ISSLP
Interdisciplinary Studies in Society, Law, and Politics

Original Research

Methods of Recovering the Muḍārib's Maintenance Expenses from the Perspective of Islamic Jurisprudential Schools and Iraqi Positive Law

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Received: 2026-06-16 **Revised:** 2026-09-15 **Accepted:** 2026-09-21 **Initial Publish:** 2026-09-22 **Final Publish:** 2027-06-01

The muḍārabah contract, as one of the most important financial and legal institutions in Islamic jurisprudence and commercial law, is founded on a partnership between capital and commercial labor. One of the controversial issues associated with this contract concerns the legal and financial status of the expenses and maintenance costs incurred by the muḍārib (the managing partner or agent), particularly in the context of commercial travel, as well as the method by which such expenses may be recovered. The present study aims to provide a comprehensive and comparative analysis of the jurisprudential foundations governing the muḍārib's entitlement to maintenance expenses and the manner of their recovery under Imāmī jurisprudence and the four Sunni schools of law (Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī), and to examine their correspondence with the legislative developments in Iraqi positive law. The research adopts a descriptive–analytical methodology with an ijtihādī–comparative approach and is based on authoritative documentary and library sources. The findings indicate that, when the muḍārib remains in his place of residence (ḥaḍar), all jurisprudential schools agree that he is not entitled to maintenance expenses in the absence of an express contractual stipulation. In the case of commercial travel, however, the right to claim customary and reasonable maintenance expenses is recognized by the majority of jurists. With regard to the method of recovering such expenses, the predominant view in Imāmī, Mālikī, and Ḥanafī jurisprudence holds that maintenance expenses should initially be deducted from the profits generated by the muḍārabah and, where no profit has been realized, should be charged against the principal capital, without imposing liability upon the muḍārib. This position is based on the customary understanding that profit serves as a protective buffer (wiqāyah) for the capital. By contrast, a group of jurists maintains that such expenses should, in all circumstances, be deducted directly from the principal capital. In the Iraqi legal system, the repeal of Articles 626–683 of the Civil Code by the Companies Law of 1983 created a legislative lacuna, while the 2018 regulation issued by the Central Bank of Iraq has generated further ambiguity by failing to specify the source from which the muḍārib's maintenance expenses are to be deducted. This study demonstrates the necessity of legislative reform and the utilization of contractual stipulations to regulate this issue more clearly.

Keywords: *Muḍārabah contract, muḍārib's maintenance and expenses, Islamic schools of jurisprudence, Iraqi positive law, protection of capital, Islamic banking.*

How to cite this article:

Majid Zahad Al-Hajaji, L., Mortazi, A., & Aminfard, M. (2027). Methods of Recovering the Muḍārib's Maintenance Expenses from the Perspective of Islamic Jurisprudential Schools and Iraqi Positive Law. *Interdisciplinary Studies in Society, Law, and Politics, 6*(6), 1-9. https://doi.org/10.61838/kman.isslp.582

1. Introduction

The muḍārabah contract (referred to as qirāḍ in the jurisprudential terminology of the Ḥijāz and the Mālikī school) is regarded as one of the most authentic, enduring, progressive, and effective commutative–participatory institutions in Islamic civilization and the legal systems of Islamic countries. From the perspective of its economic function, this contract facilitates an organic, constructive, and balanced relationship between owners of liquidity and idle capital (arbāb al-amwāl), on the one hand, and skilled, innovative, trustworthy, and commercially experienced human resources (the muḍārib or managing agent), on the other (Husayni Amili, 1998). The rationale underlying the institution and legitimacy of muḍārabah in Islamic jurisprudence is based on facilitating the circulation of wealth within society, preventing the hoarding and stagnation of capital, and making optimal use of the commercial capabilities of persons who lack the monetary capital required to conduct business (Husayni Amili, 1998; Ibn Rushd al-Qurtubi, 2004). Since the legal structure of the muḍārabah contract is founded upon such elements as the fiduciary character of the agent's possession (yad al-amānah, entailing no liability in the absence of transgression or negligence), the distribution of profit on the basis of a contractually agreed undivided share, and the exclusion of any guarantee of the principal capital, any ambiguity, uncertainty, or improper interpretation in defining the parties' financial rights and expenditure-related obligations disturbs the economic equilibrium and commutative justice of the contract and creates the conditions for serious judicial disputes and complex financial claims before the courts (Balkhi & Scholars, 1892; Muhaqqiq al-Hilli, 1988).

Among the various financial relationships governed by this contract, one of the most fundamental, technically intricate, and simultaneously controversial financial and legal issues concerns the precise determination of the maintenance, subsistence expenses, and expenditures of the muḍārib during the conduct of commercial operations. The fundamental and challenging question is whether, while engaged in muḍārabah trading activities, the muḍārib must pay the ordinary costs of living, accommodation, food, clothing, transportation, hire of means of transport, and medical treatment from his own personal property, or whether he is entitled to withdraw and deduct such expenditures from the muḍārabah property as expenses connected with the contract. The significance of this issue is heightened by the fact that the muḍārib devotes his time, expertise, and entire productive effort to generating returns on another person's capital. If he were required to bear all of his daily expenses personally without receiving any guaranteed remuneration and, ultimately, no profit were realized due to market fluctuations, he could suffer substantial loss and contractual imbalance (Ibn Rushd al-Qurtubi, 2004; Khoei, 2009).

In addressing this structural issue, jurists of the Islamic schools have divided the analysis, according to the agent's location and the nature of his activities, into two fundamental situations: ḥaḍar (remaining in one's city or permanent place of residence) and commercial travel. In the case of ḥaḍar, prominent Imāmī, Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī jurists agree that, where the contract is silent, the muḍārib is not entitled to maintenance expenses. Their reasoning is that a person residing in his own home and locality would ordinarily incur his regular living expenses in any event, and conducting muḍārabah business within the city does not impose additional subsistence expenses that ought to be borne by the trading property (Ibn Abd al-Barr al-Namari al-Qurtubi, 1980; Khoei, 2009). Nevertheless, even where no inherent entitlement exists, a significant controversy has arisen among the schools concerning the permissibility of including a stipulation for the payment of maintenance during ḥaḍar. Unlike the predominant position among Ḥanbalī, Ḥanafī, Mālikī, and Imāmī jurists, the Shāfiʿī school considers such a stipulation to invalidate the very nature of the contract, on the ground that it renders the profit uncertain and causes the agreement to depart from the essential requirements of muḍārabah (Khatib al-Shirbini, 1994; Nawawi, 1991), whereas the other schools, relying on the general principles governing the fulfillment of contractual conditions and the presumption of contractual binding force, regard such a stipulation as valid and enforceable where the precise amount is determined (Ansari, 1994; Ibn Rushd al-Qurtubi, 2004).

The pivotal point of the scholarly controversy, the principal locus of juristic disagreement, and a major challenge for financial systems emerges in the case of the muḍārib's commercial travel. Although entitlement to maintenance and subsistence expenses in principle is recognized across the jurisprudential schools as a rationally and legally grounded right, a profound and foundational disagreement exists concerning the source of recovery, the financial accounting sequence, and the mechanism for reimbursement of such expenses. The question is whether the muḍārib's maintenance constitutes a direct expense attached to the property itself, to be deducted ab initio from the principal capital (ra's al-māl) irrespective of the existence of profit and independently of the profit account—a view toward which jurists such as Ibn Saʿīd al-Ḥillī and others inclined (Ibn Sa'id al-Hilli, 1974; Muhaqqiq al-Hilli, 1988)—or whether maintenance is regarded as a form of constructive depletion or loss of capital and, pursuant to the well-established rule and commercial understanding that "profit serves as a protection for capital" (al-ribḥ wiqāyah li-ra's al-māl), it must first be set off against and absorbed by the profits realized and, only in the absence of profit, charged against the principal capital without imposing any obligation upon the muḍārib to reimburse it (Balkhi & Scholars, 1892; Ibn Jallab, 2007; Sabzawari, 1992). The financial and practical consequences of this jurisprudential disagreement are highly significant for final settlement, the recognition of actual profit, the allocation of commercial losses, and the protection of the rights of both the capital owner and the managing agent. Examining these jurisprudential challenges and systematizing the rules governing the muḍārib's maintenance expenses assumes even greater importance, strategic significance, and practical urgency in light of legislative developments and positive law in Iraq. In the original formulation of the Iraqi Civil Code of 1951 (Law No. 40 of 1951), drafted with the distinguished legal contribution of ʿAbd al-Razzāq al-Sanhūrī and directly inspired by Ḥanafī jurisprudence and Islamic legal sources, Article 672 expressly regulated the muḍārib's maintenance expenses during travel and recognized, as a matter of law, that reasonable expenses could be met from the muḍārabah property (Sanhuri, 1998). However, in subsequent legislative developments, through the enactment of the Companies Law No. 36 of 1983, the Iraqi legislature expressly repealed, pursuant to Article 215 thereof, all provisions governing civil partnerships, including Chapter Three of the section on partnerships (Articles 626–683 of the Civil Code), without replacing or reformulating the nuanced structure and supplementary rules governing the muḍārabah contract in the new Companies Law (Sanhuri, 1998). This legislative decision created a legal lacuna and substantial judicial gap in Iraqi courts and left disputes concerning the muḍārib's expenses to be resolved through the derivation of rules from Islamic jurisprudential sources pursuant to Article 1 of the Civil Code.

In recent years, with the expansion of Islamic banking and the growing demand for participatory contracts in both micro- and macro-financing, the Central Bank of Iraq issued in 2018 a regulatory instrument entitled Rules Governing Islamic Financing Instruments for Islamic Banks (*Ḍawābiṭ Adawāt al-Tamwīl al-Islāmī lil-Maṣārif al-Islāmiyyah*), paragraph 4-12 of which affirmed the muḍārib's right to maintenance expenses during commercial travel. However, because the instrument remains entirely silent regarding the financial mechanism and the precise source from which such expenses must be deducted—whether from gross profit or from the principal capital advanced—it has not resolved the existing legal ambiguities and has instead increased the legal and financial risks associated with banking muḍārabah contracts. Accordingly, the present study adopts a descriptive–analytical and comparative approach to undertake a comprehensive examination of the jurisprudential opinions of the five schools (Imāmī, Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī), evaluate the relevant transmitted evidences, governing jurisprudential maxims (including the maxims of lā ḍarar, al-kharāj bi-al-ḍamān, and al-ghurm bi-al-ghunm), and established rational and commercial understandings, and, through a critical assessment of Iraq's legal and legislative framework, propose a clear financial and jurisprudential mechanism for recovering the muḍārib's maintenance expenses that may assist courts, legislative reform, and the more precise drafting of banking and investment contracts.

2. Methodology

In terms of its nature, objectives, and ultimate outcomes, the present study falls within the category of fundamental–applied research. It is fundamental insofar as it seeks to identify the operative legal rationale, reassess the relevant ijtihād-based evidence, and explain the jurisprudential and legal-philosophical foundations governing the allocation of expenses in participatory contracts. It is applied insofar as its findings can be directly implemented and utilized in legislation, judicial practice, reform of banking regulations, and the drafting of standardized muḍārabah contracts under Iraqi positive law.

In terms of methodology and implementation, the study employs a descriptive–analytical method with an ijtihād-based, legal, and comparative approach, grounded in documentary research and the examination of primary texts. To achieve a comprehensive and systematic explanation of the issue of recovering the muḍārib's maintenance expenses, the study's body of information and data has been identified, extracted, and analyzed at three distinct but intersecting levels:

1. Jurisprudential and ijtihād-based level (comparative analysis of the five schools): At this level, primary sources, fatwā collections, and argumentative jurisprudential works of Imāmī jurisprudence and the four Sunni schools (Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī) were examined comparatively and at their doctrinal foundations. The principal sources include such authoritative works as *Miftāḥ al-Karāmah* (Husayni Amili, 1998), *al-Mabānī fī Sharḥ al-ʿUrwah al-Wuthqā* (Khoei, 2009), *Muhadhdhab al-Aḥkām* (Sabzawari, 1992), Ḥanafī sources including *al-Fatāwā al-Hindiyyah* (Balkhi & Scholars, 1892) and *Radd al-Muḥtār* (Ibn Abidin, 1992), Mālikī works including *al-Tafrīʿ* (Ibn Jallab, 2007), *al-Kāfī fī Fiqh Ahl al-Madīnah* (Ibn Abd al-Barr al-Namari al-Qurtubi, 1980), and *Bidāyat al-Mujtahid* (Ibn Rushd al-Qurtubi, 2004), and Shāfiʿī works including *Mughnī al-Muḥtāj* (Khatib al-Shirbini, 1994) and *Rawḍat al-Ṭālibīn* (Nawawi, 1991). In this examination, transmitted evidence, including Qurʾānic verses, Prophetic traditions, and reports from the Ahl al-Bayt, as well as rational arguments concerning the negation of undue hardship, the principle of voluntary assumption of risk, and the essential requirements of the contract, were analyzed.

2. Level of statutory texts and Iraqi positive-law instruments (documentary and historical analysis): This level focuses on the legislative history and official statutory texts of Iraq. The principal documents examined include the original text and preparatory materials of the Iraqi Civil Code of 1951 (Law No. 40 of 1951), with particular emphasis on repealed Article 672; the Iraqi Companies Law No. 36 of 1983 and its 2004 amendments, for purposes of analyzing the reasons for and consequences of the express repeal of Articles 626–683 of the Civil Code; and, finally, the supervisory and executive instrument entitled *Rules Governing Islamic Financing Instruments for Islamic Banks*, issued by the Central Bank of Iraq in 2018, particularly paragraph 4-12 of the section on muḍārabah, in order to assess its effectiveness and identify the existing legislative gaps and inconsistencies within Iraq's contemporary monetary and banking system.

3. Level of jurisprudential maxims, legal doctrine, and general principles of commerce: At this level, general principles governing civil liability, financial risk management, and the equitable sharing of profit and loss were employed as criteria for evaluating the competing theories. These include the maxim of **lā ḍarar wa lā ḍirār** (no harm and no reciprocating harm), the maxim **al-kharāj bi-al-ḍamān** (entitlement to yield corresponds to bearing liability), the maxim **al-ghurm bi-al-ghunm** (liability accompanies gain), the principles of contractual binding force and enforceability of conditions, the presumption against gratuitous performance in financial transactions, and the doctrine of established commercial understandings and **protection of capital**, in order to assess the relationship between reimbursement of expenses and recognition of net profit.

The data were collected through library research, thematic note-taking, and systematic retrieval of jurisprudential and legal documents. The process of analysis and validation of the study's propositions was conducted in four sequential stages:

- **Stage One (description and conceptual differentiation):** Precise differentiation of the nature of maintenance expenses from agreed remuneration (**ujrat al-musammā**), customary remuneration (**ujrat al-mithl**), and the undivided share of profit, together with an explanation of the relevant rules based on the distinction between **ḥaḍar** and **travel**.
- **Stage Two (comparative and inferential approach):** Extraction of the documentary bases of each school and their classification into two principal approaches—sequential recovery and set-off against profit versus absolute recovery from the principal capital—together with an evaluation of the strengths and weaknesses of the transmitted and rational evidence supporting each approach.
- **Stage Three (critical analysis of legal texts):** A historical–analytical examination of Iraq's legislative

fluctuations, from the period of statutory clarity in 1951 through the legislative hiatus and lacuna following 1983 to the shortcomings of the Central Bank's 2018 regulations, with the aim of identifying the origins of divergent judicial practices and banking-accounting ambiguities.

• **Stage Four (synthesis and problem-solving model construction):** Evaluation of the effectiveness of each of the two jurisprudential approaches in light of contemporary economic conditions and the Iraqi legal structure, followed by the formulation of a comprehensive legal–contractual model—including a computational formula for deducting maintenance expenses and proposals for legislative reform—to fill the legislative gap and promote uniformity of practice among Iraqi courts and Islamic banks.

3. Research Findings

3.1. Characterization of the Muḍārib's Expenses and Their Conceptual Distinction from Remuneration and the Share of Profit

Within the financial system of Islamic jurisprudence, precise differentiation among financial concepts is essential:

• **Share of profit (al-ribḥ al-mushāʿ):** The consideration and reward for the muḍārib's management, expertise, and commercial efforts. It is contingent in nature and materializes only when the capital generates a return.

• **Customary remuneration (ujrat al-mithl) or agreed remuneration (ujrat al-musammā):** These concepts arise in the case of an invalid muḍārabah or in contracts for the lease of services and constitute an obligation borne by the owner or attached to the relevant property.

• **Maintenance and expenses of the muḍārib:** These consist of the actual, necessary, and customary expenditures incurred by the agent for his subsistence and his ability to continue commercial activity exclusively in furtherance of the interests of the muḍārabah contract, including food, personal subsistence, clothing, temporary accommodation, transportation costs for both goods and the agent himself, and packaging expenses (Balkhi & Scholars, 1892).

Such maintenance does not constitute **consideration for labor**; rather, it is a form of **expense coverage** intended to preserve the practical operability of the contract and prevent loss to the muḍārib.

3.2. Comparative Examination of Entitlement to Maintenance During Ḥaḍar and the Status of Contractual Stipulations

Imāmī jurists (Husayni Amili, 1998; Muhaqqiq al-Hilli, 1988), Ḥanafī jurists (Balkhi & Scholars, 1892), Mālikī jurists (Ibn Abd al-Barr al-Namari al-Qurtubi, 1980), Shāfiʿī jurists (Khatib al-Shirbini, 1994), and Ḥanbalī jurists (Ibn Rushd al-Qurtubi, 2004) agree that where the muḍārib conducts muḍārabah business in his hometown and permanent place of residence, he is not, in the absence of an express contractual provision, entitled to receive any maintenance expenses from the muḍārabah property.

The jurists' reasoning for this shared position rests on two grounds:

1. **The principle of voluntary assumption and the absence of additional expenditure:** During ḥaḍar, the muḍārib resides in his own home and his ordinary living expenses arise independently of the muḍārabah contract. Consequently, conducting muḍārabah business imposes no additional financial burden upon him that should be borne by the property or its owner.
2. **The essential nature of the contract:** Muḍārabah is a contract founded upon the combination of labor and capital. The agent's labor is furnished in exchange for a share of profit, rather than a salary or reimbursement of his ordinary living expenses while residing in his own city.

Disagreement Regarding the Validity of a Maintenance Stipulation During Ḥaḍar

• **Shāfiʿī position (invalidity of the stipulation and its vitiating effect):** Shāfiʿī jurists maintain that a stipulation providing maintenance during ḥaḍar is invalid and that its invalidity extends to the entire muḍārabah contract, rendering it defective. This is because, during ḥaḍar, the muḍārib works for himself, and allocating a specific amount to him under the designation of maintenance renders the undivided profit uncertain and causes the contract to depart from the requirements of muḍārabah and to resemble an invalid lease arrangement (Khatib al-Shirbini, 1994).

- **Ḥanbalī, Ḥanafī, Mālikī, and Imāmī position (validity and enforceability of the stipulation):** These schools argue that a maintenance stipulation during ḥaḍar is lawful and serves a rational contractual purpose. The relevant jurisprudential position recognizes the validity of a stipulation requiring payment of the muḍārib's maintenance, whether during residence or travel, whereas the Shāfiʿī approach does not recognize such a stipulation during residence (Ibn Rushd al-Qurtubi, 2004). The basis of this position lies in the principle of freedom of contract and the general obligation to honor contractual conditions and agreements, provided that the amount of maintenance is determined and ascertainable so as not to create excessive uncertainty.

3.3. Detailed Analysis of Jurisprudential Approaches to the Method and Source of Recovering the Muḍārib's Maintenance Expenses During Commercial Travel

Where the muḍārib undertakes commercial travel with the express or implied authorization of the capital owner, his entitlement to travel expenses is established. However, two fundamental and substantially divergent approaches may be identified and evaluated in Islamic jurisprudence concerning the method, source, and accounting mechanism for recovering such maintenance expenses.

First Approach: Sequential Recovery and Set-Off Against Profit (Predominant Jurisprudential View)

The majority of Imāmī jurists (Khoei, 2009; Sabzawari, 1992), Ḥanafī jurists (Balkhi & Scholars, 1892; Ibn Abidin, 1992), and Mālikī jurists (Ibn Jallab, 2007) maintain that the muḍārib's travel maintenance constitutes an overhead expense of the commercial venture and that its settlement follows this sequence:

- It is first deducted and accounted for from **profit (faḍl/ribḥ)**.
- If the commercial activity generates no profit, or if the profit is insufficient to cover the maintenance expenses, those expenses are deducted from the **principal capital**, and the muḍārib bears no liability for compensating the resulting reduction in capital.

Evidence and Theoretical Foundations of This Approach

1. **The principle governing the realization of profit and established commercial understanding:** Khoei emphasizes that profit and its amount can be determined only after all expenses and costs have been deducted, and that this is the customary practice in commercial transactions; deviation from it requires a specific basis and express consideration (Khoei, 2009). Accordingly, until the muḍārib's maintenance expenses have been covered and deducted, no distributable profit has legally or commercially materialized for division between the agent and the capital owner.
2. **The theory of constructive loss and the protective function of profit vis-à-vis capital:** Ḥanafī jurists argue that maintenance paid to the agent constitutes part of the muḍārabah property expended in furtherance of the owner's commercial purpose and is therefore treated as constructively consumed. According to the Ḥanafī position, maintenance is first charged against profit, if profit exists, and where no profit exists, it is charged against the principal capital, because such maintenance constitutes a consumed portion of the property and, as a general rule, depletion is first absorbed by profit (Balkhi & Scholars, 1892). Sabzawari similarly maintains that expenditure may initially be made from the principal property where no profit has yet arisen; however, if profit subsequently materializes, the expenditure is charged against that profit because profit serves as a protection for the principal capital against diminution, so that the reduction must first be restored before the remaining profit is distributed (Sabzawari, 1992).
3. **The express Mālikī position and the exclusion of liability on the part of the agent:** Ibn Jallāb states that maintenance is deducted from the surplus, after which the parties divide what remains according to their agreed proportions; if the property generates no profit and the maintenance has nevertheless been expended from it, the agent is not required to reimburse the capital owner (Ibn Jallab, 2007). This position demonstrates that Mālikī jurisprudence likewise adopts a sequential structure and allocates the loss resulting from maintenance to the investment capital rather than imposing it upon the agent.

4. **Narrative evidence:** Ibn Abī Shaybah reports from Ibrāhīm al-Nakhaʿī that the muḍārib may spend on his maintenance and clothing according to what is customary; if the venture generates profit, such expenses are taken from the profit, whereas if it sustains a loss, they are borne by the principal capital (Ibn Abi Shaybah, 1988). This early report expressly demonstrates that the method of deducting maintenance from profit and, in the event of loss, from the principal capital constituted an established jurisprudential practice from the earliest centuries of Islamic law.

Second Approach: Absolute Recovery from the Principal Capital (Ra's al-Māl)

In contrast to the predominant position, a group of Imāmī jurists holds that the muḍārib's maintenance constitutes an obligation and expense attached directly to the capital itself and should therefore be deducted directly from the principal property irrespective of whether profit has arisen:

• Ibn Saʿīd al-Ḥillī adopts this view in *al-Jāmiʿ lil-Sharāʾiʿ* (Ibn Sa'id al-Hilli, 1974).

• Other Imāmī juristic authorities similarly maintain that maintenance is taken from the principal property whether or not profit becomes apparent (Muhaqqiq al-Hilli, 1988).

• This approach further holds that entitlement to maintenance does not depend upon the realization of profit and that expenditure may therefore be made from the principal capital even where profit subsequently arises (Husayni Amili, 1998).

The foundation of this position is reliance upon the **unqualified wording** of legal and jurisprudential texts that permit expenditure from the property without conditioning such expenditure upon the existence of profit. Accordingly, proponents of this approach maintain that the deduction of maintenance is independent of the profit account: the principal capital should first be reduced by the amount of the relevant expenses, and only any subsequent increase in the remaining property should be recognized as profit.

3.4. Structural and Comparative Assessment under Iraqi Positive Law

First Period: The Period of Statutory Clarity under the 1951 Civil Code (Article 672)

Under the original structure of the Iraqi Civil Code (Law No. 40 of 1951), drafted under the supervision and influence of eminent jurists including ʿAbd al-Razzāq al-Sanhūrī, the muḍārabah contract was incorporated into the provisions governing contractual partnerships, with substantial reliance upon Ḥanafī and broader Islamic jurisprudence. Article 672 of the Civil Code provided that a muḍārib undertaking authorized commercial travel was entitled to withdraw his reasonable and customary expenses from the muḍārabah property. This provision furnished a clear statutory foundation for the adjudication of commercial disputes (Sanhuri, 1998).

Second Period: Repeal of the Partnership Provisions and the Emergence of a Legislative Hiatus (1983 Onward)

With the enactment of Iraqi Companies Law No. 36 of 1983, Article 215 expressly repealed Articles 626–683 of the Civil Code. The legislature sought to consolidate the rules governing commercial companies within a modern statutory framework. The strategic legislative deficiency, however, was that muḍārabah—which is essentially a bilateral commercial contract and not necessarily a company possessing an independent commercial legal personality—was not incorporated into the new legislation. Consequently, the rules governing muḍārabah, including Article 672 concerning the muḍārib's maintenance expenses, disappeared from Iraqi positive law. Iraqi courts were therefore compelled, pursuant to Article 1 of the Civil Code, to resort to the general principles of Islamic jurisprudence in resolving such disputes. Given the diversity of jurisprudential opinions, this situation contributed to inconsistency in judicial decisions.

Third Period: The Central Bank of Iraq's 2018 Regulation on Islamic Financial Instruments

With the development of Islamic banking in Iraq and the need to formulate appropriate financing instruments, the Central Bank of Iraq issued in 2018 a regulatory instrument entitled *Rules Governing Islamic Financing Instruments for Islamic Banks*. Paragraph 4-12 of the muḍārabah section provides that a muḍārib is entitled to reasonable maintenance expenses in all commercial journeys undertaken in the interests of the muḍārabah. Although this regulation reintroduced the entitlement to travel-related maintenance expenses into Iraqi positive-law discourse, it left two serious issues unresolved:

1. **Failure to specify the source from which maintenance expenses are to be deducted:** whether the bank must deduct them as project expenses from gross profit or directly from the capital advanced.
2. **Failure to determine the legal consequences of loss and additional commercial risks.**

4. Discussion and Conclusion

The comparative analysis of the jurisprudential findings and their correspondence with the gaps in Iraqi positive law demonstrates that the method of recovering the muḍārib's maintenance expenses lies at a complex intersection of the law of obligations, Islamic financial jurisprudence, and economic risk engineering.

From the jurisprudential perspective, comparison of the two approaches indicates that the predominant position—sequential recovery from profit and subsequent allocation to the principal capital where no profit exists—provides a more coherent doctrinal account of the financial structure of muḍārabah than absolute deduction from capital. This position accords with the economic logic of muḍārabah and the principles governing commutative justice, because capital should not be regarded as having generated distributable profit until the current costs associated with generating that return have first been absorbed. The maxims al-ghurm bi-al-ghunm and al-kharāj bi-al-ḍamān likewise connect entitlement to gain with the corresponding assumption of liability and cost. If maintenance were deducted directly from principal capital without first being absorbed by realized profit, the capital owner would bear the reduction even though the common purpose of the owner and agent is to achieve a net increase in investment capital.

From the perspective of Iraqi positive law, the historical analysis demonstrated that the legislature's 1983 decision to repeal the Civil Code provisions governing muḍārabah created a legislative discontinuity that the Central Bank's 2018 regulations have not comprehensively remedied. The silence of the 2018 regulation regarding the source from which maintenance expenses must be recovered has created uncertainty for Iraqi Islamic banks in calculating the profits attributable to depositors and financing recipients. To address this legislative and legal difficulty in Iraq, the following solutions are proposed:

1. **The capacity of Ḥanafī and other Islamic jurisprudential doctrines within the Iraqi legal system:** Given that Article 1 of the Iraqi Civil Code recognizes Islamic jurisprudence as an important source for filling statutory gaps, it is proposed that Iraqi judges and jurists apply the rule that maintenance expenses are deducted from profit and, where no profit exists, are borne by the principal property without liability on the part of the agent as a supplementary and interpretive rule in muḍārabah disputes (Balkhi & Scholars, 1892; Ibn Abidin, 1992).
2. **Use of an express contractual stipulation in modern agreements:** On the basis of jurisprudential recognition of conditions governing the muḍārib's maintenance expenses, Islamic banks and commercial actors in Iraq should incorporate into every muḍārabah contract a separate clause entitled "Agent's Maintenance and Travel Expenses", expressly specifying the maximum daily expenditure, permissible categories of expense (transportation, accommodation, and food), and the precise source from which such amounts are to be deducted, namely gross revenue prior to the distribution of profit. Such a provision, based on the binding force of valid contractual conditions, can reduce legal disputes and prevent unnecessary prolongation of judicial proceedings (Ansari, 1994).
3. **Proposal for legislative reform:** It is proposed that the Iraqi Council of Representatives enact an additional chapter within the Commercial Law or adopt comprehensive legislation governing Islamic transactions and banking, thereby restoring the repealed rules on muḍārabah in a form adapted to the requirements of contemporary financial markets and expressly regulating the method of recovering the muḍārib's expenses on the basis of the relevant jurisprudential framework.

Authors' Contributions

Authors contributed equally to this article.

Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

Acknowledgments

We would like to express our gratitude to all individuals helped us to do the project.

Declaration of Interest

The authors report no conflict of interest.

Funding

According to the authors, this article has no financial support.

Ethical Considerations

In this research, ethical standards including obtaining informed consent, ensuring privacy and confidentiality were observed.

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