to creditors and the advances of two of the partners, the assets were insufficient to make good the capital. A considerably larger sum was due in respect of capital to G. than to M:- Held that having regard to s.44 of the Partnership Act, 1890. The true principle of division of assets was for each partner to be treated as liable to contribute an equal third share of the deficiency, and then to apply the assets in paying to each partner rateably what was due to him in respect of capital.

Joyce J. observed the real question in this case is how, as between two partners, the ultimate deficit, which arises in the partnership assets from the default of a third partner to contribute his share of the deficiency of the assets to make good the capital, is to be borne by them. We have now in the Partnership Act, 1890, a code which defines the mode in

which the assets of a firm are to be dealt with in the final settlement of the accounts after a dissolution.

Section 44 is plain. [His Lordship read the section, and continued:-] I do not find anything in that section to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share. Sub-s(b) of s.44 proceeds on the supposition that contributions have been paid or levied. Here the effect of levying is that two partners can pay and one cannot. It is suggested on behalf of the plaintiff that each partner is to bear an equal loss. But when the Act says losses are to be borne equally it means losses sustained by the firm. It cannot mean that the individual loss sustained by each partner is to be of equal amount.

There is no rule that the ultimate personal loss of each partner, after he has performed his obligations to the firm, shall be the same as or in any given proportion to that of any other partner. I have to follow the Act, and I see no difficulty in doing so in this case. The assets must be applied in paying to each partner rateably what is due from the firm to him in respect of capital, account being taken of the equal contributions to be made by him towards the deficiency of capital.

It has been submitted that the above rule in essence provides that upon dissolution, each partner is required to contribute towards the partnership losses in proportion to which he would share in the distribution of partnership profits. Solvent partners are not required to make up any shortfall in the contribution of the insolvent partner. That loss is borne rateably by the solvent partners when the final distribution of capital occurs. The rule makes no provision for the catastrophic loss situation where the amount recovered in contributions is insufficient to meet the claims of outside creditors. In that case the

paramount obligation of partners to satisfy the liabilities of the partnership requires that the solvent partners make further contributions until the liability is satisfied.[43]

We submit that the rule in practical application is deceptive, in that, it upheld the non-liability of a solvent partner to contribute for an insolvent partner who fails to pay his share. In reality however the solvent partners end up suffering a reduction in their entitlement for the reason of the inability of the insolvent partner.

In real sense the solvent partners are oblique to contribute to the insolvent partners portion. The only difference is the form and quantum of liability. While each partner including insolvent partner is bound to bear the liability of his proportion of the loss. The solvent partners are also further oblige to suffer a reduction in terms of the proportion of the insolvent partner; this time in relation to the proportion of their capital contribution making it a double tragedy.

Perhaps the following illustrations may express the operation of the principle.

[1] XYZ enter into partnership with the understanding that they contributes X- ξ15,000.00, Y- ξ10,000.00 and Z- ξ5000.00 and that they share profit equally. Z becomes insolvent thereby leading to the dissolution of the partnership. The sum of ξ30,000 was realised but ξ15,000.00 were owing to creditors. After settling the creditors, a balance of ξ15,000.00 stands to the credit of the partnership (i.e. ξ30,000.00 - ξ15,000.00 = ξ15000.00). Dividing the loss equally each partner will loose ξ5,000.00 thus X- will have ξ15,000.00 - ξ5,000.00 = ξ10,000.00 while Y have ξ10,000.00 - ξ5,000.00 = ξ5,000.00 and Z will have ξ5,000.00 - ξ5,000.00 = 000.

The above illustration does not pose any problem since Z the bankrupt partner's contribution was equal to his loss, none of the other partners suffers any extra burden.

If for example the position is such that the sum of ξ21,000.00 has to be settled to creditors out of the ξ30,000.00 realised. The balance will then be ξ9,000.00 meaning ξ21,000.00 stand as amount of capital lost. The rule dictates that XYZ are to contribute equally to this loss i.e. X= ξ7000.00, Y = ξ7000.00 and Z = ξ7,000.00 however Z cannot contribute since he is bankrupt. Therefore the notional amount for distribution will ξ9,000.00 surplus + X's = ξ7,000.00 + Y's = ξ7,000.00 = ξ23,000.00 which is to be divided rateably between X and Y as per the proportion of their capital contribution. Their total capital contribution is ξ25,000.00 X= ξ15,000.00 = 3/5 and Y = ξ10,000.00 = 2/5 since only ξ23,000.00 has been realised, therefore X will receive 3/5 X 23,000.00 = ξ13,800.00 - ξ7000.00 = ξ6,800.00. Y receives 2/5 X ξ23,000.00 = ξ9,200.00 - ξ7000.00 = ξ2,200.00. This supports our contention in that X's actual loss is ξ8,250.00 (i.e. ξ15,000.00 - ξ6,800.00) while Y's actual loss is ξ7,800.00 (i.e. ξ10,000.00 - ξ2,200.00)

This proves that any deficiency in terms of an insolvent partner's contributions is borne by the solvent partners in proportion to their capital contribution.

It is apprehended that the same principles apply where there is an overall loss to the extent that amount realised is insufficient to meet the creditors claim, the solvent partners will have to contribute to meet the deficiency.

For example applying the above illustration if nothing was realised and there is ξ69,000.00 owing to creditors; that means there is a shortfall of ξ30,000.00 to be met.

For example applying the above illustration if the amount realised was ξ1,000.00 and there is ξ70,000.00 owing to creditors, that means there is a shortfall of ξ69,000.00. The firm loss including capital contribution is ξ99,000.00. In order to meet the claim of creditors, the lost have to be apportioned among the partners, which means they are to

contribute ξ33,000.00 each, however, Z cannot contribute for reason of bankruptcy. The contribution of X and Y will produce ξ66,000.00. There is still ξ3000.00 outstanding. It has been opined that in such circumstances the solvent partners must contribute equally to the shortfall[44] i.e. in this case ξ1,500.00 each.

What seems to account for the change in approach between the above subject situation and previous illustration is the operation of section 44 of the Act. While the application of rateable principles presupposes situation where there is a surplus after settling creditors is covered under section 44(b) of the Act. The above illustration conceived situation where there is an overall loss and by virtue of section 44(a) of the Act, the loss is to be shared in the same proportion as they were entitled to share profits.

The settlement is however without prejudice to the solvent partners right to lodge claims against the estate of the insolvent partner for the amount they contributed on his behalf.

7.12 CONSEQUENCE OF DISSOLUTION UNDER ISLAMIC LAW

Generally, the processes involved following termination of partnership to final settlement of account leading to a complete and final disengagement are virtually the same with that obtained under statutory laws. The only differences may be in principles and legal position especially relating to the freedom of the parties under statutory laws to settle proportion of loss or profit according to their wish. Whereas under Islamic law freedom of the parties is restricted in this regard taking into account the law prohibiting usury. The loss is shared strictly in accordance to the proportion of capital contribution.

There is unanimity of opinions that in Sharikah, every partner owns a share in the invested capital, therefore a part of the profits may be shared out among the partners before

the final settlement of account. Since at the time of accounting any overpayment can be made good from capital. Under Mudarabah, the capital belongs to only one party, any distribution of profit during the running of the business may lead to dispute as if it turns out to be more than what the working partner is entitled or if the business returns a loss, it may be very difficult to get the working partner refund the amount he has taken in anticipation[45] .

Whether the business makes a profit or loss, can only be determined at termination of the business and final settlement of account.

7.13 WINDING UP UNDER ISLAMIC LAW

Like statutory laws, dissolution under Islamic law is also followed by accounting process, realisation of assets, settling of debts, restoration of capital and sharing of profit if any, or if it is a loss, it is to be proportionately shared.

If after realisation of asset, the business is discovered to have returned a loss, such would be deemed reduction of capital and is to be borne by owners of the capital in proportion to their capital contribution. Shaikh Ali Al -khafif writes:-

> "Shortage or loss will always be distributed in proportion to capital proper. All imams agreed on this in spite of their belonging to different schools of thought. Any condition agreed to in contravention of this principles would be null and void and would not be executed."[46]

In order to determine whether the business makes a loss or profit, the assets realised after dissolution must be applied first to settling any debt owed by the partnership, then followed by restoration of capital. If there is a remainder after restoration of capital; it is deem profit, which is to be shared according to the agreed proportion. Where however, the

assets is not enough to pay the capital investment, whatever shortage is deemed a loss and is to be shared by owners of capital in proportion to their capital investment. When all the business efforts and capital investment produces neither profit nor loss, the capital owners takes back their capital with no return in the form of profit.

In the case of Mudarabah, the working partner is entitled to a share in the profits as per the agreed proportion where the business returns a profit. If it returns a loss he gets nothing in return. He is however, not liable to contribute to loss since under Islamic law loss follow the capital, therefore since he did not contribute capital, he cannot suffer any liability for loss. It has been submitted that for getting no return, the working partner has suffered a great loss and therefore need not be further penalised. That behind this principle lies the idea of justice and fairness. For purposes of labour and business effort joining hands with capital was to add to the capital. The penalty for this addition not coming about cannot justly be charged to the party making business effort. His loss lies in the fact that the failure to add to the invested capital denies him all reward for business effort which has been wasted.[47]

There is agreement among the jurists that actual profit or loss is determined at termination of business.

Query: Is it lawful to share any part of the profit before the termination of business and final settlement of account? Where such division is done, does the profit so divided become wholly and permanently the property of the partner to whom it was given or is it only partly and temporarily his property?

It seems opinion of the jurists differs on these issues. Some jurists hold the view that it is lawful as a temporary or interim arrangement. This may be convenient to the

parties especially in the case of Sharikah since if the business at final settlement of account returns a loss or the share given turn out to be in excess of what the party is entitled to, such amount can be recovered or deducted from such party's capital contribution. In the case of Mudarabah on the other hand, it may not be easy and may generate to friction as the working partner do not have any capital contribution, it may be difficult to get him refund any portion of the profit he has taken. This therefore implies that whatever profit is shared before the termination of business can only be temporary and does not amount to absolute ownership, since it may be recall at termination of business if the need arise.

According to Hanafi, Maliki and Shafi'i Schools, the ownership of profit is proved only when, after the settlement of account, the invested capital has been restored to the owner; but according to Hanbali and Shia law, the working partner in Mudarabah become owner of his share of profit the moment it accrues but the ownership is fully established when the profit is shared out after final settlement of account[48] .

The essence of this principle is to make any distribution of profit prior to final settlement of account to be a temporary arrangement which does not confer absolute ownership of such profit on the person collecting it until final settlement of account. When the account is finally settled and the business returns a profit, then whatever was collected would be deemed part of the share of he who collects. If it turns out that he collected more than what he is entitled, he will then return the excess or it be deducted from his capital in case of the capital owner. In case of the working partner, he will have to return the excess to the capital owner. Where in the whole, the business returns a loss, all the profits previously collected must be returned. Where however, the distribution of profit is deemed to be the end of the business but the working partner still hold the originally invested capital and the contract was replaced with a new one. The profit shared

would be deemed as final and none of the parties would be required to return any portion of it should the business returns a loss subsequently.[49]

The winding up process therefore involve the selling of all merchandise and the conversion of the invested capital into cash. This is followed by the settlement of account, that is to say payment of debts and liabilities if any; this is followed by the restoration of capital. It then becomes valid for whatever remains to be distributed as profit as per the condition agreed by the parties.

There is unanimity of opinion among the jurists that the final distribution of profit and its full ownership is conditional upon the restoration of the original capital. The capital restoration may be in the form of physical or de facto restoration to the owner, which is submitted to be most preferable. It may be in the form of de jure restoration where though the capital is available but not handed over physically to the owner.

Some jurists like Shafi'i insist on transformation of original capital into cash by sale of goods before distribution of profit. We however, submit that giving regards to contemporary business arrangement, it is as well sufficient if upon understanding and agreement of both parties, the goods are valued and transmitted into cash on paper. He who wants to take possession of them may do so and the value be debited against his entitlement.

One distinct problem that needs discussion is question of liability in the case of credit transactions in excess of capital investment with the permission and consent of all the partners. Where the business returns a loss to the extent that it is not possible for such loss to be cleared or liquidated within the confines of the original invested capital; how is the balance to be settled? In the case of Sharikah, the injunction is that all the partners should share equally in the joint responsibility irrespective of whether their investment

were equal or not. In the case of Mudarabah, one view is that the debts will be the responsibility of the capital owner since the working partner made the credit purchase as his agent. Another view is that of Hanafi, according to which, the capital owner and the working partner are to share the loss equally because the credit purchase is considered as step taken jointly. Hanbali and Shafi'i are silent but Maliki consider such a step as illegal;[50] both profit or loss from that additional purchase is to be borne by the working partner only[51] .

The above goes to show that in most cases under Islamic law of partnership, the liability for loss lies within the scope of the invested capital, so that recourse to additional contribution for loss does not arise. This is so especially in Mudarabah, since by its nature, it cannot be made on the basis of loan. In the case of Sharikah, credit purchase may be made, it will be a joint property with joint responsibility.

It has thus been submitted that in the simple form of Sharikah or Mudarabah, that is where no partner makes any transaction such as adding his own personal capital or borrowed capital to the joint business, or purchasing in excess of the capital resources of the business. The total financial liabilities of the business cannot exceed its total capital. It is not possible that at the close of business there be any amount or claim that cannot be met by the capital stocks of the business. In such situation no problem of financial liability will arise. The problem only arise when a loan is taken or credit purchase has been made, or service has been obtained with promise for future payment and, following loss or bankruptcy the amount can not be met from the capital of the business in such circumstances, the partners will be equally liable provided that such additional liability was incurred with their consent.[52]

7.14 DEDUCTIBLE EXPENSES

In Mudarabah, the working partner may deduct all legitimate business expenses from the invested capital in accordance with the criteria of: customary commercial practice and the pursuit of profit. If he travel for business purposes, he is entitled to deduct his travelling expenses, this includes clothing, food, ointment, cost of his mount while travelling and during his sojourn in the city to which he has come, in the customary manned commensurate with the expenses of somebody of his status.[53]

The above proposition has been defended on the basis that if the agent departs with the capital to another place for the purpose of trading with it, then his expenses on the road and while in the city to which he is travelling are to be taken from the capital. This is so, because of custom, for his departure and travel are on behalf of the commenda capital. A person does not normally undertakes, this kind of hardship for the sake of an uncertain profit which he may or may not achieve, and then pay his expenses from his own money. However, he is willing to undertake such hardship with a view to the benefit that might accrue to him, and this is not to come about except by taking the expenses sufficient for this upkeep from the money at hand.[54]

Query: Are expenses incurred in bribing tax official or other government officials for the purpose of protecting the investment from confiscation to be deductible from the capital?

It seems according to early authorities, they are not deductible they are to be part of the private expenses of the working partner. This is the view of Abu Hanifa and Shaybani. It is however, opined by the latter jurist that because of the deterioration of moral quality of political rule and unjust exercise of power, a bribe should be considered a legitimate

expenses since it is intended to benefit the investment by paying out part of it in order to protect the whole from harm.[55]

In view of the above, and the need to know the exact amount of expenses, to enable the parties to determine the share of profit, the need for the working partner to keep proper account for the business and personal expenses cannot be over-emphasises.

7.15 RESTORATION OF CAPITAL AND DIVISION OF PROFIT OR LOSS

In the case of Mudarabah, it is concluded upon the working partner completing his series of transaction and returning the invested capital to the owner, whatever profit is left, is to be shared between them as per the proportion agreed at the commencement of the contract. Where the division of profit was interim, and the working partner continued to trade with the capital, if it subsequently returns a loss, the profit already shared will be call back to make up the capital investment. This is in line with the principles that in running business losses are made good by profit till the business comes to a close and accounts are finally settled. At the time of settlement of account, the original capital will be restored or set aside, if there is any amount left, it is deemed profit and if there is shortage it is deemed loss. This principle applies both in Sharikah and Mudarabah.

Where there is a loss in the case of Mudarabah it is borne absolutely by the capital owner, while under Sharikah all the investors will share the loss in proportion to their capital investment.

CHAPTER SEVEN NOTES AND REFERENCES

1 Partnership Act 1890, Section 36(1), Kaduna State Partnership Edict , Cap 107, Laws of Kaduna State, 1991 Section 38(1)
2 Partnership Act 1890, Section 36(3) Kaduna State Partnership Edict op cit. Section 36(3)
3 Partnership Act 1890, Section 37 Kaduna State Partnership Edict op cit. Section 39
4 Anson Banks R.C.I.(1995) Lindley & Banks on Partnership, 17th Ed.; Sweet & Maxwell, London, P.733
5 Partnership Act, 1890, Section 38 Kaduna State Partnership Edict op cit. Section 40
6 Heath v Sansom (1832) 4 B & Ad 172
7 Charles D.D.(1983) Law of Partnership, 3rd Ed, Sweet & Maxwell, London, P.222
8 Partnership Act, 1890, Section 39 Kaduna State Partnership Edict op cit. Section 41
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CHAPTER EIGHT

8.0 CONCLUSION

Partnership as a medium of trade and commerce, is widely employed in business transactions. It is all the more important in the Nigerian society of today where enough capital to start a business is not easy to come by. People are therefore of necessity forced to put their resources together, in partnership.

The Principal laws that govern partnership in Nigeria are the statutory and Islamic laws. On the other hand, the statutory laws are codified in various statutes under the state laws meant to be applied or use as a guide in determining partnership related disputes. While on the other hand, the Islamic law may be employed by the vast majority of Muslims by taking such matters to Sharia courts.

As important as it is, the partnership laws are yet to be enacted by many states. States like Kano, Katsina, Taraba, Niger, Sokoto, Jigawa, Kebbi, Nassarawa, Zamfara, Bauchi, Adamawa Gombe, Yobe, Borno to mention but a few are still applying the pre-1900 English Partnership Act of 1890. To say the least, even the states that have enacted their partnership laws, such as Lagos, the former Western State now Oyo, Ondo, Ogun and Osun and former Bendel State now Delta and Edo and Kaduna States have succeeded only in reproducing the English Act with virtually little or no modifications. It is therefore high-time for the states to enact laws that would be wholly or largely indigenous so as to reflect our peculiar circumstances and economic realities.

Partnership offers opportunity to both small scale business, intermediate and even incorporated companies to put resources together with a view to profit. If properly utilised, it could be the best form of business organisation, which everybody can grab for

the betterment of the society at large. It is affordable and easily accessible because of the absence of technicalities in starting. Partnership can be started without the need of incorporation or registration. The agreement can be reached orally or in writing just like any other ordinary contract.

In practice, we have found that people hardly make use of the elaborate provisions of the law both under statutory and Islamic law alike. It is common that people enter into partnership agreement without stipulating the time duration, nature of business talk less of calling witnesses. Likewise nothing is said on the manner of sharing profit and loss. In fact most market people are not even aware of the existence of the partnership laws neither do they bother to engage the services of a counsel; probably because of the legal fees. This in most cases leads to fraud, breach of trust and sometime end up in the courtroom.

The task before us now is to enlighten people generally and potential partners in particular on the provisions of the laws under statutory and Islamic laws so as to afford them the opportunity of utilising them for a hitch free partnership business.

8.1 SUMMARY

Chapter One attempted to trace the historical development of the partnership laws under both Islamic and statutory laws. With regard to statutory laws, it is our findings that the laws as we have today incorporated in various statutes are principally offshoots of the English Partnership Act 1890, which is statute of general application, and therefore by virtue of the reception provision applies to Nigeria. The various states that enacted their partnership laws does so through direct reproduction of the English Act with little or no modification, this therefore necessitate the use of the English Act as one of our major source of law in the treatment of statutory aspect of this work. As a bedrock to our

discussion, we examine the definition, nature and scope of partnership. Partnership is principally seen from two viewpoints, viz: Commercial and legal; the combination of which makes partners and firm indistinguishable. What is considered the firms property, debt and liabilities are in reality the partners property, debts and liabilities. This striking characteristic marks the distinction between incorporated company and partnership; while the former possess legal personality separate and distinct from its members, the later does not and its members are held personally responsible for its obligations.

This chapter also examines the various means of ascertaining the existence or otherwise of a partnership. We have seen that there is hardly any hard and fast rule, and whether a particular transaction can be termed a partnership, would depend on the circumstances surrounding it. If the circumstances exhibit the attributes of a partnership, the law will pass it as such irrespective of what the parties decided to call it. We have also seen some of the guidelines laid down by the partnership Act to determine whether a given transaction is a partnership or not. We have seen that co-ownership, sharing of gross return, produce or profit per se is not conclusive but that in all cases an assessment of the parties intention and conduct is necessary. However, sharing of profit has been identified as one of the prima facie evidence of the existence of partnership though it is not always conclusive as the Act itself recognised some exceptions to such a presumption.[1]

We have also considered the legal capacity of the parties to enter into a partnership. It is worthy to note that these capacities are in general the same with those required under the ordinary law of contract. An infant can ordinarily enter into partnership, but the partnership remains unenforceable against him and cannot incur any contractual liability to third party. In other words it is voidable at the option of the infant who has the right to avoid at any time before he attain the age of majority or soon after. While in the case of

mental patient, we have seen that they are generally presumed to be liable for any contract or partnership they entered into save if the other party can be shown to be aware of their state of mind at the time of contracting. The capacity of married women has also been considered and we have seen how progressive statutes have accepted and recognised their rights to contract like a feme sole. Other legal capacity considered are that of alien and corporation; we have seen that aliens are generally capable of entering into partnership or any other contract subject to immigration rules, the same applies to corporation in which case it is subject to the provisions of its memorandum and articles of associations. Corporation as an artificial person functioned within the provisions of its articles only, if it goes out of the articles it would be caught under the rubric of ultra vires, which would render any purported transaction, void. Lastly the capacity of bankrupt to enter a partnership has also been considered, we have seen that such person can only enter into a partnership upon full disclosure of his position and all transaction can only be done through his receiver.

The chapter also considers the formation of partnership, which we have seen may generally be formed in writing or orally or partly in writing and partly oral or by conduct, though it has been upheld to be more prudent to adopt a written agreement. We have highlighted the essential ingredients to be taken into consideration in drafting the written agreement, we shall later in the course of this conclusion provide a draft sample of a partnership agreement.

On the other hand, the chapter also considers the historical development of Islamic law of partnership. Like other aspects of Islamic law, its origin is traced to Arabia before the advent of Islam. With the advent of Islam, Partnership as a means of trade was adopted, modified and passion in line with Islamic tenets having regards to profit and loss

sharing as well as prohibition of usury. Examples of various partnership arrangements engaged either by the Holy Prophet himself and those that received his tacit approval have been cited to serve as incontestable authorities to partnership as a lawful means of trade and commerce. A brief mentioned has been made of the sources of Islamic law. Mentioned was made specifically of Quran, Sunnah, Ijmah and Qiyas and some of the subsidiary sources.

The definition of partnership under Islamic law from its different perspective has also been examined. We have likewise, in discussing the nature and scope of partnership, examines the formalities of its formation and the need to have a written agreement as stipulated in the Qur'an;[2] thereby departing from the strict procedure of the law evidence which limits legal proof to oral testimony of witnesses we shall in the course of this conclusion provide a draft partnership agreement in line with Islamic standard. We have also highlighted the different types of partnership under Islamic law ranging from proprietary to contractual partnerships such as Mudarabah, Muzara'a; Musaqat, Mufawadah, Inan etc.

We have also examine the rules governing the distribution of profit and loss, we have seen that these rules are the main features that distinguishes partnership under Islamic law and statutory laws. Hand in hand with the rules is the issue of capacity of the parties to enter into partnership, the requisite capacity have been seen to include adulthood, sanity freedom and religion.

Chapter two focussed attention on the types of partnership. Under statutory laws partnership is broadly classified into civil and commercial. While the civil category of partnership does not involved much of commercial activities, the commercial partnership has it as its main purpose. Association that can be classified as civil includes those of

farmers, artisans, labourers and other associations involving manual labour. Commercial partnership on the other hand is classified into: undisclosed, general and limited partnership, others include: partnership by estoppel, corporate, group, particular and sub-partnerships. We have also considered the instances when a partnership may be termed illegal.

On the other hand, we have also considered the categories of partnership under Islamic law, which we have seen to be broadly divided into two: proprietary (Sharikat al-milk) and contractual or commercial (Sharikat al-Aqd). Contractual or commercial partnership: consists of Mufawada - unlimited investment partnership; Sharikat al-inan - limited investment partnership. Other categories include Mudarabah - commanda, Sharikat al-sanai - work partnership, sharikat al-wujuh - credit partnership, Muzara'a or Musaqat - share tenancy.

Chapter three considers the relationship of the partners among themselves (inter se). It examines the level of the partners' participation in management, capital contribution and extent of liability. Under statutory laws it is seen that the partners have ample freedom to determine the principles that should govern their relationship; however, where they do not have an agreement, the Act applies to govern the relationship. The parties are as well free to put an end or vary their agreement at any time they so wish all under the rubric of freedom of contract. The partners relation visa viz partnership property and how to distinguish such property from personal property of the respective partners have also been considered. Also examined are the rules relating to interest and duties of the partners as set out by the Act.[3] With particular reference to share of capital and profit, indemnity to partners for payments made or personal liability incurred in the ordinary course of the partnership business, payment of interest to partners in respect of any payment or advance

beyond the amount of their capital contribution. Others includes restriction on payment of interest before ascertaining the profit rights of each partner, right to take part in management, mode of settling disputes, keeping of partnership books etc. Other important aspect examined are the provisions relating to expulsion and retirement and the fiduciary duties of the partners which includes duty to render account and accountability for private profits. We have also seen the right of assignees of share, this contemplates a situation where one of the partners assign his share to a third party. In such situation save in the event of dissolution, the assignee has no right to account or to interfere in the administration or management of the partnership.

Consideration has also been made of the Partners relationship among themselves (inter se) under Islamic law. Trust has been seen to be the underlying principle of the partners' relationship, each partner is considered trustworthy and transact as an agent of the other. Like our discussion under the statutory aspect, we have examined partnership property and the various juristic opinions as to its constituent, having regards to whether the partnership is limited or unlimited. Hand in hand with the issue of property is the formation of joint capital which is one of the deciding factor of what constitutes the partnership property since it obviously depends on the category of capital admissible for investment. Examine also are the rules relating to interest and duties of partners and duty to account. We have also examine the modalities relating to distribution of profit and loss. While profit distribution may be determine on any proportion agreed by the parties, their discretion to determine the proportion of loss is restricted; the loss by Islamic standard strictly follows capital contribution and any agreement to the contrary is unlawful. This is one of the clear distinctions between the concept of partnership under statutory laws and that under Islamic law.

Lastly the chapter examined the issue of equality in partnership, which is to some extent under the Hanafi School peculiar to Mufawada in so far as it relates to equality in all respect.

Chapter four dealt with the relationship of partners to third parties. On the one hand the discussion under statutory laws focuses attention in particular to the operation of the agency rule relating to principal and agent as it affects the mutual relationship between partners in transacting the firm's business. In noting the partners' powers to bind the firm, it is seen that each partner is endowed with general authority to bind the firm while acting within the scope of authority and the usual course of business. This led us to examine what is the scope of authority and the usual course of business that will bind the firm. It has been stated to be acts done on behalf of the firm and with authority, where acts are unauthorised, the firm is not bound provided the creditor is aware that such act is unconnected to the partnership business.[4] We have also considered the joint liability of the partners for the firms debts and obligation as well as the firm's liability for wrongful Acts of partners which is determine on two criteria i.e. for acts or omission committed in the ordinary course of business and acts or omission authorised by the other partners and the firms liability for misapplication of money or property received for or in the custody of the firm. Other areas of liability considered is the firm's liability for admission and representation of partners concerning the affairs of the firm. Consideration has also been made on the effect of notice to the firm and the position of liability where there is a change in composition of the firm, such as admission of a new partner or retirement of an existing partner.

On the other hand the partners relationship to third parties under Islamic law, have also been considered; attention was focused on the question of liability. Unlike statutory

laws, liability in all types of partnership under Islamic law is unlimited, and each partner is liable in proportion to his share of capital contribution and the liability is several not joint. A third party can only sue the partner with whom he transacted that partner will then be indemnified by his co-partners to the extent of their own share of liability. We have seen that in both Sharikah and Mudarabah the relationship of the partners to third parties is characterised by the prohibition of fraud, coercion, uncertainties, vagueness and control of injury in all dealings ranging from procurement of capital to supply of joint capital to third parties in both Sharikah and Mudarabah. Also considered is the right of a third party to share in profits and the rights and liabilities of the partners as well as that of working partner in respect of credit and other transactions. Considered also is the partners relationship to third party under Mufawada; the liability for goods lost while entrusted to a third party, investment with third party and the limits of mutual surety in Mufawada.

Chapter five examines the relationship of partnership to other related concepts such as incorporated companies and the doctrine of Agency. Particular attention was focused on concept of legal personality and limited liability as they apply to both statutory and Islamic laws. We have seen that legal personality is a feature exclusively for incorporated companies, partnership lacked legal existence distinguishable from its members, members transact the business of the firm both as principals and as agents while incorporated companies are crowned with legal personality quite distinct and separate from its members. The extent of the application of this doctrine dictates that the Company may even employ the proprietors while in partnership the firm cannot since no man can employ himself. Hand in hand with the concept of legal personality is that of limited liability. For in incorporated companies the liability of members is limited to the amount of shares they subscribed while in the case of partnership with the exception of limited partnership has

always involved unlimited liability on the part of its members. In contrast we have seen that the position under Islamic law is quite different, the concept of limited liability and corporate existence are inapplicable. Each partner is liable to the debts and obligation of the partnership in proportion to his share of capital contribution and the parties are not allowed to vary such position by agreement, this is because under Islamic law, loss follow capital contribution.

We have also examined the concept of perpetual succession, which is seen as the ability of a body to survive changes of individual members either as a result of retirement, transfer of shares; death or other supervening circumstances. This advantage again is only peculiar to incorporated companies while in the case of partnership it is automatically terminated by death, withdrawal or change in the composition of the partners. The same principles applies to partnership under Islamic law which may also be terminated by death, retirement, notice, etc. Though unlike statutory laws, where the partnership involved more than two partners, it terminates only in respect of the ownership of the deceased or retiring partner while the surviving ones may decide to continue with the relationship.

Another important distinction considered is the possibility to transfer shares which is one of the glaring advantages of incorporated company. While in partnership the partners can only assign and the assignee has no say in the affairs of the firm. This demonstrates the impersonal nature of incorporated companies as compared to the personal nature of partnership. The same principles explain the ownership of property, while in the case of incorporated company it owns the property, in the case of partnership, the property belongs to the partners. The discourse also highlights that the concept of legal personality or corporate soul is peculiar to statutory laws only and has no application to Islamic law, a law which forbids uncertainties, harm and usury.

The other limb of the chapter deals with the relationship of partnership to agency. The doctrine of agency have been seen to be one of the bedrock for the operation of partnership, the working of which lies solely in the operation of the agency law relating to principal and agent. Like principal and agent relationship, the firm as a whole is liable for the acts of any of its members done within the scope of his authority and in the ordinary course of business. We have seen that each partner function both as principal and as agent. A partner acts as Principal when he acts for the firm in the ordinary course of business, he is principal in his own right and an agent for his co-partners and vice-versa. In the case of agency, it is one way affair, the agent function only as agent and the principal only as principal; for this reason it is seen that the agency maxim: Delegatus non potest delegare does not apply to partnership. We have also seen that while an agent may be entitled to remuneration, a partner is entitled only to profit. In both partnership and agency, the principal or the firm as a whole is liable for torts and frauds of their co-partners or agents committed in the ordinary course of business. Likewise under both partnership and agency, the parties are bond to be honest to one another in their dealings with third parties and are entitled to be indemnified for expenses and losses bona fide incurred in the course of business. This principle in a general note also applies to Islamic Law.

Chapter Six focuses attention on dissolution of partnership. Various ways in which partnership may be brought to an end has been examined, it includes technical and general dissolution. A Technical dissolution as seen, comes about as a result of change in the composition of the firm rather than a complete break in business while a general dissolution involve a full scope winding up and settlement of account. We have seen that the dissolution is brought about either by agreement of the parties or by intervention of court. Partnership is dissolve by mutual agreement, exercise of reserved power, rescission,

repudiation, frustration retirement, expulsion, or by expiration of term in the case of a fixed term partnership or conclusion of adventure in the case of partnership for a particular adventure. Other means of dissolution discussed are by notice in the case of a partnership at will, other factors that can bring about dissolution are bankruptcy, death or charge. It has also been seen that in some cases the dissolution may be necessitated by operation of law through the change of factual circumstances or legislation rendering it illegal for the firm to continue its business. We have also seen that, sometimes the dissolution is occasion by intervention of court on grounds such as mental infirmity, permanent incapacity, prejudicial conduct wilful and persistent breach of the partnership agreement, when the firm's business can only be carried on at a loss and when the court consider it to be just and equitable to dissolve the partnership. On the other hand, dissolution under Islamic law has also been considered, we have seen that most of the grounds are common to those under statutory laws, thus it can be terminated by repudiation, renunciation, mutual agreement, death, mental infirmity, lack of discretion, necessitating legal restrictions on appropriation and apostasy, frustration, accomplishment of purpose and expiration of term in the case of a fixed term agreement and lapse of equality in the case of Hanafi's Mufawada.

Chapter Seven examines the consequences of dissolution, which involve the process of winding up and settlement of account. This as seen involved settling rights of persons dealing with the firm which is provable against all apparent members of the firm, that is why it is the right of every partner to notify of dissolution or retirement, to avoid being held liable under the doctrine of holding out. It has been seen that the winding up process involved the authority of the partners to complete uncompleted transaction and perform all act necessary for winding up the affairs of the firm, their duties at this stage

includes: selling of the whole or part of the partnership property including goodwill paying off the firm's debts, drawing upon the partnership account, endorsing bills, previously drawn and accepted, collect debts due to the firm, issuing bankruptcy notice etc and finally application of the assets realised to payment of the partnership debts and liabilities and paying the surplus if any to the partners in accordance to their entitlements.[5]

It has been seen that the parts of the payments to be made includes return of a portion of premium.[6] Where shares of deceased or retired partners was employed by the continuing partners, such retiring or the estate of deceased partner are entitled to claim either a share of profit or interest at the rate of five per cent per annum on the amount of his share so employed in the partnership business. We have seen that following the realisation of assets, the proceed is applied to: the liquidation of the firms debts and liabilities, followed by repayment of advances given by partners, the payment of administration cost where court's assistance has been enlisted then followed by repayment of capital to partners. If there is any balance it is to be divided between the partners in accordance to their proportion in share of profits. Where there has been an overall loss however, the partners must contribute the difference. Comparatively, we have also seen that almost the same processes are involved for winding up under Islamic law, the difference arising principally because of the law prohibiting usury which make loss to be shared strictly in proportion to capital contribution. Profit or loss is determined only at termination of the business and final settlement of account. The settlement of account involved realisation of assets, settling of debts, restoration of capital and sharing of profits if any or loss depending on the circumstances of each case.

8.2 OBSERVATIONS

Our foregoing discussion focuses more on the legal provisions relating to the operation of partnership under both Islamic and Statutory Laws. It is ideal here to consider the legal provision vis-à-vis the practical operation of partnership. In doing so recourse was had to a lot of businessmen; market stall and private shop owners in and around Zaria, Kaduna and Kano; some of the traders/businessmen contacted have a great deal of business experience trading across the nation.

From our investigation, it is apparent that a lot of businesses are run on the basis of partnership either by express agreement or understanding. The types of businesses in question are not exhaustive but particular finding have been made on the following:-

(a) Transportation – We have discovered that most transporters buy a vehicle and entrust it on another person so that such person will work with it and at the end of the day whatever is realised is shared in proportion between the vehicle owner and the driver. In some cases the driver is asked to bring a certain fixed amount daily, this irrespective of whether he made such amount or not and if he happens to make double or triple or whatever amount daily, the excess belongs to him. In such type of business the responsibility for the maintenance of the vehicle is shared between the driver and the owner of the vehicle on the basis of their agreement which in most cases is verbal and may be with or without witnesses. The means of transportation in consideration here includes both motor vehicle and motor cycle. While in some isolated cases persons may put money together for the purchase of such vehicle to give to a driver or for one of them to drive.

The question here is does this type of agreement qualifies as a partnership? Strictly speaking it does not when viewed from the statutes point of view and especially when the driver does not contribute anything to the purchase of the vehicle. His position is that of a

servant or agent, what he gets does not qualify him as a partner or liable as one. Where the driver has a share in the vehicle however, it may perfectly fit as partnership. When viewed under Islamic Law, such a business would qualify as Mudarabah in that the owner of the vehicle has given it to the driver who will work with it and generate some profit in return for a share in the profit. Although the practical mode of the practice clearly departs from the tenets of Islamic Law. What will it take to make it Islamic is not far fetched. The parties are to have strength in faith. The driver is to render full account of what he realised. The repairs and other incidental expenses are to be deducted from the amount realised. At an agreed period, a week or a month they may share some part of the money in a proportion agreed by them. While the other part of the money is to be kept towards realising the cost/capital invested in purchasing the vehicle.

Another type of partnership business can be seen in Estate Developers. Some people do put resources together and purchase house(s) or develop same, put tenants inside and be sharing the rents/profits sometimes and very commonly the joint ownership of the house or estate may be as a result of inheritance however. The sharing of profit and the agreement of the parties to render it for profit purpose do fulfil the requirements of its being a partnership.

We also found the existence of partnership in farming where people put resources together to cultivate land and share whatever produce is harvested. This may involve the parties contributing capital in the form of money to hire labourers, purchase seeds, fertiliser, etc. It may also involve joint use of their own labour. The manner of assessing each partner 's labour contribution may not be easy.

Findings have also been made in respect of the sells of provisions and pharmaceutical stores. We discovered that a lot of shops, if not all engage in partnership in

one form or the other. Some join capital to run the business, while some procure goods from wholesalers on credit with promise to return the price after the sale of the goods. In all cases the wholesalers inject their profits in the price given to the retailers. It is difficult in such situation to divorce such proceeds from usury in the event of loss or destruction of the subject matter.

We have also discovered that some people finance a business in return of profit. This may be to an already established trader or to a beginner; it may as well be the sole capital or capital joined to the one owned by the trader. The manner for sharing profit is either on the basis of a fixed amount or in proportion to the whole profit. Where the share of profit is fixed it amount to usury.

It is also our findings that in most of these types of partnership, the parties enter into them in very informal manner. Nothing is reduced into writing nor are there witnesses to the agreement. This laxity in most cases results in conflict especially when there is a loss or breakdown in business.

Likewise it is our findings that there are a lot of insecurities in the business field and this go a long way in affecting the conduct of businesses generally. Most investors are afraid of losing their capital to the retailers. This couple with the very common fraud in terms of 419 and lack of fear of God in the minds of individuals further aggravate the situation. It is very common for the traders to convert the money into something else and tell the capital owner that the money was stolen or lost. This problem may not be unconnected to the general economic recession and hardship the nation is undergoing.

Another problem associated with the conduct of partnership generally is the absence of the limited liability. Each and every partner is liable to the firm's debts and liabilities irrespective of his level of capital contribution. The partners are jointly and

severally liable, especially in partnership under statute although such does not apply to partnership under Islamic Law where third party can only sue the person he directly transacted with, who would in turn be reimburse by the other partner(s) in proportion to their capital contribution.

Furthermore, partnership business does not enjoy perpetual succession, in that the death of one of the partners brings the partnership to an end. This is true from the theoretical point of view. Practically, it is very common that business do continue after the death of one of the partners and his estate get whatever proceed or profit he is entitle to get had he or she be alive. This might not in all be correct, that the business has to stop somewhere and account be taken so that the interest of the deceased person would be settled being it in the form of profit or loss. The factor also goes a long way in deterring people from partnership as a means of trade and commerce.

Another problem affecting the operation of partnership is the over reliance on the concept of trust, especially among the Muslims partners. Under these auspices parties enter into agreement without complying with the requirement of the law either getting witnesses or reducing their agreement into writing. This, in most cases lead to problems of breach of trust and even denial of any business line.

We have also discovered that a lot of people do not set in advance, the modalities of profit sharing, leaving such sensitive issue at the discretion of the trading partner. It is our findings that this easily leads into suspicion and eventual breakdown of the partnership.

Another problem of some partnership business is lack of clear yardstick and objectives, no stipulation is made on the nature and type of business. Where it was made,

it is often not adhered to. The partners or the trading partner engage in any type of business. This would certainly lead, to dispute when it comes to ascertaining profit.

Likewise, more often than not the parties do not bother to stipulate the commencement and termination dates for the partnership; thereby rendering most of the partnership to be partnership at will. This, needless to add will certainly create uncertainty in the minds of the partners.

One important thing hampering and deterring people from freely employing partnership as a means of trade is the fear of fraud, which has recently gained ground in the country and popularly styled as 419. It becomes the order of the day, creating fears in minds of potential investors to join hands with even the most honest people who need capital. This, coupled with the lack of available business opportunities affects the operation and practice of partnership greatly.

Another important factor affecting operation of partnership is lack of capital. In every business, lies the need for available capital at least to start. For example for partners to open a moderate law firm they need not less than ₤250,000.00. Considering the economic recession in the country no bank will be willing to support such a venture talk less of individuals. Same problem applies to a lot of other trade or profession. Moreover, even when the partners are able to secure the finance, they would then be faced with lack of business opportunities, patronage and rubbing shoulders with those already established in the business.

We have also discovered that a lot of laxity exists. People do not adhere to ordinary rules and regulations thereby denying themselves the benefits of the well-established rules relating to partnership. In some cases, we discovered that the people are indifferent while in some, they are completely ignorant of the existence of such rules and

regulations, the consequence of which at this stage fall beyond the purview of their projection.

Another problem, especially to Muslim partners, is how to avoid usurious transaction. In most business the strict Islamic standard is almost unattainable, if you rely so much on trust of your partner, he is not likely to account the true position to you. Some of the businesses are dictated by non-muslim to whom usury is no harm. In such circumstances the Muslims option is either to stay clear of the business or risk taking usury or being defrauded. Sometime, the business is of such a nature that the capital is revolving, thereby making it impossible to ascertain profit.

We have also discovered that a lot of investors do not take part in the business especially the working class capitalist; which best qualify them as limited partners.

Unfortunately, except in the case of the laws of former Bendel State and Western region, the limited partnership provision is glaringly absent in all the statutes.

8.3 RECOMMENDATION

Having highlighted the above problems associated with the operation and practice of partnership in Nigeria. Our work would be incomplete except when we proper some likely/useful solutions to the problems. In our opinion most of the problems are not insurmountable and we believed partnership may be the easiest affordable and attractive means of business if the following suggestions are adhered to.

First and foremost, the parties must be aware of what they are entering into. If they intend partnership, it should be clearly understood from the onset. If it is just a hire contract or employment contract it should be understood to be so by all the parties.

In the case of transportation, where the relationship is not that of partnership i.e. where it is that of hire or Ijara; entitlement of the driver should be expressly stated. Where it qualifies as a partnership, a means should be devise of finding the income derived from the vehicle and time for sharing the proceed. A modality should also be agreed for paying the partner that is driving the vehicle, an agreed remuneration for his labour. While if it is to work properly as Mudarabah under Islamic Law a proportion in sharing of the profit must be determined in advance and the profit can only be known after recovering the price of the vehicle. Although in the interim both parties can collect some amount or credit, which is to be deducted from their final entitlement at the close of business.

In the case of joint ownership of property like building or estate, it may not qualify as partnership in the commercial sense but it certainly do in terms of proprietary partnership. However, where profit motive is apparent the partners should agree in advance on the modalities for sharing the profit or loss and the running of the estate generally.

With regard to the problem of usury especially for the Muslim partners, such can be avoided. For example in the case Mudarabah related transaction, like giving goods on credit, the ideal and realistic price for the goods should be set and should be the same price with the one who is purchasing with cash. Any additional sum on the basis that it was a credit purchase will amount to usury. Likewise where the participation of one is on the basis of capital contribution the share of profit is to be determined in proportion rather than fixed amount. The uncertainty surrounding a fixed amount, whether such amount will be generated or not, whether loss will be returned is unknown until close of business; as such any purported condition fixing a stated sum amounts to usury. In other words Muslims

partners are advised to fix their share of profit in proportion such as 60%/40%, 80%/20%, 50%/50% as the case may be.

With respect to lack of capital, the government should make policies that will encourage banks to finance such business initiatives. The government might as well consider creating a body that would be charged with financing such business ventures for examples bodies like Peoples Bank, Family Economic Advancement Programme etc. They are however to be remodelled in such a way that whatever money they advanced is not to attract interest.

In fact the government in this direction deserve a praise in that the family economic advancement programme do finance and promote family businesses involving women and their husbands although the procedure for securing the loan is too rigid. The mandate of the programme should therefore be extended to cover all categories of person with genuine business plans.

By and large for the informality and indifference of people, it is high time people realise the importance of adhering to formalities, and although writing is not a compulsory requirement both under Islamic and Statutory Law, the importance of a written agreement cannot be over-emphasised. Oral agreement are likely to be forgotten in terms of their details and other essential conditions while if such are reduced into writing, it is just a matter of referring to the agreement. It is therefore our opinion that parties should always insist on having their partnership agreement reduced into writing being it under Islamic Law or Statutory Law. They should as well get witnesses to the agreement, preferably to engage the services of a counsel, who will ensure that all necessary conditions are included.

In the case of insecurity and fear of fraud, the government is trying its best towards that direction, in the sense that tribunals have been created to deal with fraud related offences, the failed banks tribunal etc. It has succeeded in injecting some sanity into many people. It is therefore ideal that such bodies be made a standing one and easily accessible to the common man. We believe the taking of this step will alleviate the fears in potential investors.

Whereas in the issue of liability; limited liability of individual partners should be recognised. For this to be successful, the partners have to lay down clear goals and objects of business. The partnership transaction should not exceed its capital, otherwise where the partners agree to transact in more capital than the firm posses, it clearly follows that where there is a breakdown in business each partner should be liable in proportion to his capital contribution. In order to avoid unnecessary hardship to a particular partner, liability should be joint and not several, that each partner will contribute his own share to the liability. Or in the alternative the Islamic Law procedure should be adopted, that is to say third parties can only sue the person they transacted with, who will in turn be reimbursed by his partners.

Likewise in the case of lack of perpetual succession, it is our opinion that the acts or edicts should be amended in such a way as to crown partnership with perpetual succession, so that the exit of any of the partners will not bring the partnership to an end. This can be achieved by a simple device of taking account, and settling the outgoing partner or at least determining the extent of his right thereby allowing the partnership to continue just like an incorporated body.

By and large for Muslim to participate in partnership and avoid usury, they have to find Muslims partners. Islamic organisation should come to the aid by preaching and

providing means of trade. A banking system on the basis of Islamic principles should be established and be charged with the responsibility of financing business on Mudarabah basis.

Likewise for civil servants and other owners of capital to participate in business, limited partnership edict should be enacted. That will enable them to invest, get their share of profit and have the benefit of limited liability. That is to say their liability will rest on the amount they subscribed save where they consented to borrowing from other sources.

8.4.0 SAMPLE OF PARTNERSHIP AGREEMENT

The importance of partnership agreement has been emphasised. We therefore deem it necessary to provide a draft sample of a partnership agreement under the two system. Both laws did not insist on the use of any particular term or formula. Any word used, which connotes partnership agreement, will suffice.

8.4.1 A DRAFT SAMPLE OF PARTNERSHIP AGREEMENT UNDER STATUTORY LAWS

FORM 1

General Business Partnership Deed Between Three Persons[7]

	THIS DEED OF PARTNERSHIP made the		day of
Parties	BETWEEN	**of**	of the first part
		of	of the second part
	and	**of**	of the third part

(hereinafter called "the partners").

NOW THIS DEED WITNESSETH:

Duration 1. The said hereby agreed to become and remain partners in the business of for a term of years from the date of these presents subject to the provisions for the earlier determination of the partnership hereinafter contained.

Firm Name 2. The partnership business shall be carried on under the name and style of and the partners shall concur and join in the execution of all documents required to be lodged pursuant to any legislation for the time being in force with regard to the registration of business or of business names.

Places of Business 3. The said business shall be carried on at and at such other places as the partners of (or a majority of them,) shall from time decide upon.

Capital 4. The capital of the partnership shall be the sum of $ as stated in the balance sheet contained in the schedules hereto. The said balance sheet correctly sets out the assets and liabilities of the partnership and the extent to which each partner is entitled to share in the said capital. Each partner shall pay into the bank to the credit of the partnership the sum due by way of contribution to capital as shown in the said balance sheet.

Increase of Capital 5. If at any time hereafter further capital is required for the purposes of the partnership business, it shall be contributed by the partners in the same proportions in which they shall for the time being be entitled to share in the (capital) (net profits) of the partnership. (A decision of a majority of the partners to the effect that further capital is required shall be binding on all the partners.)

Goodwill 6. The goodwill of the partnership is valued at $ and belongs to the partners in the shares in said balance sheet.

Interest on Capital 7. Each partners shall be entitled to interest at the rate of percent per annum on the amount of the capital for the time being in the business.

Loans by Partners 8. If any partner shall, at the request in writing of the other partners, advance any sum of money by way of loan to the partnership the same shall be a debt due from the partnership to that partner and shall carry interest at the rate of percent per annum payable at the end of the trading year in which the advance was made and at the end of each succeeding year during which the subsistence of the loan. Provided that, if the loan is repaid during the course of any trading year, the interest shall be apportioned up to and shall be payable on the date of repayment. Every such loan, together with the interest payable in respect thereof, shall be repaid to and received by the partner who made the advance on the last day of the calendar month next occurring after the expiration of from the date on which partner made the advance made a written demand upon the other partners for the repayment or on which the other partners gave the partner written notice of their intention to repay.

Outgoing 9. All expenses and outgoing on the partnership including interest under clauses 7 and 8 hereof the all partnership losses shall be payable, in the first place out of the profits, secondly out of the capital of the partnership, and thirdly, in the case of any deficiency, by the partners (equally) in the proportions in which they are entitled to share in the (capital) (net profits) of the business).

Accountants and Tax Agents 10. The partnership's accountants and tax agents (hereinafter called "the Accountants") shall be or such other firm of accountants and tax agents as shall be agreed upon by the partners from time to time. The Accountants shall be instructed to carry out an annual audit of the partnership books of accounts and to prepare the partnership's

annual profit and loss account and balance sheet as at the (thirtieth day of June) in each year and to prepare the annual partnership of the continuance of the partnership. The Accountants shall be directed to provide each partner with a copy of the annual profit and loss accounts account, balance sheet and return of partnership income. Each partner shall sign the annual profit and loss account and balance sheet and every such account and balance sheet shall be binding on the partners unless some manifest error is brought to the attention of the partners and of the said Accountants within calendar months of the signing of the said account and balance sheet by the partners.

Shares in Net Profits 11. The net profits of the partnership, after the payment of the outgoing and expenses under clause 9 hereof shall belong to the partners (in equal shares) (in the following shares, that is to say: to the said) (in the same proportions in which they are for the time being entitled to share in the capital of the partnership).

Bankers 12. The bankers of the partnership shall be **of** or such other bankers as the partners shall from time to time agree upon. All moneys (not required for current expenses) belonging to the partnership shall be paid into the partnership account and all securities belonging to the partnership shall be deposited with the said bankers. All documents of title to the partnership's freehold and leasehold properties shall be deposited with the said bankers for safe custody and shall not be withdrawn from such custody without the consent in writing of the partners for if a majority of them). All cheques drawn on the partnership name (and shall be signed by (all) (at least two) of the partners) (but each partner shall be entitled to sign such cheques on behalf of the partnership).

Drawings by 13. Each partner may during the course of each calendar month draw

Partners out of the said business on account of their share in the anticipated profits such sums as shall not exceed a total of $ or a sum equivalent to a one-twelfth part of the share in the net profits for the preceding year whichever is the less. If on the taking of the annual account at the end of any year the amount drawn out by a partner shall be found to have exceeded the share of the net profits to which the partner shall be entitled for that year, the partner shall immediately refund the excess to the partnership by way of payment into the said partnership banking accounts.

Duties of Partners 14. Each partner shall during the continuance of the partnership (except during such holidays as shall be agreed upon between the partners) devote the whole of her or his time and attention to the partnership business and attend therein with the utmost diligence and use all skill and endeavours for the benefit of the said business. Each partner shall be just and faithful to the other partners in all matters relating to the partnership business and at all times whether expressly required to do so or not give a full and true account of all matters known to the partner relating to the said business.

Private Obligations of Partners 15. Every partner shall punctually pay and discharge her or his separate debts and obligations and shall at all times ensure that the partnership is fully indemnified against any claim arising therefrom.

Prohibitions 16. During the continuance of the partnership business no partner shall without first obtaining the written consent of the other partners:

(a) Either directly or indirectly engage in any business trade or profession other than that of the partnership;

(b) Lend any money on behalf of the partnership;

(c) Deliver on credit goods belonging to the partnership or otherwise give credit one behalf of the partnership in excess of the sum of $ in any one year;

(d) Pledge the credit of the partnership in excess of the sum of $

(e) Borrow money on behalf of the partnership or give any security over partnership property in respect of any loan;

(f) Release (except where the debtor has paid in full) any debt owing to the partnership;

(g) Compromise any claim invested in the partnership;

(h) Enter into any bond, become bail, security or surety for any person or otherwise enter into any obligation whereby any partnership property may become liable to be sized, attached or taken in execution;

(i) Enter into any bond contract on behalf of the partnership for the purchase of any property real or personal exceeding in value the sum of $;

(j) Hire or dismiss any servant or agent of the partnership;

(k) Make any journey on behalf of the partnership exceeding kilometres in distance from any place of business of the partnership;

(l) Assign, mortgage or charge a share or interest or any part thereof in the partnership business;

(m) In any way attempt to make any other person a partner in the partnership business.

Accounts 17. Proper books of accounts shall be kept by the partnership in the form recommended from time to time by the partnership's Accountants. It shall be the personal

responsibility of each partner to ensure that full particulars of every transaction on behalf of the partnership are duly entered in the said books of account. The said books shall be kept at the (principal) place of business of the partnership (except when they are required by the Accountants for the audit and preparation of the annual accounts) and each partner shall have reasonable access to and be entitled to take copies of the same.

Retirement 18. Any partner may retire from the partnership after the day of notice in writing to the other partners, or the survivor of them, or leaving such notice at the place where the business of the partnership shall for the time being be carried on, and on the thirtieth day of June next succeeding the expiration of such notice either the partnership shall, as regards the partner giving or leaving such notice, terminate in accordance with the provision of clause 19 hereof or the partnership may be terminated as regards all the partners in accordance with clause 22 hereof.

General Provision for winding Up

19. Where the partnership is determined as regards all the partners by effluxion of time, or at the option of the partners in accordance with clauses 18 and 22 hereof, a general account shall be taken of the assets and liabilities of the partnership, and the assets shall be realised as soon as is conveniently possible, and the next proceeds after the discharge of such liabilities and the payment of the expenses of the winding up shall be applied in the following order of priority:

(a) In repayment of any advance made by a partner together with interest thereon up to the actual date of repayment in accordance with the provisions of clause 8 hereof;

(b) In payment to each partner of any interest on capital due under clause 7 hereof;

(c) In payment to each partner of any share of profits due under clause 11 hereof in respect of any year other than the year of the winding up;

(d) In repayment of each partner of the contribution to capital under clause 5 and 6 hereof;

(e) The balance, if any, remaining after the above amounts have been paid in full, shall be divided between the partners in the same proportions as they were entitled to share in the profits immediately prior to the determination of the partnership.

Each partner shall execute all such deeds and documents and shall do all such acts as shall be necessary or convenient for the expeditious winding up of the partnership business and affairs and shall give such releases and indemnities to co-partners as shall agreed upon by the partners (or by majority of them).

Disposal of Goodwill on Winding up

20. Where the partnership is determined and wound up in accordance with the provisions of clause 19 hereof the business and goodwill thereof shall be sold as a going concern unless the partners (or a majority of them) shall otherwise decide and the partners, other than any partner who may be the purchaser of the business, shall enter into a joint and several covenant with the purchaser that they shall not for a period of years from the sale carry on or be employed either as a servant or as an agent in the business of within a radius of kilometres from any of the places where the business is then carried on. Where on such determination the business is not sold as a going concern each partner shall be entitled to carry on the business either on own account or in partnership with others, provided that it is not under a name or style identical with that of the partnership

hereby constituted (and shall be at liberty to circularise and solicit former customers and clients of the dissolved partnership provided that there is no holding out of carrying on business succession to the dissolved partnership).

Notice of Dissolution

21. Where the partnership is dissolved, either as regards all the partners or as regards some or one only of them a letter signed by all the partners and former partners shall be sent to all the persons with whom the partnership has had business dealings during the continuance of the partnership , and all the partners shall consent to the insertion of the advertisements in accordance with the provisions of section of the *Partnership Act* or of any legislation for the time being in force, and they shall concur in the filing of all documents and returns that may be required by any legislation relating to the registration of business or business names.

Effect of Death, Bankruptcy or Retirement

22. The death, bankruptcy or retirement of a partner shall not effect an automatic determination of the partnership but shall entitle the surviving, solvent or continuing partners (hereinafter called "the continuing partners") at their option (or at the option of any one of them) either to determine the partnership and have it wound up in accordance with clause 19 hereof or to purchase the share and interest of the deceased, bankruptcy or retired partner upon the following terms:

(a) Written notice, signed by the continuing partners, of their intention to purchase the said share and interest shall be given to the retiring partner before the expiration of his notice under clause 18 hereof, to the Official Receiver or Trustee in Bankruptcy of the bankrupt partners within weeks of the sequestration order and, in

the case of a deceased partner, to the Accountants for the time being within calendar months of his death.

(b) The continuing partners shall instruct the Accountant to make up the partnership accounts as at the accounts as at the date of the death, bankruptcy or retirement and within of the presentation of the said accounts to the continuing partners they shall pay to the retired partner, the Official Receiver or Trustee in Bankruptcy or bankrupt partner or the representatives of the deceased partner all sums shown therein to be due to the said partner, whether in respect of capital, goodwill, advances, profits, interest or otherwise, together with interest thereon at the rate of per cent per annum until the date of repayment.

(c) The payments made under paragraph (b) of this clause shall be in full and final statement of the deceased, bankrupt or retired partner's claims against and interest in the partnership business and after such payment the assets, including the goodwill, of the said business shall belong exclusively to the continuing partners.

(d) All necessary and convenient deeds, documents and acts shall be executed and done, at the expense of the continuing partners, for the effectual vesting in them of the share and interest of the retired, bankrupt or deceased partner and for effectually indemnifying the retired partner or the estate of the bankrupt or the deceased partner from the liabilities of the partnership, and all documents relating to the partnership property and business shall be delivered to the continuing

partners. The retired or the bankrupt partner shall be deemed to have given an undertaking to the continuing partners in the terms of the covenant set out in clause 20 hereof.

Expulsion 23. A partners may, subject to the provisions of clause 24 hereof, be **of a** expelled by the other partners (or by a majority of them,) in any of the **Partner** following circumstances:

(a) If the partner shall, in any way, otherwise than as is expressly authorised by this deed, assign, mortgage or charge a share or interest in the partnership or any part thereof;

(b) If a share of interest in the partnership becomes subject to a charge in respect of a separate judgement debt under the of the *Partnership Act* or of any enactment then in force;

(c) If the partner shall commit any breach of the provisions of this deed;

(d) If the opinion of the other partners (, or a majority of them,) one shall have been guilty of conduct calculated to prejudice the partnership business (whether or not such prejudice to the business was intended);

(e) If, by reason of unsoundness of mind or of any other ill health, a partner shall become incapable of attending to the partnership business during a continuous period in excess of calendar months.

Notice of Expulsion 24. Before any partner is expelled under the provisions of clause 23 hereof the partners requiring expulsion shall:

(a) Within of the ground, upon which they desire to expel the said partner, coming to their knowledge or to the

knowledge of any of them, give written notice to him setting out full particulars of the ground for the proposed expulsion and informing him that unless his conduct is explained to their satisfaction within of the date of the said notice he shall be expelled from the partnership forthwith.

(b) Where the ground for expulsion is that contained in paragraph (e) of clause 23 hereof, written notice, signed by the partners requiring the expulsion, shall be given to the incapacitated partner and a member of the household or to the medical attendant or other person having the care of the partner. The said notice shall require the incapacitated partner to submit to an examination by two medical practitioners nominated by the signatories and shall state that failure to submit examination or if the said medical practitioners are of opinion that the partner will be incapable of attending to the duties in the partnership business for a period of at least from the date of the said examination, the partner shall be expelled from the partnership forthwith.

Effects of Expulsion

25. Where any partner is expelled in accordance with the provisions of clauses 23 and 24 hereof it shall be deemed to be a retirement from the date of such expulsion and other partners shall be deemed to have elected and be bound to purchase the share and interest in the partnership business in accordance with the provisions of paragraph (b), (c) and (d) of clause 22 hereof but without prejudice to any claims, liquidated or unliquidated which they may have against the expellee.

Arbitration 26. All differences which shall arise between the partners or their representatives or any of them, either during the continuance of the partnership business or thereafter, with regard to the construction of this deed or with regards to the rights and obligations of the partners hereunder or with regard to any other matter relating to the partner or the partnership business shall be referred to a single arbitrator agreed upon by the parties and, in default of agreement, to two arbitrators, one to be appointed by each party to the difference in comparable legislation in force at the time of the reference. IN WITNESS, etc.

8.4.2 A DRAFT SAMPLE OF PARTNERSHIP AGREEMENT UNDER ISLAMIC LAW

As observed earlier, the law does not insist on any particular words or phrase for the written agreement, thus any words or phrases connoting the terms of agreement is acceptable e.g.[8]

This is a document to which the witnesses named hereunder testify. They all testify that the parties herein after named, whose identity they have ascertained and whom they know that:-

X handed over to Y .....Naira on the basis of a valid and sound partnership on the following conditions:-

(a) The agent may use it to buy any and all categories of trading goods as he sees fit, from whom he sees fit, any time he sees fit, in any and all places lie sees fit.

(b) He may pay the price of anything he buys in this regard from the money mentioned in this document.

(c) He may sell these goods or any part thereof that he sees fit, for whatever he sees fit, either for cash or credit in any and all place that he sees fit.

(d) He may take possession of the price of what he sells in this regard, and may deliver what he sells to the one to whom he sold it.

(e) He may hire in this regard whomsoever he sees fit, to go to wherever he sees fit on land and on sea, and he may pay, as he sees fit, the wages of whomsoever he hires in this regard from the money mentioned in this document and from that which he might profit by virtue of the commenda mentioned in this document.

(f) He may deliver, administer the capital in this fashion and dispose of the funds that may come into his possession and the funds accruing from that which he sells just as he could freely dispose of them previously (prior to the purchase and resale of the commenda goods) by virtue of the agent's activities with it within the commenda agreement mentioned in this document.

(g) From whatever profit God grants this money by virtue of the agent's activities with it within the commenda agreement mentioned in this document, the agent will hand over to the investor his invested capital after payment of any debt the agent might have incurred on account of the commenda agreements and whatever profit made is to be shared, the investor taking.....percent and the agent taking..... percent

WHEREAS the investor have handed over to the agent the entire sum of ..... Naira the receipt of which the agent hereby acknowledged.

(h) The agent hereby undertakes to conduct himself in a God-fearing and trustworthy manner.

IN WITNESS whereof, the parties hereto, have hereunto set their hands, and seal the day and year first above written.

Signed, sealed and delivered

By the within named Investor

Signature:.....

Names

In the presence of:

1. Name:.....

   Address:.....

   Description

2. Name:.....

   Address:.....

   Description

Signed, sealed and delivered

By the within named Agent

1. Name:.....

   Address:.....

   Description

2. Name:.....

   Address:.....

   Description

CHAPTER EIGHT NOTES AND REFERENCES

1. Partnership Act 1890 Section 1(2), Kaduna State Partnership Edict Cap 107 Laws of Kaduna State, 1991 Section 4(2).
2. Holy Quran 2:282, Ali A.Y. The Holy Quran, Text, Translation and Commentary Vol. I Dar Al-Arabia P.113 It Provides:- "O ye who believe when you deal with each other in transactions involving future obligations in a fixed period of time reduce them to writing. Let a scribe write down faithfully as between the parties; let not the scribe refused to write, as God has taught him, so let him who incurs the liability dictate, but let him fear his Lord God, and not diminish aught of what he owes, if the party liable is mentally deficient or weak, or unable himself to dictate, let his guardian dictate faithfully and get two witnesses out of your own men, and if there are not two men, then a man and two women such as ye choose for witnesses, so that if the one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period whether it be small or big; it is juster in the sight of God, more suitable as evidence and more convenient to prevent doubts among yourselves..."
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4. Partnership Act 1890, Sections 7 and 8, Kaduna State Partnership Edict, op cit. Sections 9 and 10.
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6. Partnership Act 1890, Section 40, Kaduna State Partnership Edict op cit., Section 42.
7. Fletcher K.L. (1991), The Law of Partnership in Australia and New Zealand, 6th Ed., The Law Book Company Ltd., Sydney, Australia Pp. 363 - 369.
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12. Sahnun, Mudawwanah Al-Kubra, Vol. 12, p: 70 as quoted by Udovitch, A.L. Ibid. at p: 51.
13. Al-Quduri A.M. (1910) Muktasar, Istanbul p. 53.
14. Al-Marginani – Al-Hedaya Vol. 2, pp. 297 – 298.
15. Sarakhsi, Mabsut 11: 152 as Quoted by Udovitch A.L. Ibid. at pp: 44.
16. Ruxton F.H. (1916) Maliki Law, London p. 195.

17. Sarakhsi, 1906/1912 Mabsut, 30 Vols., Cairo 22: 19 as quoted by Udovitch Ibid. p. 172.

18. Shaybani, Asl Mudaraba, Foll 42A and 426, Saraksi, Mabsut 22 : 18.

19. Schacht, Introduction to Islamic Law p: 144 – 147.

20. Al-Badai-Wal-Sanai Vol. 6, p. 177

21. Kitab Al-Kharaji p: 331 No. 386.

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6. Limited Partnership Act (1907).
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QUESTIONNAIRE

OPERATION OF PARTNERSHIP BUSINESS

1. What type of Partnership do you engage in: -

   (a) Mudarabah (Commenda)

   (b) Inan (restricted mandate)

   (c) Mufawada (general mandate)

   (d) General Partnership

   (e) Others (specify)

2. Volume of Partnership capital

   (a) Less than ₦20,000.00

   (b) ₦21,000.00 - ₦50,000.00

   (c) 51,000.00 - ₦100,000.00

   (d) ₦101,000.00 - ₦250,000.00

   (e) Others (specify)

3. Types of Business

   (a) Provisions store

   (b) Hardware shop

   (c) Transportation

   (d) Contractors

   (e) Others (specify)

4. How many partners are involved: -.....

5. What are the proportions of the partners' capital contribution:-.....

14. What are the problems (if any) facing your partnership business

    (a) Lack of enough capital

    (b) Lack of enough business

    (c) Poor location

    (d) Expensive rent, rates and taxes

    (e) Others (specify)

15. How many times have you concluded partnership agreement?.....

16. How many times have you made profit?.....

17. How many times have you suffered loss?.....