

# The Problem of the Jurisprudential Concept in Islamic Banking Products

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## Abstract

*This study delves into the intricacies of the concept and its multifaceted levels to examine the intermingling of certain financial transaction contracts, such as Al-wadi'ah (Deposit), Mudaraba (Speculation), and the concept of "Naqd" (Currency). The study analyzes the diverse ways in which these terms are employed, leading to a multiplicity of interpretations and, consequently, a divergence of legal rulings and a plurality of Islamic juristic opinions based on the understanding of these concepts and their applications.*

**Keywords:** Concept, Deposit, Bank Speculation, Currency, Islamic Jurisprudence

## INTRODUCTION

The relationship between the term and the concept is a clear interdependence, and the existence of one cannot be separated from the other. They may overlap in their application in a unified manner, and both are composed of parts of an abstract essence or meaning that is detached from the structure. If it is added to the level of terminology and contextualisation, the concept is exclusively determined, not shared with concepts in other fields of knowledge except if the user's utilize the first placement for which the meaning was intended.

Despite the agreement on the term sometimes, there is often a difference in the concept in terms of its nature in the field of knowledge and use. The concept of "Alwadi'ah" (Deposit) is not the same in contemporary banking use, and the same applies to Mudaraba (Speculation) and "Alnnuqūd" (Money) and other terms and concepts.

## Research Problem

Therefore, research into the content of this problem takes on cognitive dimensions and patterns that may complement or agree in the details of the study of Islamic jurisprudence, economics and law, and may differ. The mechanisms of this are not understood by abstract theory alone, but rather with experiences and practices that have dealt with banking systems and the realities of banking transactions and their applications in a manner that is consistent with Islamic law and the need to observe the evidence of legal rulings, the principles of sales, preserving the interests of funds, and caring for the interests and livelihoods of servants.

In this context, we will discuss the problem of the jurisprudential concept and its multiple levels to stand on the overlap of some financial transaction contracts such as the concept of "Alwadi'ah" (Deposit), Mudaraba (Speculation) and the concept of "Naqd" (Currency) (Cash) (Money), and the rotation of these words in use in several faces and meanings, leading to a multiplicity of interpretations and, consequently, a divergence of legal rulings and a plurality of Islamic juristic opinions based on the understanding of these concepts and their applications.

The research try to put a methodological approach to the aspects of the concept as a cognitive datum detached from use, and by virtue of its occurrence and use. Therefore, some issues in Islamic banking were selected, because they raise a lot of cognitive problems in terms of the relationship between the jurisprudential and banking concept such as "Alnnuqūd" (money) and "Alwadi'ah" (Deposit) in its various types, and "Almuḍārabah Almaṣrifīyah" (Banking Speculation), and the effect of that in the Islamic jurisprudential

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view using some of the previous research in epistemology and concept building, and the efforts of jurists in the jurisprudential and economic fields alike.

### **Previous Studies on Conceptual Theory**

The researcher acknowledges the existence of previous studies that have addressed conceptual theory and its contexts. Among the most notable works on the subject is "Building Concepts: A Cognitive Study and Application Models" by a group of researchers supervised by Dr. Ali Jumaa and published by the Higher Institute for Islamic Thought. This study includes an in-depth analysis of Islamic banking products as a concept, particularly the concept of "money." Another significant contemporary study is Dr. Maher Al-Kababji's book "Al-iqtisād Al-ṭabī'ī Badīlan 'ni Al-anẓimah Al-iqtisādiyyah Al-qā'imah" which was used to analyze the theory of "Alnnuqūd" and "Almuḍārabah Almaṣrifīyah".

The researcher also mentions other studies and researches that will be detailed in the study.

### **Research Plan**

This study is meticulously organized into an introduction followed by four chapters, embarking into the Essence of "Concept" and Its Levels, the Concept of "Alnnuqūd" (Money) and "Alwadī'ah" (Deposit) in Islamic Jurisprudence and Banking, unraveling the enigma of "Almuḍārabah Almaṣrifīyah" (Banking Speculation) and Its Levels.

The research culminates in a comprehensive conclusion that highlights the significant contributions of the research.

### **Chapter 1: The Essence of "Concept" (Almafḥūm) and Its Levels**

The term "concept" (Almafḥūm) is a multifaceted and interwoven in many fields of knowledge, based on usage patterns. In linguistics, it stems from the trilateral verb "Fahima" (to understand), and "Alfahm" (understanding) refers to the perception and comprehension of meaning. It is said, "Fahimtu 'an fulān wa fahimtu minhu fahman idhā taṣawawtu ma' nā kalāmih" (I understood from so-and-so and understood his meaning when I perceived the meaning of his words), so I am understanding and wise. "Al'istifhām" (inquiring) refers to seeking understanding and uncovering meaning. "Almafḥūm" (concept) is applied to everything that is understood and derived from the word. The root of "Alfahm" (understanding) is "Al'ilmu bishay'i wa ma' rifatuhu bilqalb" (knowledge and cognition of something with the heart). It is said, "Fahimtu ashay'a afhamuhu fahman ay 'alimtu wa 'aqaltu biqalbi" (I understood some thing, I understand it thoroughly, meaning I knew it and reasoned it with my heart). "Altafahum" (comprehension) refers to understanding speech piece by piece. "Almafḥūm" (concept) also refers to the image of something in the mind, whether with a word or not. (Ibn Fāris, 1979, p. 457). (Al-Farahidi, n.d, p. 61). (Al-Zabidi, n.d, p. 224)

The term "Almafḥūm" (concept) refers to that which has been acquired by the mind, whether potentially or actually. "Almafḥūm" (concept) and "Alma'nā" (meaning) are fundamentally intertwined, as both represent the image formed in or by the mind. However, they differ in terms of their intended purpose and acquisition. When the image is intended to be conveyed by a word, it is termed "Alma'nā" (meaning). Conversely, when the image is acquired by the mind, it is termed "Almafḥūm" (concept). (Al-Tahanawi, 1996, vol 2, p. 1617)

"Alma'ānī" (meanings) are the mental images for which words are established. If these images are expressed using singular words, they are referred to as "Alma'ānī almufradah" (singular meanings). Otherwise, they are termed "Almurakkabah" (composite meanings), as stated in (Alshamsīyah) text: "In the context of singular meanings, every concept is considered "particular" if its inherent nature precludes the possibility of sharing it. Conversely, it is considered "general" if no such restriction exists. The word denoting these concepts is termed "comprehensive" or "specific" incidentally". (Al-Katibi, 2013, p. 88)

And as for the "Contextualisation", which is the act of placing the word according to its meaning, it must have a maker, which is either the law, the language, the custom, or the usage, whether it is general or specific.

The indication of a word to a designated thing without another while their relationship to it is equal is impossible. Therefore, it is necessary to attribute it to one of them, and attribution requires an effective factor for its realization. This factor is contextualisation, which is the designation of a word in relation to a meaning by itself, as a precaution against metaphor when you designate it in relation to what you intended with an indication. For that designation is not called contextualisation, just as the indication of a meaning to another one is not impossible. So either the word is used to mean what it is placed for or to mean the meaning of its meaning with the help of an indicationn.(Sakkaki, n.d, pp. 466,467)

In this context, we do not need to explain the divisions of contextualisation because that would be too long to mention. We refer the reader to the book “Alwad‘” (contextualisation) by the scholar ‘Aḍḍ al-Dīn al-Ījī in his epistle on “‘Ilmu alwad‘” (The Science of contextualisation), due to the importance of this branch of science, since the theory of knowledge in the construction of concepts is built upon it.

The scholars have summarized the conditions for placing a term in relation to a meaning so that concepts do not become confused, truths are not lost, and judgments do not change.

Therefore, they considered these conditions as an art in science and a gate of philosophy. Among the most important of these conditions are:

a. The presence of a relationship between the linguistic and technical meaning, otherwise we would arrive at the issue of “The Symbol”, and the technical term by the symbol is something other. There is a relationship between the analogy (Al-qiyās) in its linguistic meaning and its concept relating to Islamic sharia, and the “loan” (Al-qarḍ) in its meaning relating to linguistics and sharia.

b. To be approved by a group of scholars to become acceptable. For example, the term "General Acceptance" before its approval, it was only a suggestion. This is what linguists call “The Prevalence of Use”.

c. Its new meaning should be related to the subject of science in which it is placed, otherwise it is borrowed from another science, and then it is one of the "Traveling Concepts".(Juma'ah, 1998, vol 1, p. 20)

The attention to the concept and placing each term against its meaning, and what the Sharia intended in its explanation in order to bring it in the prescribed manner is of paramount importance, although minds and perceptions may differ in its interpretation, with the fear of placing it in other meaning which the speech and the Sharia ruling were intended for, and caution in reversing or changing Sharia words. Al-Mazari pointed to a glimpse of this understanding in explaining the proof of Imam Al-Haramayn by saying: "Since Sharia rulings are based on words, then when they are changed and reversed, the rulings are mixed, the system is spoiled, and the landmarks of Sharia disappear. This is not disputed in the prohibition of reversing and corrupting it, not for its own sake, but for its leading to spoiling of Sharia".(Almāzārī, 2001, p. 147)

After we have understood the essence of “Concept” and “Contextualization” in Islamic knowledge, and the “Levels of Concept” became clear, we must stand at some financial concepts of “Alnnuqūd“ (Money), “Al-wadaī‘ Al-maṣrifīyah” (Bank Deposits) and Mudaraba (Speculation), based on what their terms and contents carry in jurisprudential and banking use, in order to get acquainted with their cognitive problems in practice and implementation.

## **Chapter Two: The Concept of “Alnnuqūd“ (Money)**

“Alnnuqūd“is the plural of “Naqd”: It is as in Lisan al-Arab: "Al-Naqd in sale is the opposite of credit. It is said: A Cash Dirham: good, no counterfeit in it. “Alnnuqūd“is: the currency of gold or silver or others dealt with, and the art of distinguishing good speaking from bad”.(Ibn Manẓūr, 1414, vol 3, p. 425)

As stated in “Mu‘jam Lughat Alfuqahā’”: “Naqd (Cash) With a fatha followed by a sukūn, it is the source of the verb“naqada ad-darāhima” (cashing Dirhams): if the counterfeit is extracted from them.. and “naqada al-kitāba” (the book is cashed): means his mistake is extracted From it. And from it comes “naqada ath-thamana” (he cashed the price), if he delivered It".(Qal‘ajī, 1988, p. 486)

The (Naqd) according to Islamic sharia concept has functional tools, including: everything that is a mean of exchange is considered, to the extent that Ibn Arabi gave the example of bread in Baghdad, and he witnessed it as a mean of exchange that he enters the bath with.

(Alnnuqūd) is a tool for saving, as Ibn Khaldun described it in his saying: "Gold and silver are the origin of gains, acquisition and stockpiling for the people of the world in general".(Ibn Khaldun, 2006, p. 833)

Islamic jurists have stated in their writings that it is a name for a specifically struck coin of gold or silver. It was dedicated by "The Name" because it was usually cashed in prices, whether it was good or not, paid immediately or after a period of time.

And among their expressions indicating this is the saying of Al-Sarakhsi in "Al-Mabsoot": "Alfulūs is promoted in the price of low-value things, not high-value ones, unlike Alnnuqūd".(Al-Sarakhsi, 1993, vol 11, p. 137) So he clarified the difference between "Alfulūs" and "Alnnuqūd".

Another definition of (Naqd) is that it is a name for everything that is used as a mean of exchange, whether it is gold, silver, copper, leather, paper, or something else, if it is widely accepted. Al-Rafi'i and Al-Nawawi said: "If there is one currency or currencies in the country that are predominantly used, the contract is directed to the known one, even if they are coins".(Al-Rāfi'ī, n.d, vol 8, p. 140). (Al-Nawawī, 1991, vol 5, p. 363)

Article 130 of the Majallat Al'ḥkām Al'adliyah states: "Alnnuqūd" is the plural of "Naqd" and it refers to gold and silver, whether they are minted or not. Gold and silver are also called "Alnaqdane".

However, (Naqd) in the financial and economic perspective has taken on forms in its development until it has become broad in concept. "Paper Money", which is the term used today, has changed its concept greatly. Although it is a mean of exchange, it is no longer a store of value after its separation from the gold cover for about fifty years or more. Therefore, we will try to identify its meaning among economists in a brief manner that the scope of this research allows.

Economists have different views on establishing a precise concept of "Alnnuqūd" based on external descriptions of the term (Naqd) and its components. Some of them consider "Alnnuqūd" as a mere mean of exchange, while others consider it a commodity. There are also those who believe that it has no intrinsic value in itself and must be linked to a fixed standard for measurement and evaluation.

"Alnnuqūd" was a commodity when it was minted or covered by keeping a certain amount of a specific commodity in exchange for the currency unit. "Alnnuqūd" was not units of measurement, but rather played an organized role in the processes of exchanging a specific product for a commodity with an intrinsic value, which is "Alnnuqūd".

However, current "Nuqūd" (Money) includes any acceptable mean of exchange, regardless of the material it is made of or held as cover for its issuance. Current "Nuqūd" are not inherently important, however the currency unit must express a specific and fixed value which is taken as a measure. The absence of a unit of measurement for money destroys the foundations of the evaluation process. (Alkababjī, 2010, p. 14)

Those who have written on "The Theory of Money" and have deconstructed its contents have gone so far to say that money is used as a mean of exchange for any product, in view of the diversity of products and units of measurement of their quantities. Economists have introduced what is known as the general price level as an economic indicator based on the prices of different groups of products.

The general price level expresses the current price level compared to a specific reference price level, usually taken as 100 or 1. Accordingly, the general price level is an indicator of changes in the value of the currency. If the general price level rises from 1 to 1.25, it can be said that the value of the currency has decreased from 1 ( $1 \div 1$ ) to become 0.8 ( $1 \div 1.25$ ). Based on this, we can say that the currency value index expresses the general quantity of national output that can be exchanged for a unit of currency, where the currency value index =  $1 \div$  the general price level.(Alkababjī, 2010, pp. 14-15)

This concept of the nature of “Naqd” raises jurisprudential problems for many transactional contracts based on the nature of “Nuqūd” and their economic purposes.

### **Chapter Three: The Concept of ”Alwadi‘ah” (Deposit) Among Islamic Jurists and Economists**

There are different understandings in determining the meaning of ”Alwadi‘ah” (Deposit) according to the following opinions:

In our Maliki school: It is an agency to keep money; Khalil said: “Deposit is an agency to keep money, meaning simply to keep it. This excludes "Muwada'ah", because its purpose is to inform the trustee of her menstruation, not preservation, as well as bequest and agency, because they are both for preservation and disposal, and the deposit of a father by his son, because it is not money. And if it is known that the “Al-wadi‘ah” is what has been mentioned, it is known that the (Deposit) is money that is entrusted to be kept only, and it appears that it does not require an offer and acceptance, and it is so, whoever places money with a person and does not say to him "Keep it" or something like that, and he neglects it - such as leaving it and going away, and the money is lost - he is liable, because his silence when he places it indicates his acceptance to keep it”. (Al-Dusūqī, n.d, vol 3, p. 419)

As for (Cash Deposit), it is the money that individuals or organizations entrust to the bank on the condition that it undertakes to return an equivalent amount to them or itself upon request, or under the agreed-upon conditions. (‘Awad, 2000, p. 17)

"Bank Cash Deposit" means: "A contract by virtue of which a person delivers an amount of money to the bank, which undertakes to return it upon request or according to the agreed-upon conditions".( Ṭāhā, 2001, p. 500)

The concept of (Cash Deposit) shows that it is deposited with banks, which undertake to return an equivalent amount upon request or under certain conditions. This deposit, as Imam Al-Sadr says: "Expresses in its various forms in the concept of usury banks an amount of money - deposited with banks, creating a deposit on demand or for a fixed period by agreement, and it entails on the part of the bank the obligation to pay a certain amount of units of legal “Naqd” (Currency) to the depositor or his order on demand or after a term, depending on the form of the deposit agreed upon between the bank and the customer.

These “Bank Deposits” are usually called “Incomplete Deposits” because the bank is not obliged to pay them on demand in the same physical form in which they were deposited, and customers cannot refuse money offered to them as it is legal.(Al-Taskhīrī, 1996, vol 1, p. 572)

The term “Bank Deposit” is derived from the English word “Deposit”, and it refers to money that a depositor places in a bank, either for a fixed period or with an agreement between the two partners that the owner may withdraw all or part of it whenever he or she wishes. Thus, it is clear that the word "Deposit" used for this type of money is not in its technical Islamic jurisprudential sense, since it remains with the depositor as it is and is not guaranteed to him except in case of aggression. However, this word is used in its linguistic sense, as it is a verbal derivative of "wad'a yad'a" meaning that it is left with the depositor - the bank here - regardless of whether it is a trust or guaranteed.(Al-‘uthmānī, nd, vol 1, p. 587)

As for the “Deposit” (Al-wadi‘ah) in the banking terminology, the Algerian legislator has stipulated in Ordinance No. 2020-02 of 20 Rajab 1441 corresponding to 15 March 2020, which defines banking operations related to Islamic banking and the rules for its practice by banks and financial institutions, in its Articles 11 and 12 that: Deposit accounts are: accounts that contain funds that are deposited in a bank by individuals or entities, with the obligation to return these funds or their equivalent to the depositor or to another specified person, upon request or according to conditions agreed upon in advance. And that deposits are investments for a term, which are left at the disposal of the bank for the purpose of investing them in Islamic financing and making profits.(<https://www.bank-of-algeria.dz>, 2023)

In our opinion, the difference is apparent in determining “Bank Deposits” based on the use to which they have been put, and hence the different views of Islamic jurists and scholars on the true nature of bank deposits and

their legal interpretations based on several understandings based on the type and nature of this contract. Some scholars have derived it from forms of contracts named in Islamic jurisprudence, including: loan (Al-qard), agency (Alwakālah), Speculation (Mudaraba), and there are those who derived it in the meaning of a loan in the general sense of debt.

The majority of contemporary Islamic jurists are of the opinion that "Cash Deposit" has the meaning of a loan, and its rulings are taken in the transaction. "Bank Deposits" in the form of demand current accounts, if they become the property of the bank, turn into a loan and the bank has the right to dispose of the deposit, whether by increasing or lending it, or in the form of (partnership), and it goes out of the depositor's hands into the depository (Bank), which it is a hand of guarantee. And it does not matter to call it a "Deposit", because the emphasis is on contracts for purposes and meanings, not words and structures.

However, the legal ruling on this issue is derived from the details of Islamic jurisprudence and the sayings of the jurists, the Hanafis make the deposit, if the depositor has disposed of it for use, it becomes a guaranteed loan. Al-Sarakhsi said in Al-Mabsool: "And the loan of Dirhams, Dinars, and Fulus is a credit because the loan is permission to use, and it is not possible to benefit from money except by consuming its essence, so it becomes authorized in that. (Al-Sarakhsi, 1993, vol 11, p. 147)

And what is on the doctrine in "The Deposit" as in Khalil: "The valued and non-valued loan is forbidden, and the fungible "Naqd" is disliked" like trade, Al-Kharashi said: "A metaphor in dislike, meaning that the depository is disliked to trade in the deposit. The difference between a loan and trade is that the borrower intended to own it, but the trader only intended to move it to take what profit he got from it", and he said: "It means that if the deposit is valued, it is forbidden for the depository to borrow it without the permission of its owner due to the difference purposes in valued ones, whether the depositor is rich or poor. It is also forbidden for the depository to borrow the deposit when he is poor, whether it is valued or like-for-like, because its owner is harmed by the non-fulfillment of the obligation at that time, and same rule include the poor who owns like the deposit or a little more. And it should be like him every one has bad judgment and the oppressor and whoever has forbidden money. And it is disliked for the rich depository to borrow the deposit if it is from money or like-for-like. As for if he is not rich, it has passed that it is forbidden for him to borrow from it at all, that is, whether it is from like-for-like or from valued things. And the attachment of the like-for-like to the money is from the attachment of the general to the specific". (alkharshy, n.d, vol 6, pp. 110, 147)

The Shafi'i school of Islamic law holds that if the owner of a deposit allows the depositor to use it, the deposit contract is invalidated, and The deposit becomes a defective loan. (Alsharwāny, 1983, vol 7, p. 105)

The Hanbali school of Islamic law holds that if the owner of a deposit allows the depository and it uses it in accordance with the permission, then the deposit becomes a guaranteed loan. (Al-Buhūtī, n.d, vol 4, p. 167)

This legal interpretation is consistent with the legal definition of "Bank Deposits" as stipulated in Article 1/35 of Law No. 12/86 of 1986 on the Banking and Credit System states: "any amount deposited with a lending institution constitutes a debt on it, whether it be the principal of that amount or its potential interest".

This distinguishes "Bank Deposits" from "Ordinary Deposits," which is defined in Article 590 of the Algerian Civil Code as "a contract by which the depositor delivers a movable thing to the depository to keep it for a period of time and to return it in kind". (<https://droit.mjustice.dz/sites/default/files/ACivil>, <https://www.tribunaldz.com/forum/t4409>, 2023)

This phrase introduces the decision made by the Islamic Fiqh Council during its ninth conference held in Abu Dhabi, United Arab Emirates, from 1-6 Dhul-Qidah 1415H (corresponding to April 1-6, 1995). The decision, numbered 86 (3/9) and published in the ninth issue of the Council's magazine (volume 65/667) (<https://iifa-aifi.org/ar/1992>, 2023), is referenced as the basis for the following statement:

**1-**Deposits on demand, whether with Islamic or usurious banks, are loans from a legal perspective. The bank that receives these deposits has a hand in them, and is legally obliged to return them on demand. The fact that the bank (Borrower) is wealthy does not affect the ruling of the loan.

**2-**Bank deposits are divided into two types according to the reality of banking transactions:

**a -** Deposits that are paid interest, are usurious loans and are prohibited, whether they are demand deposits, time deposits, notice deposits, or savings accounts.

**b-** Deposits delivered to banks that are committed to the provisions of Islamic law under an investment contract for a share of the profit are investment capital, and the provisions of Mudaraba (Qirad) in Islamic law apply to them, including the prohibition of the bank guaranteeing the investment capital.

**3-** The guarantee in demand deposits is on the borrowers (Bank Shareholders) as long as they enjoy the profits generated from their investment, and depositors do not participate in the guarantee of those current accounts, because they did not participate in borrowing them or in the accrual of their profits.([https://iifa-aifi.org/ar/1992, 2023](https://iifa-aifi.org/ar/1992,2023))

Hassan Abdullah Amin argues in his insightful study that Al-wadī'ah is a contract of trust (Amanat), which is the most accurate opinion, because it is the placing of an amanat for the purpose of safe keeping with offer (Ijab) and acceptance (Qabul). Therefore, an "On-Demand Cash Deposit" is an amount of money that is placed with a bank and can be withdrawn at the depositor's discretion. This is all that is required in a real deposit, and there is no defect in it. Even though the bank is accustomed to dealing with it according to custom, this unilateral action cannot be extended to the depositor and his will, forcing him to change from depositing to lending. The depositor's will did not tend towards lending in this type of deposit, nor did the bank receive this deposit as a loan, as evidenced by the fact that it charges a fee (commission) for keeping the on-demand deposit, unlike a fixed-term deposit on which it pays interest. This is also evidenced by the bank's extreme caution in using and disposing of it, and its immediate readiness to return it upon request. This indicates that the bank, when it disposes of it, does so from an opportunistic position that is not based on a legal position such as that of the borrower.

Assuming that the bank disposes of it with the depositor's implied consent based on custom, such consent does not divert the depositor's will from the primary purpose of the deposit - which is to request its safekeeping - to another purpose ancillary to the first purpose that was created by banking custom for the benefit of the banks themselves.(‘Abd Allāh Amīn, 1983, pp. 233-234)

There is no doubt about the validity of this argument in terms of the role of banking custom. The bank manages the deposit and mixes it with other funds, and it is only liable for its equivalent, not for its specific items and entities. This is one of the most important functions of the bank, as it does not receive deposits in the form of loans.

This restriction is in line with what the legislator considered in the Islamic banking system (The Currency and Credit Law expressed the legislation of Islamic banking by the system and not by the law. It is known that the law is the highest level of the system in terms of obligation). Article 20 states: "With the exception of deposits in investment accounts, which are subject to written consent from the customer, who authorizes his bank to invest his deposits in a project portfolio and in Islamic banking operations, deposits of funds received from the "Islamic Banking Window" are subject to the provisions of the aforementioned articles of Order No. 03-11 dated 27 Jumada II 1424 corresponding to 26 August 2003, relating to Currency and Credit (Naqd and Qard), as amended and supplemented".

The owner of an investment deposit account has the right to receive a share of the profits generated from the "Islamic Banking Window" and bears a share of the potential losses recorded in the financing it carries out (Regulation No. 2020-02 of 20 Rajab 1441 corresponding to March 15, 2020, determining the banking operations related to Islamic banking and the rules for its practice by banks and financial institutions).(https://www.bank-of-algeria.dz, 2023)

We can explain what is stated in Articles 20 and 21 of the Currency and Credit Law in the following articles (Law No. 23-09 of 3 Dhoul-Hijjah 1444 corresponding to June 21, 2023, includes the monetary and banking law):(https://www.bank-of-algeria.dz, 2023)

**Article 69:** Funds received from the public, especially in the form of deposits, with the right to use them on behalf of the recipient, on condition that they are returned.

**Article 70:** According to this law, a loan operation is defined as: Any act for consideration whereby one person places funds at the disposal of another person, or whereby one person undertakes on behalf of the other person to sign, such as a standby guarantee, personal guarantee, or security

**Article 71:** According to this law, an Islamic Banking Transaction is defined as: Any transaction carried out by banks or Islamic windows that complies with the provisions of Islamic law.

Based on this conceptual problem, Dr. Hussein Kamil Fahmi has proposed the need to reconsider the current legal classification of current accounts in Islamic banks, so that they become deposits (in their legal Islamic sense) with both the Islamic bank and the central bank at the same time, with the central bank only being authorized to use them. This proposal may be in line with the ruling on the permissibility of multiple depositors, since the balances of current accounts are divisible, and there is a possibility that the funds will remain in the hands of the first depositor (The Islamic Bank) for short periods during their transfer from and to the second depositor (The Central Bank).

This proposal, which is known as the banking concept: maintaining a 100% reserve of current account balances with the central bank, performs the same functions related to customer service in terms of receiving their deposits, and responding to their periodic withdrawals. However, in addition to that, it takes us out of the controversy raised by some about leaving part of the money supply unused in the banks.

This proposal guarantees the prevention of the potential harm resulting from the misuse of current deposits by commercial banks by preventing them from using these deposits for their own account. In addition, it also ensures that funds are not immobilized during the deposit period with the banking system as a whole, by allowing the central bank to use them in public spending while guaranteeing to return them to the depositing customers upon request. This proposal is also distinguished by the fact that the central bank's uses are not aimed at making a profit, and that it is in itself the monetary authority in the state, which allows for direct control over these balances if they are used. (Fahmī, n.d, vol 1, p. 616)

### **“Al-wadī‘ah Al-maṣrifīyah” (The Bank Deposit): A Special Investment Contract**

“The Current Account” (Al-Ḥissāb Al-jārī) (Al-wadī‘ah Al-bankīyah) (is a contract of a special nature: it is a new contract that does not exist in the named contracts of Islamic jurisprudence or in the contracts derived from them. Rather, it has its own special name, and its own financial and banking reality that makes it independent of other contracts. Among those who have adopted this view are Muhammad Al-Shahat Al-Jundi and Hamza Al-Salem.

It is a modern contract dictated by contemporary banking developments. Although it has some similarity to these contracts, it has aspects that make it distinct from them.

“The Current Account” is similar to a “Al-wadī‘ah” (Deposit) in that the depositor's purpose is to preserve and protect his money, which the owner of “The Current Account” intends when he deposits his money with the bank. However, “The Current Account” differs from the “Al-wadī‘ah” which is a contract of trust (Amana), and “The Current Account” is not, because the money deposited in it is guaranteed by the bank. The deposit also remains the property of the depositor, and the depository may not dispose of it, which is contrary to the nature of “The Current Account”, as the ownership of the money is transferred to the bank which has the right to develop and invest it.

“The Current Account” is similar to a “loan” (Al-qard) in that the ownership of the money in each of them is transferred to the borrower, and he has the right to dispose of it. It is also guaranteed by the borrower. However, “The Current Account” differs from the “loan” in that interest and even the benefit “in it with a condition” are prohibited in the “loan”, however interest and the benefit are a reality in “The Current Account” and intended in it, since its effect is aimed as a result follows from.



“The Current Account” is similar to “Agency” (Alwakālah) in that the bank is bound by the customer's instructions at his request to open the current account. The bank also receives a commission and fee for opening the account for the customer. However, “The Current Account” differs from “Agency” in that the bank invests the money deposited in the current account without the customer's permission, which is contrary to agency.

Therefore, we find that each of these contracts individually is not suitable for the classification of “The Current Account” according to it, Also, and its derivation according to these contracts combined is not correct either; because of the differences between them. This necessitates considering the current account as an independent contract of a special nature. (Al-Jundī, 2008, p. 144)

Many jurists cite the classification of the “Bank Deposit” as a loan based on what is narrated in Al-Bukhari in his Sahih (Book of Farḍ Alkhums, Chapter of Barakat Al-Ghāzī Fīmālihi Hayyan Wa-Mayyitan, n° 3129): Ishaq bin Ibrahim narrated to me, he said: I said to Abu Osama, Hisham bin Urwa narrated to me from his father from Abdullah bin Al-Zubair, who said: "His only debt was that the man would come to him with the money and deposit it with him, and Al-Zubair would say, 'No, but it is a loan, for I fear for it to be lost'". (Al-‘Asqalānī, 1979, vol 6, p. 229)

Al-Hafiz Ibn Hajar said: His saying: (No, but it is a loan); meaning that he did not accept a deposit from anyone except if its owner agreed to put it in his care, and his purpose in doing so was that he feared for the money to be lost and he would be suspected of negligence in preserving it. So he saw that he should make it guaranteed so that it would be more secure for the owner of the money and more in keeping with his honor. Ibn Battal added: And so that the profit of that money would be good for him. (Al-‘Asqalānī, 1979, vol 6, p. 229)

The concept of the “Bank Deposit” as a loan is applicable, meaning that the debt comes in the sense of investment and sale debt, so it is a participatory contract under the guarantee. The deposit is a trust (Amana), and is not guaranteed except in case of transgression and negligence. So it is guaranteed money, but it came out in the form of a loan like (Assalam) in its aspects.

Hamza al-Salem, in his explanation of the hadith of Al-Zubair, argues that the text of the hadith, both in word and meaning, indicates that the transaction between Al-Zubair and the depositors was a participatory contract, not a loan contract. Al-Zubair preserved their money and guaranteed it in return for the benefits of using it. The guarantee was in exchange for the profit, as the Prophet, peace be upon him, said, "The tax is in exchange for the guarantee".

Al-Salem points out that the wording of Al-Zubair's son Abdullah, as reported in Al-Bukhari, is: "His only debt was that the man would come to him with the money and deposit it with him, and Al-Zubair would say, 'No, but it is a loan, for I fear for it to be lost. “The word “loan” (salaf) falls under the general meaning of "Debt" (Dayn), but it comes in the sense of investment and sale debt, not loan debt, as the Prophet, peace be upon him, said in the context of “Salam” (forward contracts), "Whoever gives a loan in anything". The deposit is not disposed of by the trustee and exposed to risk. Al-Zubair therefore resorted to a guaranteed partnership for the owner of the capital. He -may ALLAH be pleased with him- traded in people's deposits. And before he died, he instructed his son Abdullah to sell the forest “The forest is a place in Madina, a great and famous land from the highlands of Madina (Al-‘Asqalānī, 1979, vol 6, p. 229)” and pay the people from it. So Al-Zubair cannot be said to be a borrower or a trustee, but rather an investor and a partner.

Al-Zubair's work was in fact an investment in his name and the people's trust to finance his trade. The reality of the exchange transaction that took place between Al-Zubair and the depositors was clear and explicit. Al-Zubair took people's money, invested it for himself and used it to meet his needs in exchange for his guarantee of it and the tax in exchange for the guarantee. The guarantee has its value, and is today called insurance, and it is practiced by banks and has many contemporary cases. (Al-Sālim, 2024)

After detailing the concept of the (Deposit), we come to the concept of “Almuḍārabah Almaṣrifiyah” (Banking Speculation) and the mechanisms of its employment in the fiqh lesson as a product of Islamic banking, which has its determinants and controls that govern it.

## **Chapter Four: The Concept of “Almuḍārabah Almaṣrifīyah” (Banking Speculation) and Its Levels**

The term "Mudarabah" comes from the Arabic word "Dharb", which means "To Travel Extensively". It is derived from the verse in the Qur'an: "And others travel throughout the land seeking bounty of Allah" [al-Muzammil/20].

The concept of Mudarabah (Speculation) has been defined in similar terms by the different schools of Islamic jurisprudence. For example, the Hanafis define it as "a partnership contract in which one partner contributes capital and the other contributes labor". (Ibn ‘Ābidīn, 1966, vol 4, p. 483)

Al-Qadi Abd Al-Wahhab Al-Maliki defines it in his book Al-Mumahhad as: "the act of a person giving money to another one to trade with it, buying and selling by the grace of Allah Almighty, and the profit being shared between them according to a proportion that they agree upon, whether small or large". (Al-Qāḍī, 2019, vol 1, p. 259)

In Mukhtasar Khalil, it is defined as "A delegation to trade in minted currency for a portion of his profit if their amounts are known". (alkharshy, n.d, vol 6, p. 203)

The Shafi'is and Hanbalis defined Mudarabah (Qirad) as "A loan contract in which one partner gives money to another person to trade with it, and the profit is shared between them". (Al-Nawawī, 1991, vol 5, p. 118) (Ibn Qudāmah Al-Maqdisī, 1997, vol 5, p. 19)

In economic usage, "Mudarabah" is a translation of the foreign word "Speculation" which means: "to think or contemplate,". It also means "to guess or estimate". The Arabic Language Academy (Majma‘ al-lughah al-‘Arabīyah) in Cairo defines Mudarabah in economics as "A buying and selling operation carried out by experts in the market to benefit from price differences". (Muṣṭafá, n.d, vol 1, p. 537)

In the financial markets, the concept of "Mudarabah" refers to the buying and selling of securities to profit from rapid changes in their prices. (Al-Suḥaybānī, p. 2)

Some have defined it as "Buying and selling operations carried out by persons, not for the purpose of receiving dividends on shares or interest on bonds, but to earn a profit from the natural differences in prices that occur between one time and another, and are called capital gains". (Āl Fawwāz, 2010, p. 44)

The concept of Mudarabah (Speculation) according to Algerian law, as defined in Decree No. 2020-02 of 20 Rajab 1441 corresponding to 15 March 2020, which specifies banking operations related to Islamic banking and the rules for their practice by banks and financial institutions, in its Article 7 states that: "Mudarabah is a contract under which a bank or financial institution, called the lender of funds, provides the capital necessary for the contractor, who provides his work in a project in order to achieve profits". (<https://www.bank-of-algeria.dz>, 2023)

This definition is criticized for its use of the word "Loan" to refer to the Mudarib (The Person Who Manages The Money), but he is in fact a financier, and the definition is further criticized for what is stated in Article 22 of this decree: In addition to the provisions of this decree, and unless otherwise provided, Islamic banking products are subject to all the legal and regulatory provisions governing banks and financial institutions. (<https://www.bank-of-algeria.dz>, 2023)

Another problem arises here; Mudarabah in the Islamic jurisprudential concept relates to trade, not to industries, agriculture, or mugharassah (partnership in the cultivation of land), and here the Algerian banking system links it to contracting, manufacturing, which is contrary to the meaning of Speculation in Islamic law.

The bank may be the person who manages the money (Mudarib), by attracting investment deposits from depositors in their capacity as "owners of the money" with the bank in its capacity as Mudarib. The bank then

provides work and effort or an investment project. This is a partnership contract in which the profits and losses are shared among all the partners.

The concept of Mudarabah in traditional banking is based on data and mechanisms on which speculation activities are based, by buying assets, goods and services, and other products in return for profits that are targeted by major speculators until their prices rise. In this way, this behavior interferes with the natural course of the market and its system.

The prices of Mudarabah are determined by the interaction of supply and demand for contracts, not the real supply and demand for the assets or goods that are the subject of the contracts. For example, in the commodity markets, the rise in the price of a barrel of oil from 40\$ to 130\$ was not an indication of an increase in demand for it by the same amount, just as the fall in its price to 70\$ was not a result of a decrease in demand for it by the same amount.

Mudarabah in the currency markets also affects exchange rates. In the stock markets, speculation in these markets represents a transfer of money between the buyer and the seller without any real addition to the national output. In general, Mudarabah in the financial markets in all its forms results in profit and loss for speculators, which is counterbalanced by the instability of the economy of societies. (Alkababji, 2010, p. 12)

In contrast, the distribution of profit in the subject of Mudarabah in Islamic Sharia is based on information to avoid ignorance, by specifying everything that removes the dispute. The Sharia standards state: "Profit must be based on a shared percentage of profit, not on a fixed amount or a percentage of capital".

The Mudarib, with the permission or authorization of the owner of the money, may add a company at the beginning or during the Mudarabah, whether the company is from the money of the mudarib or from a third party. Mixing absolute investment deposits with the funds of institutions is of this type. (<https://iefpedia.com>, p. 375)

The original discussion of this issue can be found in the Mudawwana regarding the mixing of Mudarabah funds. Ibn Al-Qasim narrated that he asked Malik: "What about a man who receives money as a Qirad (Mudarabah) from another man, and he purchases goods with it. Then, the owner of the money gives him another amount of money, and he purchases another good with it. Then, he sells both goods and makes a profit on one but loses on the other? Malik replied: "Each amount of money is treated as a separate Qirad, and it is not permissible to deduct the loss from the profit". (Ibn al-Qasim, 1994, vol 3, p. 650)

However, another issue arises in that the profit in Mudarabah does not represent the outcome of investment operations. Instead, the Mudarib bank determines its amount. However, this is not from the net profits of the partnership activities that fall under the scope of Mudarabah, but rather from the total investments and investment deposits.

Dr. Maher Al-Kababji says that the Mudarabah contract between the bank and the depositors stipulates a percentage of participation in the profit of investments, but it is the bank's board of directors that determines the amount of profit that can be distributed. If the profit on investments is 100 million dinars, the bank's board of directors may decide to distribute only 80 million, and consider the difference as reserves that revert to the bank and its shareholders.

From a practical point of view, the bank determines the amount of distributable profit to the investment depositors. It excludes from the book profit recorded according to the established accounting rules without being bound by the matching of profit with investment - what it deems appropriate from provisions and reserves, in addition to what the accounting standards for Islamic banks have approved under the name of profit distribution stability reserve. Banks, for their part, try to make the rates of distributable investment returns compatible with the prevailing interest rates.

It appears from this that the only difference between the interest of traditional and Islamic bank is that the first one fixes the interest rate in advance, while the Islamic bank determines the profit rate at the end of the financial period. Thus, the distributable profit does not represent the result of investment operations, but rather the

Mudarib bank determines its amount, contrary to the simplest rules of partnership in Sharia and law. (Alkababji, 2010, p. 33)

The intermingling of profits resulting from the mixing of banking transactions between deposits, loans, investments, and other products poses a real challenge in determining the profit ratio from the subject of legitimate Mudarabah. Should the profit ratio be based on the total capital of the bank, the funds of its shareholders, and depositors, or should it be based on a proportion of the Mudarib's (Bank's) funds from the original project capital?

The issue of borrowing in Mudarabah is also problematic. The customer does not bear the burden of borrowing on Mudarabah funds, as the bank is obligated to grow the funds of its depositors, not to borrow on top of them. Therefore, we hold depositors responsible for the bank's borrowing and the loss of investment of its funds.

Fiqh rulings stipulate that the Mudarib is not permitted, under any circumstances, to borrow on Mudarabah funds, by purchasing more than the capital in his hands or getting something for Mudarabah with a price that is not in his possession from the same type of money. As stated in *Badai' Al-Sana'i'*: "Because borrowing proves an increase in capital without the consent of the owner of the money, and in the guarantee for the owner of the money without his consent. If we were to allow borrowing on Mudarabah, we would be forcing him to increase the guarantee that he did not agree to, and this is not permissible". (Al-Kāsānī, 1328, vol 8, pp. 3612-3615)

For this reason, Islamic banks attract deposits in the form of current accounts that do not share in investment profits or bear losses. Instead, they are legally structured as loans that the bank may invest on its own responsibility, with the profits accruing to it and the losses borne by it.

Also structure cash insurance to issue letters of guarantee, guarantee withdrawals, and documentary credit commitments as trusts which the bank is not permitted to invest them. Current accounts and insurance raise the issue of borrowing on Speculation funds, as the bank engages in joint Mudarabah. However, banks adopt the legal form of a limited liability joint-stock company. Here, the conflict arises between the limited liability of the partners (shareholders) and the investment of funds from current accounts or trusts, which often create debts on the bank that exceed its capital.

The delegation of authority to the board of directors is a binding agency for the principal (shareholders) and their obligation under the agency, according to Sharia, cannot be limited to a specific contribution or a fixed amount of money. However, their legal obligation is limited to the amount of their capital. In the event of the bank's bankruptcy, the question arises: who bears the burden of repaying the bank's debts? From a legal standpoint, the shareholders bear the first burden, and any amount in excess of their capital is borne by the depositors. As a result, the practice of Islamic banks investing borrowed funds or trust funds conflicts with the relationship between the bank and its shareholders and depositors. (Alkababji, 2010, p. 33)

In the concept of guaranteeing Mudarabah funds, the owner of the money may demand a guarantor or guarantee from the Mudarib in cases where liability is proven.

Violation of the conditions is a reason for the guarantee because Mudarabah has the meaning of agency which accepts restrictions. The agent or Mudarib must abide by the restrictions of the owner of the money, and if he violates them, he is liable. This, although it is a consequence of Sharia rulings, it is necessary to stipulate it, as it is a consequence of fulfilling the conditions.

Therefore, it is permissible to stipulate a third-partner guarantee in Mudarabah, i.e., anyone other than the Mudarib and the owner of the money. It is limited to guaranteeing the original capital and is an independent obligation from the Mudarabah contract. This condition is valid in consideration because it does not overturn the original contract by nullification.

The validity of such a condition is because it is a form of donation from a third partner, and this donation relates to the amount of any decrease in the capital, ignorance in donations is excusable, as is established by Islamic jurists.

The decision of the Islamic Fiqh Academy at its fourth session in Jeddah, decision No. (5/4) on Mmuqarada bonds regarding third-partner guarantees in article nine states: "There is nothing in Sharia to prevent stating in the issuance prospectus or Muqarada bonds a promise from a third partner, separate in his personality and financial liability from the partners to the contract, to donate without compensation a specific amount to compensate for the loss in a specific project, provided that it is an independent obligation from the Muqarada contract, meaning that his fulfillment of his obligation is not a condition for the validity of the contract and the establishment of its provisions between its partners. Therefore, the holders of the bonds or the Mudarib do not have the right to plead the invalidity of the Mudarabah or to refrain from fulfilling their obligations due to the failure of the donor to fulfill his donation on the grounds that this obligation was a consideration in the contract".(<https://iifa-aifi.org/ar/1713>, 2023)

There are certain cases where guaranty is mandatory due to the violation of the actions required by the Mudarabah contract. Some of these cases include:

**a** - If the Mudarabah is absolute, the Mudarib, whether it is the bank or otherwise, disposes of buying and selling on credit without authorization from the owner of the money, or other than the currency of the country (exchange of currencies) and his disposition results in a loss, he is liable in any case.

**b** - He is not permitted to lend to others from the Mudarabah funds because it is money prepared for trade and investment, and the loan takes the Mudarabah out of its essence. If he does so, he is liable for what he has lent.

**c** - Just as he is not permitted to lend, he is not permitted to give gifts, donations, or charity from the money of the lender except with the permission of the owner because it is designated for trade and investment. If he does so, he is liable. Donation, therefore, from the money of the Muda, whether it is a gift, loan, charity, or bequest, etc., is not permissible for the Mudarib because the money of another does not bear donation. However, if the owner explicitly authorizes the Mudarib to donate, it is permissible, because the prohibition was for the right of the owner of the money and he has waived it himself. (Al-Qāḍī, 2019, vol 1, p. 274)(Al-Dusūqī, n.d, vol 3, p. 538)(Al-Kāsānī, 1328, vol 8, p. 3617)(Almardāwy, n.d, vol 5, p. 414)

**d** - His agency for others is not permissible because the owner of the money has only accepted him and no one else. It is not permissible for the agent to share the money with anyone else. Qadi Abdul Wahab stated:"The owner of the money only accepted the agent's trustworthiness and the money being in his hand. He did not authorize him to hand it over to someone else. If he did so, they are bound by their own terms. However, if the agent destroyed the money or put it in a pledge, he is liable".(Al-Qāḍī, 2019, vol 1, p. 274)

## CONCLUSION

This research has reached several important results, including:

**1** - The importance of the concept in the cognitive and jurisprudential field is a significant epistemological necessity, taking into account the facts, especially in its use in Sharia, and it is closely linked to the term for which it was placed.

**2** - The concept is what occurs in the mind, whether it occurs in potential or in actuality, and the concept and meaning are identical in essence, as each of them is the image that occurs in the mind or is present in it, and they differ in terms of intention and occurrence.

**3** -"Naqd" (Money) in islamic jurisprudential concept is a name for the struck gold and silver in particular, and it was given this name because it was usually used to pay price,butIn terms of financial and economic implications it is everything that was a mean of exchange for some, and is considered a commodity by others. Some believe that it has no value in itself and must be linked to a fixed standard for measurement and evaluation.

**4** - The difference is apparent in determining the true nature of "Bank Deposits" based on the use to which they have been put. Hence, the views of Islamic jurists and scholars on "Al-wadī'ah Al-maṣrifīyah" (Bank Deposits) and their jurisprudential interpretations differ based on several understandings to the genus and type

of this contract. Some jurists have derived it from forms of named contracts in jurisprudence, including: loan, agency, Speculation. Others have derived it from the meaning of a loan in the general sense of debt.

5 -The research has reached the existence of jurisprudential and legal problems in the concept of “Almuḍārabah Almaṣrifīyah” (Banking Speculation), as the legislator has stipulated that Speculation is a contract under which a bank or financial institution lends the necessary capital to the contractor, who provides his work in a project in order to achieve profits. This concept is objected to because it mentions the term loan in the meaning of the lender of money, but he is actually the financier.

6 - The study showed that Mudarabah (Speculation) in the Islamic jurisprudential concept is related to trade, not to industries, agriculture, or planting. Here, the Algerian banking system has linked it to contracting, manufacturing, which is contrary to the meaning of Mudarabah in Sharia.

**Praise be to ALLAH, the Lord of the Worlds.**

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