



# Application of Constructive Possession (*Qabd Hukmi*) In Islamic Banking Products: *Shariah* Analysis

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**Abstract:** Possession is one of the fundamental elements to acquire wealth in a valid manner. Financial contracts will not be concluded and irrevocable without possession of respective subject matter. It has been observed that in contemporary Islamic banking products and transactions mostly, not the real, but a legal or constructive possession is practiced, and in this context the customary practices play a significant role in determining the proper mode of possession. Thus, this effort intends to investigate the essence of possession and its appropriate mode for contemporary Islamic financial transactions. This is a library-based research and it has adopted qualitative document and content analysis. The classical references to prominent Schools of Islamic law have been utilized as the primary tools to perform this analysis and investigation. The study finds out that the essence of possession is to relinquish it to the merchandise and its rightful beneficiary, so that it can be enjoyed without any interruption. It posits that the mode of possession would be varied subject to the nature of the commodity itself.

**Keywords:** Constructive Possession, *Qabd Hukmi*, Islamic Banking Products, *Shariah*, Relinquish

**JEL Classification:** K12

## Introduction

Possession of subject matter is one of the important elements of the sale contract. Anything which prevents the possession, such as excessive ambiguity (*gharar*), ignorance, etc. makes the sale null and void. Possession could be valid and could also be invalid. In turn, it has an effect on the conclusion and completion of the contract. Possession has several modes which vary according to the nature of the

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subject matter of the contract. In addition, possession of the buyer restricts the rights of the seller in the subject matter.

Possession has some significant effects on the transaction. Through a valid possession, the liability of the merchandise is transferred to the party who possesses that. Once the purchaser possesses the subject matter, and thereafter if anything happens such as devastation, defect, decrease and so forth, he should bear that. Also, by a valid possession the possessor acquires the right to dispose of the merchandise possessed. So, in a sale contract, after a valid possession, the purchaser obtains the authority to exercise all of his lawful rights in the subject matter without any obstruction thereof. In addition, among the important effects of possession is the obligation of payment on the party that possesses the commodity. So, once the purchaser possesses the goods, he has to settle the payment immediately, unless there is any prearranged agreement on the delayed payment (Ministry of Awqaf & Religious Affairs, 1992).

This paper endeavors to discuss the essence of possession, legal evidence and the obligation of possession in the contracts, followed by discussion on various modes of possession in performing a valid transaction. Also, it attempts to analyze the ambit of the effect of the possession to restrict the actions of the owners in their properties. Finally, the study focuses on finding the appropriate mode of possession in the contemporary banking and financial transactions.

## Literature Review

### *Meaning of Possession (qabd)*

*Qabd* means *akhadh*, i.e. to receive, *qabada al-shay'* means *akhadhahu*, i.e. he received the thing, *sara al-shay' fi qabdatik* means *sara fi milkik*, i.e. it has become your possession, *qabbadahu al-mal*, i.e. he gave him the wealth (al-Razi, 2008). Lexically the word '*qabd*' gives the sense of receiving, taking, possessing, accumulating and so forth. Ibn Faris (1399AH) says the root word '*q,b,d*' refers to the thing which is received. Ibn Manzur (1990) says *qabd* means to take anything by hand, and '*qabdah*' refers to the thing that has been received by hand. Moreover, Ibn al-A'rabi mentions several connotations of *qabd* as it means to accept the commodity, though it is not transferred to the recipient's custody. Also, it means to acquire the goods and transfer it to the custody of the beneficiary. *Qabd* also refers to take the thing by hand physically. To have something in one's *qabdah* means having that in his holding and control (Abu Jayb, 1982).

In terminological sense *qabd* means to receive and possess the thing, either physically or legally. Possessing something legally means to relinquish to the beneficiary, his right. It would be in the ruling of the item received physically, though in reality it may not be possessed. Hanafi Scholar al-Kasani (2005) defines *qabd* as enabling (*tamkin*), relinquishing (*takhalli*) and removing the obstacles customarily, commonly and really. Tasuli (1998) says it is getting the control over the things acquired and occupied. In addition, Hammad (1398AHa) defines *qabd* as being capable of dealing in subject matter of the contract.

Although lexically *qabd* means taking something, or taking control thereof, in *fiqhi* terms it is more particular than that as it is pertinent to the subject matter of the contract. Yet, scholars differ over its meaning and essence, pursuant to their various viewpoints in the way of executing the possession properly. Moreover, Muslim jurists mostly do not want to give a comprehensive definition of *qabd* encompassing all its types; rather they discuss it through the description of various types thereof. Also, they trace back the issues of *qabd* to the custom as a fundamental principle for it.

### *Terms Related to Qabd*

There are some other words and terms that are close and related to *qabd*, as follows:

*Naqd*: Muslim jurist use the word '*naqd*' in the sense of possession and delivery when the item delivered is cash. It is said, *naqadtu al-rajula al-darahima*, which means *a'taytuhu*, i.e. I have given it, and then *fa intaqadaha*, which means '*qabadaha*' i.e. he has possessed it (al-Fayyumi, 1323 AH). *Naqd* is the opposite of debt, loan and deferment. Nevertheless, as Ibn Manzur (1990) and Ibn Faris (1399AH) say, delivery and possession of the dirham is called *naqd* because upon its delivery and possession, the contracting parties can investigate and examine its quality and soundness (*naqd*). Ibn Juzayy (2005) says, *bay' al-naqd* refers to the contract in which the commodity and price are delivered and possessed immediately (Ministry of Awqaf & Religious Affairs, 1992; Hammad, 1990b).

*Munajazah*: Scholars of the Maliki School use this term to mean the delivery and possession of the commodity and price immediately after conclusion of the contract. It is said, *bi'tuhu najizan bi najizin*, i.e. I have exchanged it on spot; and *shay najiz* refers to the item that is present in the contracting session, and if said, *bi'tuhu gha'iban bi najizin*, i.e. I have sold the deferred item with the cash on spot (Hammad, 1990b).

*Hiyazah*: Mostly the Maliki School uses this term. They use this term in general and exclusive senses. In general sense, by this word they mean to establish the control over the asset and to be able to deal in that. So, in general sense *hiyazah* is a synonym of *qabd*. In exclusive sense, by the word '*hiyazah*' the Maliki School refers to the deed and title of the ownership for the one who alleges it. This denotes the actual authority over the thing which someone exercises however the person could or could not be the proprietor of that thing (Ministry of Awqaf & Religious Affairs, 1992; Hammad, 1990b).

*Yad*: Muslim scholars use the word '*yad*' in the sense of acquiring something and being capable of dealing and utilizing that. In this connection, the word '*yad*' denotes the same sense as of *qabd* (Ministry of Awqaf & Religious Affairs, 1992).

*Yad bil Yad*: The majority scholars use this term to mean the delivery and possession of both merchandise and price in the contracting session. For example, it is said: *baya'tuhu yadan bi yadin*, i.e. I have exchanged this while both subject matters are possessed in the contracting session before dispersal of one party from the other (Hammad, 1990b).

*Ha'an wa Ha'an*: Khattabi says, this means possession. This expression denotes delivery and possession of the subject matter (Hammad, 1990b).

*Qada* and *Iqtida*: These two terms also refer to the delivery and possession. However, these two are exclusive for the debt, not for the tangible assets. It is said: '*qada gharimahu daynahu*', i.e. he has settled his debt, and *waqtadahu*, i.e. he has received that (Hammad 1990b).

### ***The Evidence of Possession (qabd)***

*Qabd* is verified and established by several narrations of the Prophet (pbuh), which have been reported on the authority of many of his companions. As reported on the authority of Ibn Abbas, the Prophet prohibited it for a man to sell the foodstuff before he possessed it completely. Then Ibn Abbas said: I believe all other things would fall under the same ruling as food (al-Bukhari, 2135; al-Nisaburi, 1525). Also, as reported on the authority of Ibn Umar that the Prophet prohibited for one, who buys food after measuring with volume, to resell it until he receives it completely (al-Sajistani, 3495). Ibn Umar says that when we bought foodstuff in the time of the Prophet, someone used to come to us with an instruction saying that before reselling it we would have to move it from the place we bought it to a different place (al-Bukhari, 2131; al-Nisaburi, 1527; al-Sajistani, 3493). Moreover, it is reported

from Hakim ibn Hizam that he told the Prophet, “O Messenger of Allah, I used to do business and involve in sale and purchase, so what would be legal and illegal for me?” The Prophet replied: “when you purchase something, do not resell it until you receive it properly” (Ibn Hanbal, 15390; al-Dar Qutni, 2796). These narrations infer that the sale of something which is not in the seller’s possession would be invalid, and this is the general rule for foodstuff and others. So, by possession the parties in contract are entitled to exercise their rights in what they possess. Thus, *qabd* is required before undertaking any further transaction in the subject matter.

## Discussion and Analysis

### *Constructive Possession in Shariah*

*Qabd* is classified into *qabd haqiqi* or *hissi*, i.e. real or physical possession, and *qabd hukmi*, i.e. constructive or legal possession (al-Thabiti, 1990). The properties could be possessed either physically in the case of taking delivery by hand, or measuring by volume and weight in foodstuff, or transferring and shifting the movables to custody of the possessor. Also the properties could be possessed constructively by *takhliyah* with enabling the possessor to dispose of freely, though there is no real or physical possession. It is known that the modes of possession would be different according to the nature of the things, dissimilarities of custom and so forth (Islamic Fiqh Academy, 1990).

Al-Kasani (2005) of Hanafi School categorizes the *qabd* into complete and incomplete. He says the sense of possession is realized by *takhliyah* in all properties, though they differ whether or not this will be considered complete possession. If *takhliyah* is considered complete possession it will result in all the provisions pertaining to the contract, like moving liability to the purchaser, making it permissible for him to exercise his rights in the subject matter, or estimating it by volume or weight or count. On the other hand, if *takhliyah* is considered incomplete possession, the purchaser is not allowed to sell the subject matter before shifting it, or to measure it by volume or weight. Nonetheless, Hanafi scholars unanimously agree that *takhliyah* results in transferring liability from the seller to the purchaser.

According to Hanafi School, *takhliyah* is considered complete possession in everything that is fungible, like the yard goods, countable goods which are dissimilar, and so forth. So, if someone buys the yard goods, or countable goods, and *takhliyah* occurs, the goods will be shifted from the liability of the seller, and accordingly the buyer can sell or utilize them before measuring by yard or counting. If

countable goods, which are almost similar, are sold by counting and not randomly, *takhliyah* will be considered complete possession thereof according to Abu Yusuf and Muhammad, while Abu Hanifah opines *takhliyah* will be considered incomplete possession thereof. Also, if the fungible items are sold randomly, *takhliyah* would be considered complete possession because in the sale of unmeasured items, knowing the volume is not taken into account. On the other hand, if the fungible items are sold by measuring with volume or weight in respect of the goods sold by volume and weight, *takhliyah* would be considered incomplete possession, and accordingly the buyer will not be allowed to sell the subject matter before estimating it by volume or weight (al-Kasani, 2005; al-Qurah Daghi, 1990).

On some occasions when necessary, constructive possession could be considered synonymous to the physical possession, even though the real possession does not occur, and therefore the rulings of real possession will be applied. However, this will occur in the three following situations:

First, when the movables need to be possessed by *takhliyah* with enabling the possessor to dispose them of freely, though in real sense the other party did not possess it. According to the Hanafi School, anything that is received by hand is considered the real possession and what is received by *takhliyah* is considered the constructive possession. Consequently, the provisions of physical possession will be applied to the constructive possession.

Second, when possession is required, but the custody of deliverer and recipient has been merged, in this case possession takes place by intention. Al-Qarafi mentions, among the cases that make the other to have possession is that, the debtor has some receivables in the custody of the creditor, and he instructs the creditor to get back his debt from his custody for himself. This is to make other possessed by mere permission, and such possession is considered for him by intention, like the father possesses his son's wealth for him from himself while he purchase that from his son.

Third, when the creditor makes a constructive possession by writing off a debt against another debt that he owes the same debtor. This is because, if the debtor deserves to possess from his creditor the same that he has to pay to his creditor, writing off these debts against each other will be considered constructive possession on the part of that debtor. In *fiqh* there are several examples of this, such as imbursement of one currency by another, offset (*muqassah*), mutual release of debts (*tataruh al-daynayn*), and so forth (Ministry of Awqaf & Religious Affairs, 1992).

### *Practices of Constructive Possession in Islamic Banking Products*

The *Shariah* standard (18) of Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) defines the possession as the gathering of a thing or what takes its rule according to the requirements of customary practice. The basis for determining the mode of possession in things is the custom. Actual possession is realized in immovable property through relinquishment and the enabling of transactions. In movables, the actual possession takes place through physical corporeal delivery. Legal possession takes place by relinquishing of the thing by the person entitled to it, enabling him to deliver it without any obstacle even when no transportation or transmission has taken place. Legal possession includes the registration of a mortgage of immovable and of mobile movables like cars, trains, steamers and airplanes through registration that is valid under the law. Registration stands in place of actual possession with respect to its rule and legal effects. Some significant applications of possession in Islamic banking products and transactions are as follows:

1. Receiving a bank draft or personal check would be considered possession of what it contains because it reflects the sense of *takhliyah* which, according to the majority, is enough for possession except in money exchange (*saraf*) contract. However, some conditions are stipulated to the check to be considered as possession of what it contains, such as it should be post-dated for withdrawal on the same day, amount thereof should be specified, should have enough balance, and so forth.
2. If money is deposited or banking transfer is made, the banking enrollment for this amount of money in the customer's account would be considered constructive possession on part of the account holder. Consequently, if the person, who transfers the amount, is indebted to this account holder, his liability would be discharged.
3. Possession of bills of exchange: Some types of the bills of exchange carry the common features of the banking check. Thus, the rulings of banking check will be applied to these types of bills in terms of possession and circulation.
4. Receiving the travelers' check: The jurists have differed regarding the *fiqhi* adaptation of travelers' check, i.e. whether it would be considered check or banknotes. If it is considered check then receiving this would be the constructive possession of what it contains by *takhliyah*, and if it is considered a banknote then upon receiving it the real possession would occur thereof.

5. If a client who has an account in the bank, requests the bank to buy some foreign currencies by the money he has in the account, based on the currency exchange, the contract is concluded immediately between the bank and the client. The immediate banking enrollment of the currencies that are purchased would be considered constructive possession on behalf of the client requesting so. Also, the amount that is deducted by the bank from customer's account to pay for the foreign currency would be considered constructive possession by the bank. The whole process of this transaction is considered tantamount to the spot delivery and possession of the subject matters of exchange contract, though the custody of deliverer and possessor has been merged tangibly.
6. If one buys a currency from a bank with another currency, while he settles the payment to the bank, which takes from him a check instead of the cash that will be drawn on the bank, then taking the check would be considered the constructive possession of what it contains, and accordingly that would be similar to the possession of both subject matters before dispersal.
7. The bills of lading are not considered commercial papers because they do not represent the specified sum of money that can be easily acquired. Despite this, they are circulated by endorsement method, whereby such endorsement would be considered tantamount to the possession of the assets that are documented in these papers.
8. Receiving the shares of the company would be considered the possession of the portion of capital of the company that is represented in the shares, subject to the custom and the text of the basic regulations for the establishment of the company.
9. If someone purchases a currency from a bank with another currency, and then he settles the payment to the bank, wherein upon request of the purchaser, the bank sends a telex to his correspondent bank instructing it to settle the payment by another currency in the account of the buyer or in a third party account to a third bank. So, this instruction of the bank by telex to his correspondent bank to settle the payment immediately would be considered to make the purchaser as having possessed constructively. Also, this transaction would be similar to a currency exchange contract where the payment from both sides is settled on spot.
10. If a client deals in an exchange contract with a bank where he has an account, and he then instructs the bank to deduct the payment from his account, whi-

le receiving a check from the bank instead of the currency he bought, it will be drawn on the correspondent bank of this bank who issues the check. So, the immediate deduction of the payment from customer's account by the bank would be considered the constructive possession of the payment from the purchasing client, and receiving the check would be considered the constructive possession of what it contains. If this transaction is executed in a session, it would then be tantamount to making delivery and possession of both subject matters on spot before dispersal.

11. Payments for a credit card are deemed legal possession of such payments.
12. Letter of Credit (LC) is a secure means of acquiring prompt payment for the sale of goods. By LC, the exporters can obtain quick, secure and guaranteed payment of goods from the banks. An Islamic letter of credit can be issued using various contracts such as agency, mark-up, profit-loss sharing and so forth. So, in an LC arrangement, if the bank enters as an agent and receives the goods through receiving all the bills of lading, then such receiving by the bank would be considered possession. This happens usually when the LC covers full amount of the price of goods to be imported. Also, taking over the goods by the bank would be considered possession if the bank enters in the LC arrangement as a partner in business, and this usually happens when the LC covers the partial amount of the price of goods to be imported. However, if the bank enters in LC arrangement through mark-up sale agreement, and receives the goods, then such receiving would be considered possession for the bank. Possession of the customer would not be concluded unless the merchandise reaches the desired port. Afterwards, the bank inspects the goods and enters in a mark-up sale with the customer. The bank then makes the goods available to the customer according to trading custom to dispose of; consequently, the customer possesses the goods (Hammad, 1990b; al-Thabiti, 1990; al-Qurah Daghi, 1990; AAOIFI, 2010).
13. *Qabd hukmi* (constructive possession) is being applied in a well-known home financing product namely BBA (*Bai Bithaman Ajil*). In BBA application, the beneficial ownership is transferred among the parties involved, i.e. developer, financier and purchaser, through constructive possession. Beneficial ownership is transferred through a sale that 'falls short of a true sale' in which the purchaser cannot exercise his full right on the subject matter of the sale (Abdullah, n. d.). Thus, through BBA, facility houses are bought and sold with a kind of fictitious possession while the houses are yet to be constructed. As a consequence,

many houses become abandoned in which developers become unable to fulfill their duty in the contracts. Hence, the lawfulness of BBA facility is being challenged many times in the court and accordingly abundant cases are reported that have dealt with BBA in Malaysia. Nonetheless, since the practice of beneficial ownership is a pressing need and in line with the consideration of public interest, it can be practiced with additional terms and conditions that could provide sufficient protection of rights and interests as well as remove harm and injustice from the contracting parties (Dahlan, Fauziah & Shuib, 2017).

14. *Qabd* is also sensitive for *Tawarruq* transaction. The purchaser shall take possession of the asset before the asset can be sold to a third party. Nevertheless, possession of the asset shall either be in the form of (physical possession) *qabd haqiqi* or (constructive possession) *qabd hukmi* (Bank Negara Malaysia, 2015). In Islamic banks, *Tawarruq* transaction is being used as an effective instrument for liquidity management in both asset and liability sides of the balance sheet. *Tawarruq* is also used as the underlying contract for Commodity Murabahah Practice. In 2008, Malaysian capital market established a platform namely Bursa Suq al-Sila (BSAS) to facilitate Commodity Murabahah Practice. BSAS is introduced to solve the issues whereof *Shariah* principles are violated such as ownership of the underlying asset, possession, delivery, agency problem and so forth. Thus, along with the constructive possession, BSAS allows the real possession of the commodity as well which may incur an addition cost (Ahmad et al., 2017).

### ***Modes of Possession (qabd) in Shariah***

Typically, *qabd* may be understood as taking and holding something. However, in technical sense Muslim jurists have identified some modes including the following, by which *qabd* would be done, such as relinquish (*takhliyah*), devastation, depositing and previous possession.

#### *First: Relinquish (takhliyah)*

Relinquish (*takhliyah*) means to allow the purchaser to dispose of the thing sold freely without any obstruction, which enables him to exercise his lawful rights in the subject matter (al-Furfur, 1990). The article (263) of the *Mejelle* (refers to the Ottoman Courts Manual titled '*Majallat al-Ahkam al-Adliyyah*') states, "*The delivery of the sold object is made by letting the buyer to be free to dispose (takhliyah), and this occurs when the seller permits the buyer to possess the subject matter without having any hindrance for such delivery and possession*" (The *Mejelle*, 1302AH).

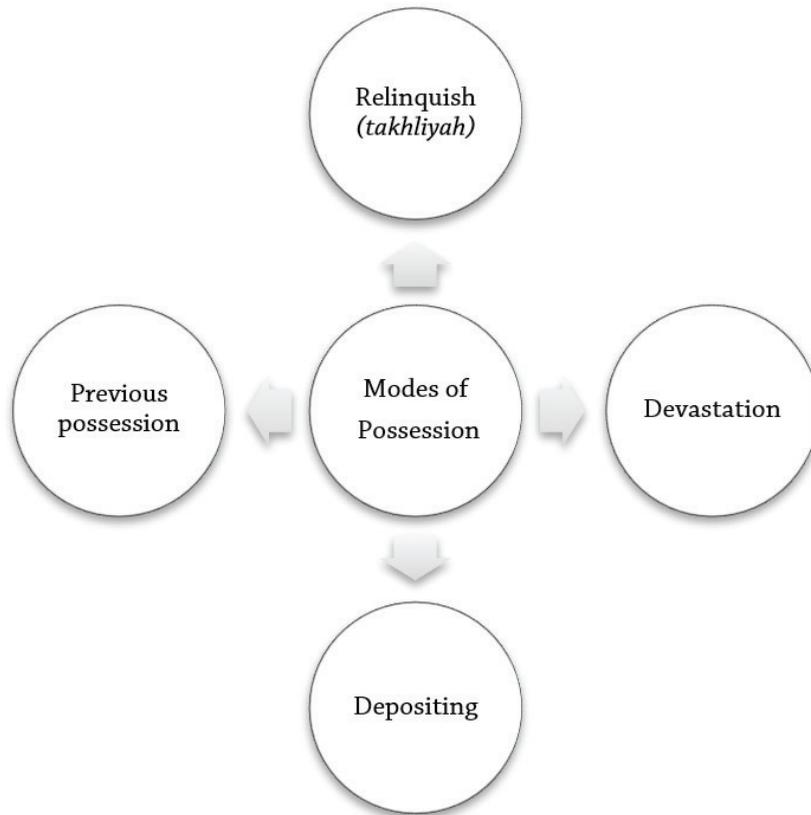


Figure 1. Modes of Possession.

According to the Hanafi School, *qabd* would be done by *takhliyah*, whether the subject matter is the real estate or the movables, except something that is sold by volume or weight because possession thereof would be by receiving the full amount of volume or weight. So, *takhliyah* between the buyer and the merchandise is considered *qabd*, though it is not possessed physically in real sense, and thus if it is perished, it would be on the cost of the purchaser. Moreover, the mode of *takhliyah* differs according to the nature of the sold object. For instance, in the case of the sale of wheat in a house, giving the keys would be deemed possession which enables the purchaser to open and shut the house whenever he wishes. In the case of selling animals in the pasture just watching and indicating them would be deemed possession. In the case of selling cloth etc. just extending the hand to catch it would be considered possession. In addition, the *takhliyah* should enable the buyer

to exercise his rights in the subject matter freely without any hindrance i.e. the sold object should not be possessed or occupied by someone else (Ibn Abidin, 1998; Ibn Nujaym, 1997; al-Kasani, 2005; al-Fatawa al-Hindiyyah, 2010).

The Maliki and Shafi'i Schools are of the view that the possession of real estate would be by *takhliyah* between the purchaser and the thing sold, and make him enable to dispose thereof like giving keys if available, whereas possession of movables is transferring and transmission, which is subject to the present custom of the people (al-Dasuqi, 2003; al-Hattab, 1995; Ibn Rushd, 2003; al-Kharshi, 1997; al-Nawawi, 2000a; Qaliyubi wa Amirah, 2003; al-Mawardi, 1999; al-Nawawi, 2007b). Al-Shirazi (1995) of Shafi'i School states that *qabd* of movables is to make delivery, and *qabd* of immovable properties, like the real estate, fruits before harvest and so forth, is to let free to dispose of. In fact, *qabd* would be referred to the custom, and it is of three types. First, the real estate and fruits on the tree; *qabd* thereof is being free to dispose of. Second, what is moveable like timbers, grains and so forth; *qabd* thereof is to move it to a place which is out of jurisdiction of the seller, and third, what could be taken by hand like dirham, dinar and so on, and *qabd* thereof is to receive it physically.

According to the Hanbali School, the possession of everything will be according to the nature of the thing. If it is something estimated by volume or weight then measuring this by volume or weight will be considered the possession. This means the nature of possession must be referred to the present custom (Ibn Qudamah, 2004a; al-Bahuti, 1997; al-Mardawi, 1997). Another opinion of this school says that the possession of everything will be by *takhliyah* with having distinction (Ibn Qudamah, 1980b).

So, all the Schools have agreed that in the case of immovable properties the possession is relinquishing (*takhliyah*). In the case of movables, the possession is subject to the nature of the sold object, and basically it will be through physical corporeal delivery. However, the custom (*urf*) has a big role to determine the mode of possession regarding the thing sold. This is what the authors prefer here and is also advocated in the *Shariah* standard (18) of AAOIFI.

SCHOOLS OF ISLAM LAW	MODES OF POSSESSION
Hanafi School	Relinquish ( <i>takhliyah</i> ) for both real estate and movable items
Maliki and Shafi'i Schools	For real estate is relinquishing and for movable items is transferring and transmission
Hanbali School	Mode of <i>qabd</i> varies according to the commodity and it mostly relies on customary practice
Authors' preference	Relinquish for real estate while in moveable item the mode of <i>qabd</i> is subject to the relevant custom

Figure 2. Views of Classical Fuqaha on Modes of Possession.

*Second: Devastation*

If the thing sold is destroyed or damaged in the custody of buyer, it will be considered as possessed, and thus the price will be established in his liability. Likewise, if the purchaser makes any defect in subject matter, or orders to destroy it, it will be considered as possessed. Thus, article (277) of the *Mejelle* states: "If the purchaser possesses the thing sold without consent of the seller before paying the price, this would not be considered a valid delivery. Yet, if the buyer takes over the commodity without permission of the seller, and then it is destroyed or damaged in his custody, such taking over would be considered a valid delivery and possession" (The *Mejelle*).

According to the Hanafi School, if the purchaser destroys the subject matter or makes any defect thereof before possession it would be deemed possession (Ibn Nujaym, 1997). The Maliki School opines that the impairment of the subject matter by the buyer would be deemed possession from his side (al-Hattab, 1995; al-Dasuqi, 2003; al-Kharshi, 1997). Shafi'i School says that the spoilage of the goods by the buyer, such as consumption of it or the like, would be deemed possession if he knows this is the subject matter. However, if he does not know that while he consumes it; in that case one view of this School says that it would be deemed possession whereas another view says that it would not be deemed possession. Nevertheless, if the sold object is destroyed by the seller then the sale would be revoked and the liability of the buyer to pay the price would be released (Qaliyubi wa Amirah, 2003; al-Nawawi, 2000a).

### *Third: Depositing*

If the thing sold is deposited to the buyer, or it is lent from him, it would be considered possession. Also, if the buyer deposits it to a stranger, or lends him, or requests the seller to deliver the sold object to him, it would be considered to have been possessed. However, if the buyer takes it as a deposit from the seller, or lends it for him, it would not be considered to have been possessed (al-Furfur, 1990).

According to the Hanafi School, if the buyer takes the subject matter as deposit from the seller or borrows it from him it would not be deemed possession. However, if he deposits the subject matter to a third party, or lends it to him and requests the seller to deliver the thing sold to that stranger, it would be deemed under possession (Ibn Nujaym, 1997).

### *Fourth: Previous Possession*

The earlier discussion is about the case when the thing sold is in the custody of the seller. However, if it is already in the custody of the buyer by a previous possession, and then the owner sells it to him, would it then be considered possession by the mere purchase, or possession requiring renewal to complete the delivery?

It is to be noted that in terms of the strength and weakness of the effect *qabd*, it is of two types. *Qabd al-daman*, i.e. possession with liability is the possession where the person who possesses would be liable towards the thing possessed, and if it is perished he will be liable for that, like the usurped asset in the custody of the usurper, the subject matter in the custody of the purchaser, and so forth. The second type is *qabd al-amanah*, i.e. possession with trust. This is where the person who possesses will be not liable for what is possessed, except for negligence and carelessness in protection, like the deposit in the custody of the depositary, loan (*ariyah*) in the custody of the borrower (*musta'ir*), and so on.

According to the jurists, possession with liability is stronger than possession with trust. The previous possession represents the necessary possession of sale contract if both are either of the same scale or the previous possession is stronger, unlike the case where the previous possession is weaker. So possession with liability represents the same, as well as the possession with trust. On the other hand, possession with trust does not represent except the same, and thus it does not represent the possession with liability because the superior is sufficed by the inferior (al-Furfur, 1990).

So, in our case if the thing which has been sold is already available in custody of the buyer, such possession would be either possession with liability or possession with trust. If it is possession with liability, it must be seen whether he would be liable to himself like the possession of the usurper, wherein the purchaser would be considered to have possessed the thing sold by the contract per se, and does not have to renew the possession. Accordingly, the seller would become free from the obligation of delivery, irrespective of whether the thing sold is present in the contracting session or absent from it. Nonetheless, in the case of possession with liability the buyer could be liable to others like the possession of *rahn*, as when the mortgagee purchases the mortgage from the mortgagor, in which case he would not be considered to have possessed, except if the mortgage is present in the session of contract, or he goes to the place where mortgage is existing and becomes able to possess it. However, if the previous possession of the buyer is possession with trust, like the possession of the borrower (*musta'ir*) or depositary, he would not be considered to have possessed, except if the subject matter is present in the contracting session, or he goes where it exists, and becomes able to possess it by letting him free to dispose thereof. This is because the possession with trust is not of the same rank as the possession with liability, and thus they do not alternate each other (al-Furfur, 1990).

To sum up, the modes of *qabd* would differ according to the types of the things. The immovable properties would be possessed by *takhliyah*, while the movables could be possessed through receiving by hand, measuring by volume or weight, transporting, etc. subject to the prevailing custom and the nature of the sold item. It is worthwhile to mention that *qabd* of the things should be understood according to the nature of things, the circumstances of people, the nature of transactions, etc. Moreover, the existing custom plays an important role in understanding the nature of the possession.

### *The Impact of Possession in Schools of Islamic Law*

Once any contract is concluded, its provisions will be implemented and applied accordingly. Sometimes possession defers from time of the contract, and sometimes person who has to possess may wish to deal in the subject matter before it is possessed, so does he allow doing so? What type of dealing he can undertake in the subject matter before possession? The dealing might be any type of exchange contract such as sale, lease and so on. Also, it might be any type of voluntary contracts or even ones besides them (al-Ani, 1990). In this regard, Scholars differ in opinions as follows:

### *Hanafi School of Law*

In general, Hanafi School differentiates between moveable and immoveable properties. Abu Hanifah and Abu Yusuf allow the sale of immoveable(s) before possession. They argue that it is a sale arrangement where the pillar is verified from the right person in the right place. Also, there is no likelihood of hazard in immovable(s) as its destruction is rare. However, Muhammad opines the invalidity of its sale before possession pursuant to the general sense of the *ahadith* of forbiddance, which do not discriminate between immoveable(s) and others. This is also the stand of Zufar and the opinion of Imam Abu Yusuf. Regarding the moveable(s), all the scholars of the School agree that it is not valid to sell it before possession as the Prophet forbade the sale of the foodstuff before it is received fully. Moreover, Ibn Abbas said: I consider everything like the foodstuff.

Nevertheless, a principle resolved in the School says that the contract which is revoked due to the destruction of the compensation before possession, undertaking any dealing with that compensation is not allowed before it is possessed, such as the subject matter of sale, the rental of leasing if it is tangible asset, and the consideration of conciliation on debt if it is tangible asset, neither sale of anything of that, nor letting other participates thereof is allowed. On the other hand, what is not revoked with destruction of the compensation, dealing thereof is allowed before it is possessed, such as the dowry if it is tangible asset, the monetary compensation of divorce and emancipation of slave, the consideration of the reconciliation on premeditated murder and so forth. If all these are tangible asset then sale, donation, leasing and other dealings in that will be valid before possession. Nevertheless, Hanafi School of law allows dealing in the price, for substitution and the like, before it is possessed, in the cases other than (*salam*) forward sale and (*saraf*) money changing (Ibnul Humam, 1995; al-Kasani, 2005).

### *Maliki School of Law*

The Maliki School opines that it is permissible to sell everything before possession except the foodstuff, and that is based on the fact that the contract transfers the ownership and liability to the person deserves possession. There is no disagreement in Maliki School regarding the forbiddance of selling the foodstuff before possession if it is measured or weighed or other types of usury items. In the case of being a non-usury item, the famous stand of Imam Malik opines that it is forbidden. Likewise, sale of the thing that is received through exchange is not allowed before it is possessed, irrespective of whether it is food or another item, such as

fruits that are taken through exchange, and the thing that is taken as dowry or divorce is not permissible to be sold before it is possessed. However, what is taken randomly, sale of that is allowed before possession, yet the liability thereof will be on the seller such as the milk of the ewe.

It is valid to sell the foodstuff before possession, where the reason of entitlement is *sadaqah* or *qard*. The same ruling will be if the reason of its entitlement is inheritance or *hibah*. The dismissal, nomination and partnership are permissible in the sold object before it is possessed. Hanafi and Shafi'i Schools of law, however, dissented from this opinion (al-Kharshi, 1997; Ibn Rushd, 2003).

#### *Shafi'i School of Law*

Shafi'i School does not allow selling of the subject matter before it is possessed, irrespective of whether it is moveable or immovable, even though the seller is given consent to possess the price. This is based on the narration whereby the Prophet (pbuh) told Hakim Ibn Hizam: "do not sell anything before it is possessed" (al-Bayhaqi). Furthermore, before possession the ownership is feeble as the contract becomes revoked due to ruining of the subject matter before possession (al-Sharbini, 2006).

#### *Hanbali School of Law*

According to this School, everything that needs to be possessed while it is purchased, reselling thereof is not permissible until it is possessed, as the Prophet (pbuh) said: "whoever buys the foodstuff he shall not sell that until he receives that fully" (al-Bukhari & al-Nisaburi). Moreover, before possession, the item is still in the liability of its seller and hence selling of that is not allowed such as in case of *salam*, etc. However, in the case where possession is not required then selling thereof is permissible before possession as per the more apparent stand of Hanbali School.

Moreover, like the Hanafi school this school also mentions a principle, which says: each consideration owned by such contract which will be revoked due to damage of the consideration before possession, dealing thereof is not allowed before possession, such as any measured and weighed items, the rental, the consideration of conciliation if it is something measured or weighed or counted, and so forth. But, something while the contract will not be revoked due to its damage dealing thereof is allowed before it is possessed, such as the monetary compensation of divorce and emancipation, consideration of reconciliation on premeditated murder, blood money, value of the things damaged, etc. (Ibn Qudamah, 2004a).

To sum up, Hanafi School draws a difference between moveable and immovable assets. Unlike moveable assets, selling of the immovable properties is permissible before they are possessed by the seller. The Maliki School opines that sale of everything is permissible before possession except the foodstuff. On the contrary, Shafi'i School does not permit to sell anything unless it is possessed, regardless of whether it is moveable or immovable. The Hanbali School is of the opinion that selling of the item, where possession is required, is not permissible unless it is possessed like the foodstuff and so on.

### ***Resolution of Islamic Fiqh Academy of Jeddah on Constructive Possession (qabd hukmi)***

In its sixth conference, Islamic Fiqh Academy of Jeddah studied the issue of *qabd*, particularly in the event of emerging various contemporary modes of financial transactions. After much deliberation the Academy decided as follows:

Firstly, *qabd* is made physically by hand or by measuring with amount or weight in foodstuff for instance, or by transporting the item and relocating that under rightful possession and control. Notwithstanding, *qabd* is also made constructively by law through relinquishing (*takhliyah*) the item that enables the person to act free in the subject matter, even if no physical possession is taken into place. Essentially the nature of *qabd* varies based on the nature of the item which shall be subject to the relevant customary practices.

Secondly, some modes of constructive possession (*qabd hukmi*), which are considered in *Shariah* and in custom, are as follows:

1. If bank credits the amount of money in the client's account that will be considered *qabd hukmi*, and that occurs in the following cases:
  - When a sum of money is deposited in the client's account directly by cash or indirectly by bank transfer.
  - When there is a valid exchange contract between the client and the bank in the event of buying another currency in the client's account.
  - When the bank deducts, upon client's request, an amount from his account and then deposits it to his another account in different currency, in the same or different bank, for client's or other's benefit, in this case bank must follow the rules of currency exchange contract in Islamic law. Nevertheless, the delay in banking credit for a period recognized in the market will be

overlooked, which enables the beneficiary to receive it actually. However, during this known period the beneficiary is not allowed to dispose of the currency until he obtains the confirmation on bank credit so that he can make an actual receipt.

2. Receiving the check that has a withdraw-able balance in the currency written on it, will be considered *qabd hukmi*, upon collecting and booking it by the bank (Islamic Fiqh Academy, 1990).

## Conclusion

All the prominent *fiqhi* Schools agree upon the fact that the possession (*qabd*) in the real estate is *takhliah*, i.e. to let others be free to dispose of. In the items other than the real estate, the mode of possession varies according to the item. Thus, the possession of the items which are measured by volume, weight or counting is through measuring them accordingly. The possession of the movables is through transporting, while the possession of what is taken by hand is to take that by hand.

The custom has a big role in determining the mode of delivery and possession, as long as it does not contradict any of the fundamentals of the *Shariah*. The modes of possession in an era would not necessarily be binding for the subsequent era. Since the custom changes, what is grounded on the custom essentially would also change due to the change of custom. Several modes of possession have been discussed in this article, such as relinquishment, devastation, depositing and previous possession.

In contemporary Islamic banking transactions basically the constructive possession is utilized. Thus, the possession of the beneficiary of bank draft or personal check is considered as possession of the amount payable by the drawee bank. Also, the payments of credit card are considered legal possession of such payments. Moreover, the money which is deposited or transferred; the banking enrollment for this amount of money in the customer's account would be considered constructive possession on the part of account holder. Consequently, if the person, who transfers the amount, is indebted to this account holder, his liability would be discharged. In addition, receiving the shares of the company would be considered the possession of the portion of capital of the company that is represented in the shares, subject to the custom and the texts of the basic regulations for the establishment of the company.

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