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Sharīʿah Appraisal of the Concepts of *Ḍamān*, *Taqṣīr*, and *Taʿaddī* in Trust-Based Contracts (*ʿUqūd al-amānāt*)

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Abstract. The study aims to examine the concepts of *ḍamān* (guarantee), *taqṣīr* (negligence) and *taʿaddī* (transgression) from Sharīʿah point of view and their relations with both trust-based contracts (*ʿuqūd al-amānāt*) and guarantee-based contracts (*ʿuqūd al-ḍamānāt*). The study conducted the qualitative research approaches which consist of documents analysis, interviews and observations in few phases. The study found that the fiduciary possessor should be held liable in a few cases; however it does not mean that it transformed the contract into a guarantee-based contract (*ʿaqd al-ḍamānah*) as it was under the rubric of *ḍamān al-itlāf* (indemnity for damage) or *ḍamān al-yad* (liability arising from possession on trust).

Key words: Trust-based contract, Guarantee-based contract, *Taqṣīr*, *Taʿaddī*, *Ḍamān*.

KAUJIE Classification: C1, C3, T1.

1. Introduction

In the wake of the vast development of Islamic finance over the last few decades, much has been said about the limited track record of Islamic financial institutions (IFIs) applying risk sharing principles, especially *muḍārabah* and *mushārakah*. The Islamic financial institutions seem to prefer the guarantee based capital and profit instruments in both asset side and liability side. The issues of high risk in general, and multi-faceted business risks in particular, that are associated with *muḍārabah* and *mushārakah* remain obstacles to their implementation. To minimize those risks, scholars have suggested a few steps such as proper guidelines on *taqṣīr* (negligence) and *taʿaddī* (transgression). Discussions on the concepts of *taqṣīr*, *taʿaddī*, *ḍamān* (guarantee), and the management of moral hazard in trust based concepts such as *muḍārabah* and *mushārakah* products is paramount in realizing the implementation.

1.1 Problem Statement

One major problem with profit and loss sharing (PLS) contracts that has been frequently mentioned in the literature is the agency problem, which is said to be inherent to these types of contracts.

Many literatures emphasized that the view of the majority of scholars prohibiting a guarantee in *muḍārabah* is the strongest opinion. However, they said that stipulating a guarantee in *muḍārabah* using the same basis as in the imposition of liability on artisans (*taḍmīn al-ṣunnāʿ*) and on those offering their labor to the general public (*al-ajīr al-mushtarak*) seems acceptable in order to protect public interest (*maṣlaḥah ʿāmmah*) against the loss of wealth, especially in a time when dishonesty has become typical behavior (Hashim and Hussain, 2011).

In few instances, the guarantee element in both *taḍmīn al-ṣunnāʿ* and *al-ajīr al-mushtarak* does not change the nature of *istiṣnāʿ* or *ijārah* contracts as this kind of guarantee falls under *ḍamān al-yad* (liability arising from possession on trust) or *ḍamān al-mutlafāt* (indemnity for damage). Therefore, the guarantee should be allowed in both cases as no element of *qarḍ* and *ribā* appears in them. However, the case is different in a *muḍārabah* contract, as any guarantee element will change the essential nature of *muḍārabah* (*muqtaḍá al-ʿaqd*). Steps in that direction are still possible as long as the efforts do not exceed the boundaries of *muḍārabah's* essential nature.

Therefore, it is a need to have a clear Sharīʿah view on the types of *ḍamān*, *taqṣīr*, and *taʿaddī* to determine the types of *taʿaddī* and *taqṣīr* for which the entrepreneur has to bear the financial consequences of the business loss, and the circumstances where the *ḍamān* is applicable for the losses. Simultaneously, there is a need for a concrete Sharīʿah view on the possibility of granting collateral for *taqṣīr* and *taʿaddī* in trust based contracts and guarantee-based contracts.

1.2 Objectives

The objectives of this study are to examine the concepts of *ḍamān*, *taqṣīr*, and *taʿaddī* from Sharīʿah point of view and their relations with both trust-based contracts (*ʿuqūd al-amānāt*) and guarantee-based contracts (*ʿuqūd al-ḍamānāt*).

1.3 Methodology

This research applies qualitative research approaches, including among others, content analysis, interviews, observations and descriptive analysis using comparative analysis of jurists' arguments.

In the first phase, the study collected data from libraries in the form of appropriate books, journals and other publications, and from recognized internet websites that discuss some of the issues related to the research objectives: inter alia, Islamic principles and concepts related to Islamic law, and standards and guidelines on finance and the banking industry.

The researchers also engaged in various industry talks in order to further understand the subjects of the study.

In the second phase, the researchers interviewed a few Sharīʿah advisors to know their views on the discussed matters. Effort was then made to determine which of their views is the most preferable. According to Sosulski and Lawrence (2008), a population is selected because they are considered good sources of information that will advance a study toward a reasonable goal. This method entails the researcher selecting relevant respondents based on his prior knowledge of the population in order to meet specific study objectives. The sample size is not a concern, as Robson (2002) noted that there is no set number of interviews needed for a flexible design study.

Face-to-face interviews were meant to seek and thoroughly discuss the practices and issues regarding the matter under discussion. The respondents were selected by using snowball and purposive sampling techniques (Silverman, 2000; and Neuman, 2003). Every interview was conducted for approximately 90 minutes, and each was recorded and transcribed for analysis.

2. Literature Review

The discussion of imposing *ḍamān* in a trust based contract has been highlighted by many scholars, especially focusing on *muḍārabah* and *mushārakah*, and whether imposing *ḍamān* may conflict with the essence of those contracts. According to them, one major problem with profit and loss sharing (PLS) contracts that has been frequently mentioned in the literature is the agency problem, which is said to be inherent to these types of contracts. For example, in the words of the State Bank of Pakistan 2008, "The agency problem is one of the major factors for the reluctance on the part of banks to undertake equity based modes of financing, as it gives entrepreneurs

the incentive to under-state profits." (Kazarian, 1993; Rickwood and Murinde, 2002; Dār and Presley, 2000; Iqbal and Molyneux, 2005).

Hassan and Mehmat (2008) said that *muḍārabah* contains many risks, particularly business risks. They insisted that managing a business has its own risks and that Islamic banks need to face these risks. Among other risks inherent to *muḍārabah*, is the business partner's freedom to terminate the partnership at any time, which will definitely cause the business to be liquidated, because no one can be forced to continue a partnership against his/her will. Given this reality, many Islamic banks avoid unnecessary exposure to *muḍārabah* risk.

However, a few studies revealed that some anxieties, such as the withdrawal of investors, have been overcome through the existing structure of the *muḍārabah* contract. Based on the decisions of the Accounting and Auditing Organization for Islamic Finance Institutions (AAOIFI) as stated in Sharīʿah Standard 2010, Standard 13, Section 4, which affirms that the *muḍārabah* contract is not binding, and that each contracting party is free to withdraw except in two situations:

1. The *muḍārib* has started the work; as soon as that happens, the *muḍārabah* becomes binding until the occurrence of liquidation, either actual (*ḥaqīqī*) or constructive (*ḥukmī*).
2. If the two sides have agreed to stipulate a term for the *muḍārabah*, it cannot be dissolved before the due date, except with the consent of both parties.

If an Islamic bank enters into a partnership in which the managing partner cannot be held responsible for any operational losses, it means the Islamic bank cannot collateralize the risk. Therefore, the *muḍārabah* structure of equity finance becomes riskier for Islamic banks. In fact, it is listed as the fifth risky type of financing in terms of credit risk (Khan and Ahmed, 2001). Moreover, Islamic banks as financial intermediaries have to undertake the process of project evaluation, which is very long and costly. The expertise that is needed for the decision process is complicated.

Several authors have come up with a number of solutions in order to make PLS contracts more appealing to IFIs. Bacha (1997) proposed that the *muḍārib* must 'reimburse' the *rabb al-māl* in the event of certain outcomes. Karim (2000) recommended that the *muḍārib* contribute some capital or collateral in the project. Adnan and Muḥammad (2008) argued that while cases of *muḍārib's* negligence leading to losses are taken care of in *muḍārabah*, proper systems should evolve to establish such negligence and ascribe the losses to the *muḍārib*. Khan (2003) suggested that banks guarantee investment deposits by *tabarruʿ* to minimize the agency problem.

A few papers were presented on this topic at the Fifth Regional Sharīʿah Scholars Dialogue in Phuket, Thailand in 2011. Hashim and Hussain (2011) emphasized that the view of the majority of scholars prohibiting a guarantee in *muḍārabah* is the strongest opinion. However, they said that stipulating a guarantee in *muḍārabah* using the same basis as in the imposition of liability on artisans (*taḍmīn al-ṣunnāʿ*) and on those offering their labor to the general public (*al-ajīr al-mushtarak*) seems acceptable in order to protect public interest against the loss of wealth, especially in a time when dishonesty has become typical behavior.

Reflecting on the view above, this study observes that the guarantee element in both issues, i.e., *taḍmīn al-ṣunnāʿ* and *al-ajīr al-mushtarak*, does not change the nature of either contract. Each is inclined to be categorized as *ḍamān al-yad* (liability arising from possession on trust) or *ḍamān al-mutlafāt* (indemnity for damage). Therefore, the guarantee should be allowed in both cases as no element of *qarḍ* and *ribā* appears in them. However, the case is different in a *muḍārabah* contract, as the arrangement in *muḍārabah* is providing money against a portion of the profit. Therefore, any guarantee element shall transform the contract into a *qarḍ* contract. Hence, the guarantee element has changed the essential nature of *muḍārabah* contract. Therefore, any measures to protect the investors (*rabb al-māl*) should observe these matters. Steps in that direction are still possible as long as the efforts do not exceed the boundaries of *muḍārabah's* essential nature.

Hashim and Hussain (2011, 16-17), then suggested that *muḍārabah* contracts with small and medium industries should be treated on the basis that they are liable for the capital in the event of loss, unless they are able to prove that they were free from

any negligence or irregularities in the management of the capital. The authors then gave the justifications for this view and suggested maintaining the original rules of *muḍārabah* for strong companies.

This research is of the view that the nature of *muḍārabah* has been changed to *ḍamān* when the losses are placed directly on the entrepreneur. Whenever the nature of *muḍārabah* has been shifted to a guarantee-based contract, the *rabb al-māl* is permitted to take collateral against any loss. In addition, the nature of *muḍārabah* becomes similar to *qarḍ*. Furthermore, the entrepreneurs then have to fight to prove their innocence. Another issue that may arise is, to whom they have to prove it. This needs to be proven in court, which consumes a lot of time and money. Assigning the *rabb al-māl* the right to determine wrongdoing is hardly likely to result in an objective and impartial judgment. Notwithstanding these complications, this research is interested in the idea of developing an instrument to enable the *rabb al-māl* to get compensation if entrepreneur negligence and misconduct do occur.

Karim (2011) also emphasizes the element of security or collateral in *muḍārabah* financing as practiced by Islamic banks in Indonesia. In their implementations, the *muḍārabah* contract is maintained as a trust contract, but the financier (bank) is allowed to impose collateral against any customer negligence or misconduct.

This practice is supported by AAOIFI in Sharīʿah Standard No. 13, Section 6, which allows the placement of such securities by stating:

"The capital provider is permitted to obtain guarantees from the mudarib that are adequate and enforceable on condition that the capital provider will not enforce these guarantees except in cases of misconduct, negligence or breach of contract on the part of the mudarib."

However, Adiwarman did not mention when the collateral will be used to claim compensation for clients and customers. Does the practice of the banks genuinely compensate the capital provider regarding the negligence or misconduct of the entrepreneur, or are there cases where they liquidate the collateral against losses not resulting from negligence and misconduct?

Furthermore, who will determine that the entrepreneurs have committed negligence and misconduct in their actions? Can the bank alone decide on the matter? If the bank is the only party that can determine whether entrepreneurs have committed negligence or misconduct, is it fair to customers to have their fates determined by the financiers? Who then will examine the moral hazard of the financier (*rabb al-māl*) determining customers' negligence?

2.1 The Problem of Capital and *Muqtaḍá al-ʿAqd* (nature of contract).

Hassan and Abdul Rahman (2011), like Hashim and Hussain (2011), have chosen the majority view of scholars that does not allow the element of guarantee in trust-based contracts such as *muḍārabah* and *mushārakah*, except if there is an element of *taʿaddī* (transgression) or *taqṣīr* (negligence). However, the authors raised several other issues that could be classified as controversial.(1)

Hassan and Abdul Rahman (2011) cited the views of some contemporary scholars about the types of *taʿaddī*; for example, Hussein Hamid and Abdul Hamid al-Ba'li proposed that if the *muḍārib* has done feasibility studies and the investment results differ from the projections contained therein, the *muḍārib* should be considered to have committed negligence and misconduct in his operations. In addition, the case can be analogized with the case of deceiving by deeds (*al-taghrīr bi al-fiʿl*). Here, as in Ashraf and Lokmanul Hakim's view, it is the responsibility of the *muḍārib* to prove that failure to achieve profitability, as in the feasibility studies, is not due to his negligence.

The view of Hussein Hamid and al-Ba'li places too much weight on the feasibility study as a criterion for honesty, equating honesty with profit and dishonesty with loss. Interviews with the entrepreneurs showed that the feasibility study is not a primary factor of success or a very reliable predictor of it. On the other hand, the view of Hashim and Hussain may be more suitable to protect the capital owner.

(1) This research was a commissioned research by International Research Academy for Islamic Finance (ISRA) and it was researchers' obligation to revisit the views held by paper presenters.

Hassan and Abdul Rahman (2011) also appeared to agree with Hussein Hamid in allowing liability for *taʿaddī* to cover submission of all the *muḍārabah* assets to the *rabb al-māl*, even if the *muḍārabah* assets exceed the capital costs. This view is intended to prevent the *muḍārib* from committing *taʿaddī* in situations in which the value of the assets rise during the course of the *muḍārabah* venture, which may motivate him to liquidate the *muḍārabah* assets, return the capital back to the *rabb al-māl*, and pocket the difference.

However, this view does not recognize the increased value of company properties as a profit that reflects the *muḍārib's* good management through smart purchasing strategies. Therefore, it is more preferable if both parties should share accordingly any amount above the capital amount. Furthermore, this view may not be feasible in *mushārakah* in which the IFI provides part of the working capital that is used to bear the operating costs. In this kind of *mushārakah*, the determination of profit is settled after calculating the overall profit of the company's operations. In the event of *taʿaddī*, the partner (*mushārik*) seems to be a guarantor and liable to repay the investment by surrendering all of the company's assets. It seems unfair to the partner when *mushārakah* puts profit-sharing as a major requirement.

Hassan and Abdul Rahman (2011) stressed that some past scholars such as al-Shawkānī and Ibn Taymiyyah and recent scholars such as Nazih Ḥammād allow the stipulation of *ḍamān* upon the *muḍārib* or *mushārik*. This study humbly offers a contrasting view from that of Hassan and Abdul Rahman (2011) in their interpretation of Ibn Taymiyyah's view, which they understand to support the permissibility of holding the *muḍārib* or the *mushārik* liable. The differing interpretations of Ibn Taymiyyah's statements will be discussed in detail in section 3.4.1 on the essential nature of *muḍārabah***.**

Although Nazih Ḥammād (2011) also upheld the non-guarantee element in *muḍārabah*, he inclined towards shifting the burden of proof in disputes over profit shortfalls to the *muḍārib* (entrepreneur), i.e., he would have to prove that he had not been negligent and had not engaged in misconduct.

"Based on what was discussed, the weightier opinion, in my view, is the permissibility of stipulating liability (ḍamān) on fiduciaries (umanā'). It is valid and binding as long as the stipulation does not empty the trust contract [of its content] and strip it of its true nature" (in Hassan and Abdul Rahman, 2011).

A few writers before Ḥammād explored *muḍārabah* and *mushārakah* contracts. For instance, Taqi Uthmani (2005: 38-40) discussed in detail current Islamic finance practices, including *muḍārabah* and *mushārakah*. He called attention to the element of capital guarantee in diminishing partnership (*mushārakah mutanāqiṣah*) as presenting a possible issue of Sharīʿah non-compliance in the arrangement.

Ḥamdān (2005) also explored *muḍārabah* and *mushārakah* contracts and related them to the practices of Islamic financial institutions. A few elements of his explanation may help in the present discussion.

ʿAbd Allāh Hamd al-Khuwaytir (1999) discussed *muḍārabah* in his book using the normal method of comparative *fiqh* study without any relation to Islamic finance. Perhaps this was because Islamic finance was still a relatively new phenomenon at that time. However, he did touch upon a few relevant issues related to this study, such as the nature of the *muḍārabah* contract, the capital contribution, negligence and misconduct, among others.

Ibrahīm al-Dabb (1998) explored *muḍārabah* within the scope of Islamic economics. He compared the view of the Sharīʿah on *muḍārabah* with the existing law of his country, Iraq. He too elaborated a few issues relevant to this study.

A number of studies have explored the issues of *ḍamān*, *taqṣīr*, and *taʿaddī* in some detail. Māyisah Aḥmad (2009) touched upon the issues of *tafrīṭ*, *ifrāṭ* and *taʿaddī* and the consequence of those acts, including *ḍamān*.

Al-ʿAnzī (2009) wrote clearly and systematically about compensation conditions in contracts. He discussed *taqṣīr* and *taʿaddī* as well as the ways to compensate for those acts.

ʿAlī Al-Khafīf (1981) wrote a valuable book on *ḍamān* in Islamic jurisprudence. He differentiated between contracts whose nature is guarantee and situations where a partner is liable (*ḍāmin*) because of his acts without transforming the contract into a guarantee-based contract.

After analyzing the works cited, it is very clear that a few topics require further discussion; for example:

1. Types of actions that can be considered from an Islamic point of view as *taqṣīr* or *taʿaddī*;

2. Elements of security and guarantee in *trust based contracts* that are permissible as long as they do not change the essence of *those contracts*;

3. *Ḍamān*, *Taqṣīr*, and *Taʿaddi* in Trust-Based Contracts

It is understood by the consensus of jurists that *muḍārabah* and *mushārakah* fall under the rubric of trust-based contracts (*ʿuqūd al-amānah*). Therefore, the element of *ḍamān* should not be present in them. However, almost all scholars agreed that the *rabb al-māl* in *muḍārabah* is allowed to ask for a guarantee to protect himself from *taqṣīr* and *taʿaddī*. In order to gain a wider view on *ḍamān*, *taqṣīr*, and *taʿaddī*, this section aims to further analyze *ḍamān* and the elements of *taqṣīr* and *taʿaddī* from various angles using various trust-based contracts such as *ʿāriyah*, *wakālah*, *ijārah*, and *wadīʿah*.

3.1 *Ḍamān*

Ḍamān literally means a guarantee or obligation (al-Fayruzabādi, 1997, 2/1592). Technically, *ḍamān* has two meanings, one specific and one general.

i. The specific meaning of ḍamān:

In defining *ḍamān* in the specific sense, jurists used the terms *ḍamān* and *kafālah* interchangeably with regard to both financial liability (*ḍamān al-māl*) and guaranteeing the presence of an individual upon demand (*ḍamān al-nafs*) (al-Khafīf, 1981, 5; al-ʿAnzī, 2009, 2/800). Thus, the contract of *kafālah* or *ḍamān* was defined by them as: *"Merging one 'dhimmah' to another 'dhimmah' in a claim without restriction"* (Ibn Qudāmah, 1997, 2/129).

Dhimmah is a term in Islamic jurisprudence that refers to an attribute of a person by which he or she is ready to uphold obligations and responsibilities imposed by the Lawgiver toward any *mukallaf* (sane adult) (al-Bujayrimī, 1996, 3/277).

Aḥmad al-Ṣāwī (1995, 3/272) defined *ḍamān* as: *"An undertaking—which is offered by a legally responsible person who has not been interdicted due to poor judgment and which may be expressed by any means—of responsibility for the debt of another or [an undertaking] to seek out the one who is liable on behalf of the creditor."*

Al-Bujayrimī (1996, 3/277) quoted al-Khaṭīb al-Sharbīnī's definition of *ḍamān* as *"An undertaking of liability [to discharge] an established right due upon another or bring [to a certain place] an asset that has been guaranteed or a person whose presence can be rightfully demanded." "Merging the dhimmah of the guarantor with the dhimmah of the guaranteed party in liability for a right."*

All of those definitions revolve around the same meaning: adding the liability of one entity to that of another entity such that liability for a right falls upon both entities simultaneously and without releasing the original party from the obligation. Thus, it is a very specific meaning which covers the merging of two parties' obligations regarding particular rights. The rights under this contract cover rights related to assets and persons. Various words can be used to indicate the same meaning such as *kafālah*, *ḍamān*, and *iltizām.*

AAOIFI (2010, 48) categorized this kind of *ḍamān* as a way to secure obligations and avoid loss or deferral of the payment of a debt. Other ways to secure a debt include; recording it properly, calling witnesses, and demanding a pledge.

In looking at this specific meaning and its relation to *muḍārabah* and *mushārakah*, it is permissible to seek a third party to guarantee the *muḍārib* or the other partner(s), and there is no restriction on this from the Qur'ān or Sunnah. Similarly, there is no Sharīʿah issue in permitting *ḍamān* from another to cover any *taqṣīr* or *taʿaddī.*

ii. The general meaning of ḍamān

Ḍamān can be used with a more general connotation; i.e., financial liability arising from a contract or the liability that results from an act without any contract; for example, assault.

ʿAlī al-Khafif defines *ḍamān* in this general sense, rather than limiting it to the contract of *kafālah* discussed earlier: *"The engagement of liability with an obligation to be discharged, whether by means of wealth or labour."*

This meaning covers various types of *ḍamān*, including (al-Khafīf, 1981, 5-6):

a. Liability to pay a matured debt.
b. Liability to pay a debt that is not yet due.
c. Liability by the seller to deliver the object of a sale.
d. Liability by the buyer to pay the price in a sale.
e. Liability to bring the accused person to the court at the scheduled date in criminal or commercial offence bail (*ḍamān al-nafs*).
f. Liability by the borrower to return the borrowed item.
g. Liability on the borrower to replace the borrowed item in the event of its destruction.
h. Liability to replace something or pay its value in the event of misconduct.

Therefore, al-Khafif concluded that *ḍamān* relates to a number of areas as follows:

1. *Ḍamān* related to an asset, such as liability for a debt, liability for destruction, liability for blood-money and indemnity for injury.

2. *Ḍamān* related to actions, such as liability to deliver a tangible asset, surrender an accused person under one's bail or pay a debt.

3. *Ḍamān* because of a request, to be performed immediately, or at a certain future date, or at an unspecified time, especially a request to borrow an item (*ʿāriyah*).

The general meaning of *ḍamān* should be discussed further to know the view of Islamic law on various issues such as the liability of the *muḍārib* or partner to pay for any losses that did not result from their carelessness or misconduct.

3.1.1 Textual Evidence on the General Meaning of Ḍamān

The general meaning of *ḍamān* as discussed earlier is a financial liability resulting from execution of a contract or from a non-contractual act such as assault. Evidence for it can be found in various verses of the Qur'ān and Aḥādīth of the Prophet (peace be upon him) as follows:

i. Allah Almighty says in sūrah al-Nisā', verse 58:

"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice."

The verse explicitly commands mankind to discharge obligations towards those to whom they are owed. The idea of *ḍamān* in the event of destruction by the one who is holding the asset is congruent with the command to render trusts.

ii. In sūrah al-Baqarah, verse 194, Allah Almighty says:

"So if anyone commits aggression against you, attack him as he attacked you."

The idea of liability to replace or compensate commensurate with what has been destroyed is clearly stated in the above verse. This kind of liability is *ḍamān* in its general meaning.

iii. Prophet Muḥammad (peace be upon him) said:

"Harm shall neither be inflicted nor reciprocated." (al-Bayhaqī, 1344H, no.11718, 6/69).

The Ḥadīth states that one should neither harm oneself nor others. The concept of liability engendered by executing a contract is paramount in ensuring that the contracting parties perform their contractual obligations such as, rendering the sold item and paying the price. The Ḥadīth also covers liability arising from non-contractual acts whenever a person goes beyond the boundary permitted to him such as, disturbing others' territories.

iv. Nuʿmān ibn Bashīr narrated that Allah's Messenger (PBUH) said:

"If anyone tethered an animal in a road used by Muslims or in one of their markets, and the animal

trod on someone's hand or foot, [the owner] is liable."[2] (al-Dāraquṭnī, 1966, no. 285, 3/179).

The narration indicates that the owner of an animal is liable for any injuries it causes to persons in public spaces.

v. Anas ibn Mālik narrated:

Prophet Muḥammad (peace be upon him) was with one of his wives when another wife sent a servant with a bowl of food. [The first wife] struck it with her hand and broke the bowl. The Prophet rejoined the fractured bowl, put the food in it and said, 'Eat.' He kept holding the fractured bowl until all the food had been taken. Later, he sent back a bowl that had not been broken and kept the broken bowl [in the house of the wife who broke it]. (al-Bukhārī, 2004, 283, 284, no. 2481).

The practice of the Prophet (peace be upon him) in replacing the broken bowl shows the concept of *ḍamān* as per its general meaning.

All the evidence stresses the concept of *ḍamān* where it relates directly to the consequences of contracts and other human acts. Discharging the trust liability when the original item has been destroyed can be done in two ways: by either replacing the item with a similar item in the market or with the value of the item.

3.1.2 The Occurrence of Ḍamān in Contracts

As mentioned in the previous discussion on the general meaning of *ḍamān*, liability arises in one of two ways (al-Khafīf, 1981, 17):

i. Intrinsic Occurrence

A thorough analysis of the nominate contracts of the Sharīʿah reveals that Allah Almighty has legitimated them for certain reasons and that *ḍamān* is not one of them; however, *ḍamān* is attendant to them. For instance, the purpose of a sale is to effect an exchange of ownership, and as a result, the seller is obliged and liable to deliver the contracted item to the buyer whenever the buyer has paid the price.

ii. Occurrence of ḍamān by stipulation in the contract or by customary need.

Liability may arise as a consequence of its stipulation in a contract or due to its recognition by customary practice; for example, the obligation upon the seller to return the money in the event he is unable to deliver the purchased item.

3.1.3 Types of Ḍamān

A number of authors have discussed in detail the categories of *ḍamān*, though they may differ in their categorization of a few types. A thorough analysis of this topic has led us to understand that *ḍamān* can be categorized into three categories (al-Suyūtī, 1983, 361-362; al-Khafīf, 1981, 17; al-ʿAnzī, 2009, 2/800; AAOIFI, 2010, 48):

i. Ḍamān al-ʿaqd (liability arising from a contract)

Ḍamān al-ʿaqd is a liability that arises from a contract. Al-Suyūtī said:

"That which is definitely liable as a contractual liability is what has been stipulated in a contract of sale, salam, ijārah or ṣulḥ."

Normally the *ḍamān* of something is derived from the content of the contract. The liability to replace a contracted item shall not necessarily refer to the actual value of the item, but shall cover the stated price. Therefore, it should be understood that *ḍamān al-ʿaqd* does not uphold the principle of actual value of the contracted matter, whether it is a tangible or intangible asset; rather, it requires payment and acceptance of the stated price.

ii. Ḍamān al-itlāf (liability due to damage)

This liability is a consequence of an act, i.e., damaging or destroying something. The obligation must be performed by the party responsible for the damage. For instance, a person is not responsible for his neighbor's house. However, if his son smashes the neighbor's window, that act makes the parent liable to replace the window. The actual value of the item is the basis for any restitution, and the replacement or compensation should not be less or more than its value.

(2) Al-Bayhaqī (1994, 8:344, Ḥadīth no. 17471), who narrated the same Ḥadīth , judged the chain of narrators (*isnād*) to be weak due to the presence of two weak narrators.

iii. Ḍamān al-yadd (liability arising from possession on trust)

It is the liability on someone who was originally liable to hold something in trust; however, as a result of his carelessness, the asset is damaged or destroyed; thus, he becomes liable to pay. For instance, an agent is under obligation to hold his principal's asset; however, the asset was damaged or destroyed due to his carelessness. As with the previous type, the basic rule of restitution for this kind of *ḍamān* is the actual value of the item, and any replacement or compensation should not be less or more than its value.

3.1.4 Types of Contract with Regard to Ḍamān

Contracts in Islamic law can be divided into two categories with regards to their relation to *ḍamān* (al-Khafīf, 1981, 21; al-ʿAnzī, 2009, 2/824):

i. Contracts that have the element of liability (ḍamān) after their execution, such as sales, leasing, marriage, divorce with compensation (khulʿ), settlement of a dispute by a transfer of wealth (ṣulḥ), and guarantee (kafālah). The Shāfiʿīs and Ḥanbalīs add gratuitous loan of an asset (ʿāriyah) to this list. Scholars agreed on the principle that ḍamān is mandatory for this category regardless of whether the contract is valid or void. For instance, the buyer is liable after receiving the sold item in a void contract. Therefore, it is mandatory upon him to return the asset safely.

ii. Trust-based contracts that do not have *ḍamān* such as *muḍārabah*, *mushārakah*, *wakālah,* deposit for safekeeping (*wadīʿah*), and charitable contracts (*ʿuqūd al-tabarruʿāt*) such as *hibah* and *ṣadaqah.* The Ḥanafīs and Mālikīs consider gratuitous loan of an asset to be of this category. As *ḍamān* is not mandatory in these contracts, it is also not binding when such contracts are void or voidable.

Notwithstanding this classification, the study is meant to further analyze this latter category on the possibility that changes of existing custom over time could cause a change in the basic rule, and thus make the contracting parties, or one of them, liable to a certain extent or require them to prove that they are free from any misconduct or negligence in order to avoid liability.

3.2 The Concepts of *Taqṣīr* and *Taʿaddī*

In order to differentiate between these two terms, one must understand their meanings

3.2.1 Definition of Taqṣīr

Taqṣīr is translated literally as negligence. The word *tafrīṭ* has the same meaning as *taqṣīr*; hence, it is used interchangeably with it (al-ʿAnzī, 2009, 2/702). The following are some explanations of the meaning of *taqṣīr* or *tafrīṭ* offered by scholars (al-Raḥībanī, 1961, 4/148):

Tafrīṭ is deficiency in safekeeping something.

"[What would] normally [be considered] deficiency in safekeeping or deficiency in safekeeping of an asset and in maintaining its full usefulness" (al-ʿĀmilī, n.d., 4/202 in Māyisah Aḥmad, 2009, 19).

In other words, scholars relate the issue to a deficiency of effort in performing the act of safekeeping.

The contemporary scholar, ʿAlī Muḥyuddīn al-Quradāghī (as cited in the website of *al-Ittiḥād al-ʿĀlamī li ʿUlamā' al-Muslimīn*, 2013) explained that *taqṣīr* is negligence whenever it causes harm.

"Taqṣīr is carelessness, for whatever reason, that causes harm."

There is a clear relation between negligence and harm; therefore, any negligence which does not cause harm is not a reason to receive compensation; for example, negligence in keeping an item properly that, despite the negligence, remains safe.

In interpreting the act of negligence, al-Quradāghī said:

"Serious carelessness and non-observance of the requirements of administration and of the management process such as attention and due regard, all these qualify as taqṣīr (negligence)."

On the other hand, AAOIFI in its Sharīʿah Standards (2012, 48) defined *taqṣīr* as:

"Failing to do what one is obliged to do by the dictates of the Sharīʿah or the contract or custom."

The above-mentioned definitions show that *taqṣīr* covers many types of wrongdoing and, thus, it is very complicated to list down every act that qualifies as *taqṣīr*. However, listing those acts that qualify as *taqṣīr* would enable the *muḍārib* to avoid them and would help narrow down the uncertainty in the definition.

3.2.2 Definition of Taʿaddī

Taʿaddī is literally translated as exceeding, transcending, going beyond limits, etc., as mentioned in *Muʿjam Maqāyīs al-Lughah* (Aḥmad Faris Zakarīyā, 1979, 4/249):

"*Wrongdoing and exceeding the limits that should be observed*.'

Ibn Taymiyyah (n.d., 30/93) defined *taʿaddī* as:

"*Doing what should not be done by anyone."*

Al-Quradāghī (2013) defined *taʿaddī* as:

"Doing what neither the Sharīʿah nor the owner has allowed."

Al-ʿAnzī states that *taʿaddī* covers all acts that cause harm and corruption, and al-Quradāghī agrees; for example, dishonesty, insincerity, fraud, forgery, theft, misuse of power, and violation of the limits of power in order to obtain any personal benefit (al-ʿAnzī, 2009, 2/701).

AAOIFI (2012, 48) summarized the definitions by stating:

"Doing something that one has no right to do as per the dictates of the Sharīʿah or the contract or custom."

Hence, a person's behavior is classified as *taqṣīr* when he or she has failed to do the required acts, whereas it is classified as *taʿaddī* when he or she commits an act beyond the limits allowed. Although some scholars considered *taqṣīr* or *tafrīṭ* to be a subcategory of *taʿaddī*, this study is inclined towards separating the two terms as discussed above.

3.2.3 Verses on Taqṣīr and Taʿaddī in the Holy Qur'ān

Allah Almighty has mentioned in various places in the Qur'ān the importance of avoiding any act that exceeds the limits He has imposed:

Allah Almighty said in sūrah al-Baqarah, 229:

"These are the limits (imposed by) Allah. Transgress them not. For whoever transgresses Allah's limits are wrong-doers."

The verse explicitly informs mankind that they should respect the boundaries set up by Allah Almighty and that not doing so will place them among the wrong-doers. In sūrah al-Nisā': 58, Allah Almighty has commanded mankind to uphold the trust that was given to them:

"Lo! Allah commands you to return things entrusted to you to their rightful owners, and, if you judge between mankind, that you judge justly."

Verse 1 of sūrah al-Ṭalāq has also elaborated the implications of exceeding the boundaries set by Allah Almighty.

"Such are the limits [imposed by] Allah; and whosoever transgresses Allah's limits, he verily has wronged his soul."

3.3 *ʿUqūd al-Amānah* (trust-based contracts) and Their Divisions

ʿUqūd al-amanāh are defined as contracts in which the subject matter, i.e. the possessed asset, is a trust placed in the hand of the possessor, whereby he is not liable for any loss or defect except in the event of negligence or misconduct. Among the contracts that fall under this category are *wadīʿah*, *rahn*, *ijārah*, *shirkah*, *muḍārabah*, and *wakālah* (al-ʿAnzī, 2009: 2/700).

The divisions of *ʿuqūd al-amānah* from the angle of categorizing them into contracts of exchange (*muʿāwaḍah*) or otherwise are as follows:

1. *ʿUqūd al-tabarruʿāt* (charitable contracts) such as *wadīʿah*, *wakālah* without fee, *rahn* and *ʿāriyah*.
2. Contracts of exchange such as leasing and services.
3. Partnership contracts such as *muḍārabah* and *mushārakah*.

3.4 Trust contracts versus guarantee-based contracts

Examining the stance of the Sharīʿah towards trust-based contracts (*ʿuqūd al-amānāt*) and guarantee-based contracts (*ʿuqūd al-ḍamānāt*), requires that these concepts be analyzed in detail.

3.4.1 The loss of a borrowed item in the hand of the borrower

Scholars disputed whether the gratuitous loan of a tangible asset (*ʿāriyah*) should be categorized as a guaranteed contract or a trust contract.

i. The First View

The Ḥanafī School is of the view that *ʿāriyah* in its original form is not to be guaranteed and the trustee is not liable to replace the borrowed item in the event of its loss or destruction through no negligence or misconduct by the borrower (al-Kāsānī, 2000, 5/323).

The Ḥadīth below clearly states that the borrower is not under obligation to replace it or to pay any compensation (al-Bayhaqī, 2001, 5/371):

The Prophet (peace be upon him) is reported to have said: "There is no obligation of restitution on the borrower who is not treacherous [if the item is lost or destroyed]."

ii. The Second View

The Shāfiʿī School and Ḥanbalī School are of the view that *ʿāriyah* is a liability contract *(ʿaqd al-ḍamānah*). The borrower is liable in the event that he lost the item or if it was destroyed while in his possession (al-Shīrāzī, 1995, 2/189; al-Bayjurī, 1999, 2/18; Ibn Qudāmah, n.d., 5/358; al-Jazīrī, 2001, 774).

They are of the view that the borrower has to replace the lost item regardless of the cause of the loss, based upon the following Ḥadīth (al-Sajistānī, Abu Dāwūd, no. 3564):

The Prophet (peace be upon him) sought to borrow armor from Ṣafwān for the expedition against Ḥunayn. Ṣafwān asked, "[Are you] commandeering it, Muḥammad?" He replied, "No, it is being borrowed with a guarantee [of its safe return]."

The proponents of this view argue that the tradition narrated by Ṣafwān is more authentic and that the Ḥadīth cited in support of the opposing view is not well known (*mashhūr*) (Ibn Rushd al-Ḥafīd,1995, 2/255). Moreover, the item was taken for the benefit of the borrower for free; therefore, it is his or her responsibility to return it to the owner safely. This justifies making the borrower liable for it.

iii. The Third View

The Mālikī School differentiates between items that can disappear or be concealed (*mā yughāb ʿalayhi*) and those that cannot. Items classified as liable to being concealed are small items that can be kept in cupboards, boxes, lockers, etc. (Ibn Rushd al-Ḥafīd, 1995, 2/255; al-Jazīrī, 2001, 773).

According to them, no liability should be imposed on the borrower for items that are impossible to conceal (*mā lā yughāb ʿalayhi*) such as property and animals. However, the borrower is liable for items that can be concealed unless he has proof to show that their disappearance is not due to him (Ibn Rushd al-Ḥafīd, 1995, 2/255; al-Jazīrī, 2001, 773).

With regards to the evidence cited in support of the other two views, they used all of it but divided the application of each to the categories they identified, i.e., the first Ḥadīth, which negates borrower liability, applies to items that cannot be concealed (*mā lā yughāb*) while the second Ḥadīth, which affirms borrower liability, applies to items that can be concealed (*mā yughāb*).

Scholars' discussions

The dispute among scholars on this matter relates to differences among them in determining the status of the relevant Aḥadīth.

As for the Ḥadīth cited for the first view, scholars criticized its status by saying that its chain of narration (*isnād*) stops at Shurayḥ, a judge from among the Tābiʿīn. There are two weak (*ḍaʿīf*) narrators in the *isnād* of the version that presents the text as a statement of Prophet Muḥammad (peace be upon him). Therefore, it is not admissible evidence for a legal argument. Even if the *isnād* were valid, the opposing party held that it would not be permissible to understand it in support of the first view for two reasons: 1) it negates liability for the usufruct and for wear from normal use; and 2) the term *mughill* in the Ḥadīth does not refer to treachery (*khiyānah*); rather, it means 'possessing'. Hence, the borrower is not liable as long as he does not possess the item but becomes liable when he takes possession of it (Ibn Qudāmah, n.d., 5/356; Ibn Ḥajar al-ʿAsqalānī, n.d., 11/210; Al-Raḥībanī, 1961, 3/742).

The Ḥadīth of Ṣafwān was rejected by some scholars on the basis of inconsistency (*iḍṭirāb*) in its *isnād* and wordings. The defects (*ʿilal*) were pointed out by Ibn Ḥazm and Ibn Qaṭṭān (Ibn Ḥajar al-ʿAsqalānī, n.d., 11/210, Al-Shawkānī, n.d., 6/30, Ibn Ḥazm, n.d., 9/131). However, a few scholars such as Ibn Rushd categorized the Ḥadīth of Ṣafwān as *ṣaḥīḥ* (Ibn Rushd al-Ḥafīd, *op cit.,* 2:257).

The third view has been criticized on the grounds that there is no textual evidence to differentiate between that which can be concealed and that which cannot, which renders the categorization arbitrary and thus weak. Moreover, imposing *ḍamān* on that which can be concealed is an accusation, and an accusation does not have the authority to make others liable as it has only the status of assumption (Ibn Qudāmah, n.d., 5/356).

Meanwhile, those who combine both items of evidence say that the borrower is obliged to replace the item or pay its value whenever there is no proof that the item was destroyed, as replacement or compensation is required in the event of loss. However, no replacement or compensation is required in the event of the destruction of the item.

This study is inclined towards the view that makes use of all the relevant evidence by applying each Ḥadīth to a separate category. Furthermore, in the current practice of *ʿāriyah*, giving the borrower the right to use the item without any obligation to replace it contradicts the owner's willingness to sacrifice his own right to use it (al-Bayjurī, 1999, 2/18; al-ʿAnzī, 2009, 2/728). Hence, it is just that the borrower should be responsible to replace or to pay the value of the item if the borrowed item is missing or destroyed. Ignoring this condition would impose an undue burden on the owner to prove that the borrower has neglected the trust. On the other hand, this view does not contradict the essence of the *ʿāriyah* contract as its content remains untouched.

3.4.2 The issue of the safe-keeper's claim that the deposited item has been stolen or disappeared and he is not under obligation to replace it

Wadīʿah is a contract in which money or another item is given to a trustworthy person for the purpose of safekeeping. This kind of contract is meant to help others in safekeeping their assets when they are not able to keep it themselves for any reason (Māyisah Aḥmad, 2009, 108-114).

There is consensus among scholars that *wadīʿah* is a trust contract and that the trustee is not liable to replace the item in the event of its loss, theft, or damage as long as he has not committed *taqṣīr* or *taʿaddī* (Ibn Rushd al-Ḥafīd, 1995, 2/253; al-Marghīnānī, n.d., 3/213; al-Bayjurī,1999, 2/116,117; al-Mardāwī, n.d., 1102).

Ibn Rushd al-Ḥafīd (1995, 2/253), of the Mālikī school of thought, says:

"If someone deposited the item on the condition that it be guaranteed [by the safe-keeper in the event of loss], the majority of scholars are of the view that [the safe-keeper] bears no liability. Others say the safe-keeper is liable. In general, scholars are in consensus that the safe-keeper is not liable unless he transgressed."

The element of *ḍamān* should not exist as the safe-keeper has to bear an obligation without any compensation for his efforts. Thus, any condition to make the safe-keeper liable may contradict the essence of the *wadīʿah* contract. However, in the event of *taqṣīr* or *taʿaddī*, scholars have various explanations in determining the cases where the safe-keeper is under obligation to replace the item or repay its value (Al-Jazīrī, 2001,755-757).

AAOIFI, in its 2010 Sharīʿah Standards, no. 5, clause 2/2/1, mentioned that it is not permissible to stipulate *ḍamān* in *wadīʿah*.

3.4.3 ʿUqūd al-ijārah (lease contracts): If the leased item is lost while in the possession of the lessee

In a situation where the lessee claims that the leased item has been lost, scholars have not reached a consensus on the matter.

According to Imāms Abū Yūsuf and Muḥammad ibn al-Ḥasan of the Ḥanafīs, the lessee is under obligation to replace the item unless it was destroyed by fire, sinking or theft (al-Kāsānī, 2000, 4/72):

"Abū Yūsuf and Muḥammad said he is liable for it except in situations of widespread fire, widespread submergence or brazen theft."

According to them, this view arises from the following Ḥadīth:

Allah's Messenger (pbuh) said, "The hand is responsible for what it took until it returns it." (3) (Aḥmad, no. 20098, 5/8, and al-Tirmidhī, n.d., no. 1266, 3/566).

Imām Abū Yūsuf and Imām Muḥammad are of the view that whenever someone is unable to replace the item, he has to pay its value.

The Mālikī School, on the other hand, is of the view that there is no *ḍamān alʿaqd* (liability arising from a contract) on the lessee as his status is fiduciary, i.e., he is *amīn*. Therefore, there is no obligation on the lessee to replace the item unless *taqṣīr* or *taʿaddī* occurred. However, they agreed to exclude a few things from this general rule when the element of greed is obvious in an item; for example, foodstuff (Ibn Rushd al-Ḥafīd, 1995, 2/187). It is obvious in our time that money is the object of most people's greed.

AAOIFI (2010, 48) in its general pronouncement on *ḍamān*, under standard No. 5, clause 2/3, has stressed that there should be no *ḍamān* on the lessee except in the case of *taʿaddī* and *taqṣīr*.

As for the case of *al-ajīr al-mushtarak* (a worker who accepts labor-lease contracts with the general public), ʿUmar ibn al-Khaṭṭāb imposed *ḍamān* on such workers in order to protect people's wealth. This is the position of the Ḥanafī School, one view of the Shāfiʿī School and one view of the Ḥanbalī School (al-Kāsānī, 2000, 4/72; Ibn Qudāmah, n.d., 6,/106; al-Jazīrī, 2001, 698).

Protecting people's rights from greed has become a justification for allowing *ḍamān* in *ijārah*, as was practiced by ʿUmar ibn al-Khaṭṭāb, as long as no element of *ribā* arises from it. Ibn Rushd noted that the *ḍamān* is imposed for two reasons: *taʿaddī* and public benefit (*maṣlaḥah*) in protecting people's wealth. Those who impose *ḍamān* in this kind of contract have no textual evidence for doing so; the basis of their position is *maṣlaḥah* and *sadd al-dharīʿah* (Ibn Rushd al-Ḥafīd, 1995, 2/187).

(3) Imām al-Tirmidhī graded the Ḥadīth as *ḥasan ṣaḥīḥ*.

3.4.4 ʿUqūd al-wakālah (agency contracts): An item handed over to an agent was lost through no fault of the agent

A question that may arise from this transaction is whether the depositor can request proof that the agent has acted appropriately in safeguarding the depositor's rights. According to al-Kasānī (2000, 5/38):

That which is in the possession of the agent for sale or purchase, or accepting payment of a debt or of a tangible asset [owed to the principal], or for paying a debt [owed by the principal] is a trust of the same status as wadīʿah (a deposit for safekeeping). [That is] because his possession on behalf of the principal is of the same status as one who accepts a deposit for safekeeping. Therefore, he is liable for [the same reasons] that the trustee who accepts a deposit for safekeeping is liable, and he is free of liability for [the same reasons]. Moreover, his statement is evidence in defending himself from paying any compensation.

The Mālikīs, Shāfiʿīs and Ḥanbalīs agreed with the Ḥanafī School that the agent's possession gives him the status of a fiduciary (*amīn*) and that, in general, he is not liable for any replacement or financial restitution (Ibn Rushd al-Ḥafīd, 1995, 2/247; al-Bayjurī, 1999, 1/743; Ibn Qudāmah, n.d., 5/229). However, they dispute about whether he is liable in a few situations; for example, when the agent buys at a price significantly higher than the market price or sells at a price significantly lower than the market price; or purchases an item having a defect; or delivers the sold item before accepting the payment (al-Bayjurī, 1999, 1/744). The disagreement about these cases would appear to revolve around whether these acts qualify as negligence or misconduct.

3.4.5 The findings of the discussion on ʿuqūd al-amānāt (trust-based contracts)

In conclusion, scholars agreed that the above mentioned contracts are, in general, trust-based contracts. When they decided that the fiduciary possessor should be held liable in a few cases, it does not mean that they transformed the contract into a guarantee-based contract (*ʿaqd al-ḍamānah*). They were discussing this matter under the rubric of

ḍamān al-itlāf (indemnity for damage) or *ḍamān al-yad* (liability arising from possession on trust). Therefore, it is not prohibited for the owner to stipulate that the fiduciary possessor should prove that he has no intention of putting the item in a dangerous situation which leads to its loss. Any inability of the fiduciary to disclose the real facts may lead an independent party (either the court or the arbitrator) to issue a judgment against him.

The considerations of protecting people's wealth and of typical greed are treated as evidence in disputes arising from trust-based contracts when the fiduciary is obliged to defend himself from prosecution of a claim against him. It is permissible to do so as long as the permissibility does not become a trick (*ḥīlah*) to consume *ribā* by transforming the contract into a *ribā*-sensitive contract such as a loan.

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التقييم الشرعي لمفاهيم الضمان والتقصيروالتعدي في العقود القائمة على الثقة

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المستخلص: تهدف الدراسة إلى فحص مفاهيم الضمان، والتقصير، والتعدي من منظور إسلامي مع بيان علاقتها بنوعي العقود؛ عقود الأمانة وعقود الضمان. أُجرِيت الدراسة على أساس منهج البحث الوصفي والذي يتبع أسلوب تحليل المحتوى، والمقابلات، والملاحظات وفق المراحل التي تمر عليها الدراسة. توصلت الدراسة إلى أن مسؤولية الضمان يجب أن يتحملها الأمين في بعض الحالات، غير أن ذلك لا يستلزم أن تتحول عقود الأمانات إلى عقود ضمان، لأن فرض الضمان عليه في بعض الحالات منبثق من ضمان الإتلاف وضمان اليد. ومن هذا المنطلق، لا مانع للمالك أن يشترط على الأمين أن يبين براءته من وضع الأموال المؤتمنة في خطر يؤدي إلى الخسران. وينتج من عدم استطاعته في تقديم براءة نفسه من خلال بيان تفاصيل حقيقية لها، تدخل الطرف الثالث– سواء المحكمة أو الحَكم الشرعي- في إصدار قرار ضده، إذا اعتبرت الدراسة حفظ أموال الناس وهيمنة الطمع على المجتمع في الوقت الحالي كبينات ضد الأمين.

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