

WADIAH: CONCEPT, APPLICATION AND ISSUES

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INTRODUCTION

- Meaning of the term: when a person is entrusted to keep an asset for the benefit of an owner
- Related terms: amanah, deposit, trust, bailment
- Authorities from the Quran and Sunnah on wadiah
- Acceptance of wadiah as benevolent act and not for profit: the need for actual delivery

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DUTY OF CARE EXPECTED OF A TRUSTEE/KEEPER

- Basically possession is as yadd amanah
- The reason why it is yadd amanah
- When fees are collected for safekeeping, issue of liability/daman will arise
- Ajir mushtarak/hiring and public policy consideration
- The relevance of negligence/taqsir and liability for loss in cases where fees are charged
- The articulation by Hanafi jurists

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WADIAH AND IJARAH

- Wadiah proper is tabarru'
- If fees are charged, ijarah contract is created thus contract become binding on both parties- Hanafi and Maliki
- Only if word ijarah is used according to Shafi and Hanbali
- The nature of ijarah and duty of care expected of the hired keeper

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PERMISSION TO USE BY OWNER

- Nature of the property is relevant to be ascertained
- Property still intact after use or diminished by the use
- Whether permission given results in qard/lending
- Or the relationship remains as wadiah
- Legal implications depend on which possibility
- The real intentions of parties: wadiah or qard?

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USE BY TRUSTEE WITH PERMISSION

- If by permission all jurists allow it
- Implied permission and right to use
- Liability of trustee who uses with permission-yadd dhamanah or amanah?
- Three views 1) possession turns to yadd dhamanah- Hanbali 2) permission invalidates wadiah contract-yadd dhamanah also-shafi 3) Still considered as wadiah-possession as yadd amanah- Hanafi

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USE WITHOUT PERMISSION

- All jurists agree that yadd dhamanah is created
- Trustee has to pay reasonable fee for such usage: ujr at al-mithl-Shafi and Maliki
- Contract of wadiyah thus terminated and trustee becomes wrongful possessor (ghasib)-Shafie and Hanbali
- But only if use comes within the ambit of breach of trust i.e not for good reasons/justification

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USE WITHOUT PERMISSION FOR TRADE PURPOSES

- Possession turns into yadd dhamanah
- Income generated from such a use: who own it?
- The owner or
- or The trustee
- or Bayt al-mal or
- Paid to charity or
- be divided according to mudharabah

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USE OF MONEY DEPOSIT WITHOUT PERMISSION-borrowing deposited fund

- Juristic opinions differ because money is fungible-mithliyy
- Majority view says it is a wrongful act giving rise to strict liability
- Other view indicates that distinction be made between solvent and insolvent trustee
- Solvent trustee can use (some say not recommended) even without permission of the owner of fund provided he have witnesses to record the fact

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WADIAH FUND IN ISLAMIC FINANCIAL INSTITUTIONS

- Deposit account based on wadiah
- Deposit account based on wadiah yadd dhamanah
- Deposit account based on qard
- Deposit account based on Mudharabah both general and specific
- Trust account

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RIGHT TO SET-OFF IN WADIAH

- All jurists agree that if the other party is not wrongful in his attitude, his property/wadiah cannot be forfeited/taken without permission
- If his is wrongful, the jurists differ in their opinions
- 1. Can take/do set-off whether the property is similar or not with the one taken/not paid but must follow to conditions 1. his action is not risky 2) will not tarnish his image @ accused of being dishonest trustee- Maliki and Shafi
- 2) Cannot take or do set-off at all- Imam Malik
- 3) Can take or do set-off with property is similar to the one taken or denied- Hanafi and Hanbali

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WAYS THROUGH WHICH WADIAH COMES TO AN END

- Termination by either party
- Death of any party
- Either party has lost legal capacity
- The owner affect transfer of ownership of the property to third party
- Wrongdoing/fault or negligence committed by trustee- yadd dhamanah is created thus
- When the owner demands return of the property but the trustee denies him the right @ refuse to return it back- yadd dhamanah is created thus

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