



## **Constructive Possession in the Sale and Purchase of Gold According to Changes in the Customary Practice**

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**Abstract:** In a sales and purchase transaction, gold is a *ribawī* item that requires taking possession (*qabḍ*) of goods on a spot basis. Since the al-Qur'an and al-Sunnah have not specifically mentioned the form of *qabḍ* in a sales and purchase transaction, the ulama has made customary practice (*'urf*) as a reference when determining whether a card is appropriate or otherwise. Besides that, the ulama has also accepted constructive possession (*qabḍ ḥukmī*) as a substitute for physical possession (*qabḍ ḥaqīqī*) in a sales and purchase transaction. The purpose of this study is to examine the validity of *qabḍ*, the forms of *qabḍ*, the classification of *qabḍ ḥukmī* in buying and selling gold, and the application of *'urf* as a reference in the validity of *qabḍ*. The study is a normative legal study using *uṣūl al-fiqh* and *fiqh al-mu'āmalāt* analysis tools. The results of the study show that rapid technological developments have changed some forms of buying and selling transactions, including those involving gold. The main challenge in transactions involving gold is the issue of *qabḍ*, especially those that do not involve physical gold. This is due to certain constraints, especially buying and selling online. Based on the views of the scholars in determining the forms of *qabḍ ḥukmī* to see the suitability of gold buying and selling applications at this time, this kind of buying and selling is permissible. As long as there is *takhlīyyah* and *tamkin* in the gold being traded, then it may be accepted as *qabḍ ḥukmī*. In addition, it must be ensured that the allocation steps, such as tagging of the physical gold, are implemented on the day of the contract to avoid *ribā al-nasī'ah*.  
**Keywords:** *Qabḍ ḥaqīqī*, *qabḍ ḥukmī*, sale and purchase of gold, Islamic economics

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**Abstrak:** Dalam transaksi jual beli, emas merupakan barang *ribawī* yang disyaratkan berlaku *qabḍ* (serah terima) secara tunai. Disebabkan *al-Qur'an* dan *al-Sunnah* tidak menentukan secara terperinci bentuk *qabḍ* dalam jual beli, para ulama menjadikan 'urf sebagai rujukan dalam menentukan suatu *qabḍ* berlaku secara sempurna atau tidak. Selain itu, para ulama juga menerima *qabḍ ḥukmī* sebagai ganti dari *qabḍ ḥaqīqī* dalam transaksi jual beli. Tujuan penelitian ini adalah mengkaji tentang berlakunya *qabḍ*, bentuk-bentuk *qabḍ*, klasifikasi *qabḍ ḥukmī* dalam jual beli emas, dan pemberlakuan 'urf sebagai rujukan dalam keabsahan *qabḍ*. Kajian tersebut merupakan studi hukum normatif dengan menggunakan *uṣūl al-fiqh* dan *fiqh al-mu'āmalāt* alat analisis. Hasil penelitian menunjukkan bahwa perkembangan teknologi yang pesat telah mengubah sebagian bentuk transaksi jual beli termasuk yang melibatkan emas. Tantangan utama dalam transaksi yang melibatkan emas ialah persoalan *qabḍ*, khususnya yang tidak melibatkan emas fisik. Hal ini disebabkan kendala-kendala tertentu terutama jual beli secara online. Berdasarkan pandangan para ulama dalam menentukan bentuk-bentuk *qabḍ ḥukmī* untuk melihat kesesuaian aplikasi jual beli emas pada masa ini, maka jual beli semacam ini dibolehkan. Selama wujud *takhliyyah* dan *tamkin* pada emas yang diperjual-belikan, maka hal itu boleh diterima sebagai *qabḍ ḥukmī*. Proses ini perlu diperkuat dengan langkah lebilisasi atas emas fisik pada hari jual beli untuk menghindari berlakunya *ribā al-nasī'ah*.

**Kata Kunci:** Serah terima hakiki, serah terima hukmi, jual beli emas, ekonomi Islam

## Introduction

Among the issues that have become an important topic of discussion in the commercial area is the issue of *qabḍ* (taking possession). Hence, this study found that syariat often stipulates *qabḍ* as a condition in an '*aqd* (contract). Sometimes it is a *al-siḥḥah* (conditions for a valid contract) condition, as in *bay' al-salam* and *bay' al-ṣarf*. Sometimes it is a *al-luzūm* (conditions that make a contract binding) condition, as in *hibah* and *hadiyyah*, while sometimes it is a *al-istiqrār* (settling of the right) condition. A discrepancy concerning *qabḍ* in any of the conditions stated above could jeopardize an '*aqd* that has been concluded.

Rapid development in technology has changed the form of transactions, including *qabḍ*. Some transactions are difficult to conclude physically as it could only be done according to *ḥukmī* (constructive possession). The issue of *qabḍ ḥukmī* is not something new. However, it is always re-newed because it refers to the local '*urf* (customary practice). Something that refers to '*urf* that change according to developments in the '*urf* itself based on methods:

لا يُنكَرُ تَغْيِيرُ الْأَحْكَامِ بِتَغْيِيرِ الْأَزْمَانِ

Meaning: Changes in rulings due to changed circumstances should not be objected to.<sup>1</sup>

Hence, discussions on *qabd*, especially *qabd hukmī*, is constantly renewed based on current developments. The issue of *qabd* becomes more important if it involves the transaction of *ribawī* (items that are sold by weight and measure) items, such as gold. This is because the exchange of *ribawī* items is subject to the *bay' al-ṣarf* decree, which has decreed that *qabd* (taking possession) should occur based on spot (spot basis).

Current transactions related to gold are also done online. When the payment is made, the gold cannot be handed over immediately in the session of the contract (*majlis al-'aqd*) due to the remote location between the contracting parties. Gold investment is very popular in the community because it is easy to implement as an investment asset. The stability of gold prices and its function as a hedge makes it a very sought-after investment commodity. The rapid development of communication technology encourages various new innovations in gold buying and selling transactions. As technology develops, many marketplaces compete to offer gold investment facilities. In these circumstances when gold is used as a basic commodity, customers usually will not intend to take the physical gold. This complicates the situation when determining whether *qabd* occurs according to spot.

This article discussed this matter in detail by looking at the *ijtihād* of ulama from various sects (*madhhab*) in order to obtain the actual picture about *qabd hukmī* according to their view. The data collected were analyzed descriptively based on the integration of the basic disciplines of Sharia, namely the science of *uṣūl al-fiqh* and *fiqh al-mu'āmalāt*. Current practices are also reviewed to ensure that discussions are founded on reality in business practice.

### Definition of *Qabd*

*Qabd* is an adjective in Arabic that originates from the word *qabaḍa – yaqbiḍu*, which has several meanings. Literarily, it means to take (*akhdh*) something by the grasp of a hand (*kaff*) but when taking it by the fingers, it is called *qabd*. Then, the word *qabd* was used to refer to all forms of taking (*akhdh*), either by hand or otherwise.<sup>2</sup>

<sup>1</sup> 'Alī Haydar, *Durar al-Ḥukkām Sharḥ Majallat Al-Aḥkām*, translated by Fahmī al-Husaynī, Vol. 1, (Riyad: 'Alam al-Kutub, 2003), p. 45.

<sup>2</sup> Muḥammad ibn Mukarram ibn Manzūr, *Lisān al-'Arab*, (Beirut: Dār Ṣādir, n.d), p. 213;, al-Sayyid Muḥammad Murtaḍā al-Ḥusaynī Al-Zabīdī, *Tāj al-'arūs min jawāhir al-qāmūṣ*, (Kuwayt: Wuzārat al-I'lām fā al-Kuwayt, 1980), p. 12.

The ulama had adduced various interpretations of the word *qabd* based on various situations. Among the ulama who had defined *qabd* that included *qabd ḥaqīqī* and *ḥukmī* were:

1. Al-Anṣārī:<sup>3</sup>

رَفُعَ خَاصِّيَّةَ تَصَرُّفِ الْمَالِكِ فِيهِ عَنْهُ بِصَرْفِ التَّمَكُّنِ مِنْهُ لِلْمُعْطَى أَوْ نَائِبِهِ

Meaning: “To lose the privileged action of the owner by transferring his control to the person he has given it to or his substitute”.

2. ‘Izz al-Dīn ibn ‘Abd al-Salāmsaid:<sup>4</sup>

قولهم قبضت الدار والأرض والعبد والبعير يريدون بذلك الاستيلاء والتَّمَكُّن من التَّصَرُّف

Meaning: People’s reaction: “I carried out *qabd* on the house, the land, the slave and the camel” that they wanted by presuming the *qabd* to be *istilā’* (control) and *tamakkun* (having the power or ability) in management.

3. Al-Qarrah Daghi defined *qabd* as:<sup>5</sup>

التخليية بين العاقد والمعقود عليه على وجه يتمكن من التسلم بلا مانع ولا حائل حسب العرف

Meaning: *Takhliyyah* among the contracting parties and the subject matter in a form that enables receipt without any obstructions based on ‘urf.

*Takhliyyah* refers to the surrender of complete control of management by the seller to the buyer. This definition clarifies that determining the impeccability of a *qabd* is measured based of the ‘urf. How *takhliyyah* occurs is determined based on the type of item as well as current practices that are acceptable and void of cheating, interests and uncertainty (*gharar*).

### ***Qabd Ḥukmī***

*Qabd ḥukmī* refers to *qabd* that does not involve the physical transfer of the subject matter (*ma’qūd ‘alayh*). All the three definitions adduced earlier only stated that *qabd* occurs when control is transferred to the new owner or when the original owner surrenders all control. The presumption of *tamakkun*, *istilā’* and *takhliyyah* could occur with the transfer of control although physically the goods have not been transferred to the new owner. The main element emphasized in

<sup>3</sup>Muhammad ibn Qāsim al-Mālikī Al-Anṣārī, *Sharḥ Ḥudud Ibn ‘Irfah*, (Beirut: al-Maktabah al-‘Ilmiyyah, 1350H), p. 415.

<sup>4</sup>‘Izz al-Dīn ibn ‘Abd al-Salām, *Al-Ishārah ilā al-ijāz fī ba’d anwā’ al-majāz*. (Beirut: Dār al-Bashā’ir al-Islāmiyyah, 1987), p.106.

<sup>5</sup>‘Alī Muḥyī al-Dīn al-Qarah Daghī, “al-Qabd: ṣuwaruh, wa bi khaṣṣat al-mustajaddah minhā wa aḥkāmuhā”, *Majallat Majma’ al-Fiqh al-Islāmī* VI, no. 1 (1410H), p. 555-634.

*qabḍ* is that there are no hindrances to the transfer of control. This element corresponds with al-Kāsānī's statement:<sup>6</sup>

ولا يشترط القبض بالبراجم؛ لأن معنى القبض هو التمكين، والتخلي، وارتفاع الموانع عرفاً وعادة حقيقة.

Meaning: It is not required to submit by hand (physically) because the elements of submission are *tamkīn* and *takhliyyah* and in fact all obstacles are removed from the point of *'urf* and customary practice.

It is also in line with al-Zuhaylī's<sup>7</sup> view when referring to *qabḍ ḥukmī*:

كل ما تحقق به الحيازة والتمكن من التصرف بحسب العرف السائد من غير تناول باليد أو قبض حسي، أو هو تمكين العاقد من تسلم المعقود عليه دون مانع.

Meaning: With every act of *hiyāzah* (controlling) and *tamakkun* (having the power or ability) towards managing something based on a dominant *'urf* without holding it in the hand or holding it physically or gives power to the person agreeing to receive the subject matter (*ma'qud 'alayh*) without any hindrances.

Similarly, the Shariah Standards pertaining to Trading in Currencies issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOFI) stated that: "Constructive possession of an asset is deemed to have taken place by the seller enabling the other party to take its delivery and dispose of it, even if there is no physical taking of possession".<sup>8</sup>

### **Form of the subject matter (*ma'qud 'alayh*) that is allowed to use *qabḍ ḥukmī***

The act of *qabḍ* differs according to the type and form of the subject matter. Generally, the ulama have divided the subject matter into *'aqār* property (immovable property) and *manqūl* property (movable property).

#### **1. *Qabḍ Ḥukmī* in *'Aqār* Property**

The ulama from the Hanafi sect have stated that *'aqār* is something that has a concrete basis and cannot be moved or transferred, such as land or buildings.

<sup>6</sup>Abu Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-sharā'i'*, Vol. 5, (Beirut: Dar al-Kitāb al-'Arabī, 1986), p. 148.

<sup>7</sup>Wahbah ibn Muṣṭafā al-Zuhaylī, *al-Mu'amalāt Al-Māliyyah Al-Mu'āṣirah*, (Damascus: Dar al-Fikr, 2002), p.166.

<sup>8</sup> *Shari'ah Standards*, (Manama: Accounting and Auditing Organization for Islamic Financial Institutions (AAOFI), 2017), p. 54.

Meanwhile, trees are included in the *manqūl* property (movable property) except if it is contracted together with the land.<sup>9</sup>

Majority of the ulama from the Maliki, Syafie and Hanbali sects were of the view that ‘*aqār*’ property refers to land, buildings and trees.<sup>10</sup> The ulama from the Hanafi, Maliki, Syafie and Hanbali sects unanimously allowed *qabā hukmī* in ‘*aqār*’ creating *takhliyyah* and *tamkīn*.<sup>11</sup>

The Hanafi sect had discussed the question of *takhliyyah* in great detail compared to the other sects. They had stipulated several conditions that were not mentioned by the other sects<sup>12</sup>, such as:

- a. The seller states to the buyer that he surrenders the right to act on the subject matter to the buyer.
- b. The buyer is able to take the subject matter without any impediments.
- c. The subject matter must be free from the claim of rights of other parties.
- d. ‘*Aqār*’ and its equivalent are placed in proximity to the buyer, or far away but he should be able to reach it and enter it according to ‘*urf*’.

## 2. *Qabā Hukmī* in *Manqūl* Property

*Manqūl* property refers property that is transferrable or movable.<sup>13</sup> *Manqūl* property is divided into two forms:

- a. *Muqaddar* is *manqūl* property that is sold using measures, by weight or quantity.

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<sup>9</sup> ‘Alī Haydar, *Durar Al-Hukkām Sharḥ Majallat Al-Aḥkām*, (Riyad: ‘Ālam al-Kutub, 2003), p. 117. Muḥammad Qadrī Bāshā., *Murshid al-ḥayrān ilā ma’rifat aḥwāl al-insān*, (Bulāq: al-Maṭba’ah al-Kubrā al-Amiriyyah, 1308H), p. 3. Muṣṭafā Aḥmad al-Zarqā’, *al-Madkhal ila nazariyyat al-iltizām al-‘āmah fī al-fiqh al-Islāmī*, (Damascus: Dār al-Qalam, 1999), p. 164.

<sup>10</sup> Muḥammad ‘Abd Allah al-Malikī al-Khirshī, *Sharḥ mukhtaṣar Khalīl*, (Beirut: Dār al-Fikr li al-Ṭibā’ah, n.d), p. 158. Muḥammad ibn Aḥmad al-Khaṭīb al-Sharbīnī, *Mughnī Al-Muḥtāj Ilā Ma’rifat Ma’ānī Alfāz Al-Minhāj*, vol. 2, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1994), p. 466. Mustafā al-Ṣuyūṭī al-Rahibānī, *Maṭālib Ulī Al-Nuhā fī Sharḥ Ghāyat Al-Muntahā*, (Damascus: Manshurat al-Maktab al-Islāmī, n.d), p. 109.

<sup>11</sup> Muḥammad Amīn ibn ‘Umar Ibn ‘Ābidīn, *Radd Al-Muḥtār ‘Alā Al-Durr Al-Mukhtār*, (Beirut: Dār al-Fikr, 1992), p. 562. Muḥammad ibn Muḥammad al-Ru’aynī al-Ḥaṭṭab, *Mawāhib Al-Jalīl Fī Sharḥ Mukhtaṣar Khalīl*, (Beirut: Dar al-Fikr, 1992) p. 447. Muḥyī al-Dīn Yahyā ibn Sharaf al-Nawawī, *Rawḍat Al-Ṭālibīn Wa ‘Umdat Al-Muḥtājīn*, vol. 3, (Beirut: al-Maktab al-Islāmī, 1991) p. 376. Manṣūr ibn Yūnus al-Buhīṭī, *Kashshāf Al-Qinā’ ‘An Matn Al-Iqnā’*, (Beirut: Dār al-Fikr, 1402H), p. 247.

<sup>12</sup> ‘Asim ibn Manṣūr ibn Muḥammad Abāḥusayn, *al-Qabā Al-Hukmī Fī Al-Amwāl: Dirāsah Fiqhiyyah Taṭbīqiyyah*, vol. 1, (Riyad: Dār Kunūz Ishbiliya li al-Nashr wa al-Tawzī’, 2015) p. 145.

<sup>13</sup> ‘Ali Haydar, *Durar Al-Hukkām Sharḥ Majallat Al-Aḥkam*, p. 116; Bāshā, Muḥammad Qadrī, *Murshid Al-Ḥayrān Ilā Ma’rifat Aḥwāl Al-Insān*, (Bulāq: al-Maṭba’ah al-Kubrā al-Amiriyyah, 1308H), p. 3.

- b. *Ghayr muqaddar* is *manqūl* property that is sold not according to measures, quantity or by weight because it cannot be measured based on specific number of units or the selling price is not determined based on the number of units, for example, selling a horse based on various aspects such as its breed, speed, level of training etc.

1). The *manqūl muqaddar* property:

According to ulama from the Hanafi sect,<sup>14</sup> one was Imam Syafie's *qawl*<sup>15</sup> and another a narrative from the Hanbali sect,<sup>16</sup> which stated that *qabḍ ḥukmī* according to *takhlīyyah* and *tamkīn* can be accepted in this case.

Hence, the Maliki,<sup>17</sup> Syafie<sup>18</sup> and Hanbali<sup>19</sup> sects stated that the items must be measured, weighed and calculated by the buyer. This means that they do not accept *qabḍ ḥukmī* but instead must be made by the buyer. Moreover, according to the Syafie sect, other than the various calculations mentioned earlier, the items must be transferred from a place or location not owned by the seller.<sup>20</sup>

2). The *manqūl ghayr muqaddar* property:

According to the Hanafi sect,<sup>21</sup> *qabḍ ḥukmī* by way of *takhlīyyah* and *tamkīn* is accepted in this case.

According to Maliki,<sup>22</sup> Syafie<sup>23</sup> and Hanbali<sup>24</sup> sects, the accepted *qabḍ* differs according to the subject matter. Thus, if hands could be used for taking it then *qabḍ* could occur in this way too. And if it could occur by moving or

<sup>14</sup> Abu Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' Al-Ṣanā'i' fī Tartīb Al-Sharā'i'*, Vol. 5, (Beirut: Dar al-Kitāb al-'Arabī, 1986), p. 245.

<sup>15</sup> Abu Ḥamid Muḥammad ibn Muḥammad al-Ghazālī, *al-Wasīṭ fī al-Madhhab*, vol. 3, (Cairo: Dar al-Salām, 1417H), p. 153.

<sup>16</sup> Abd Allāh ibn Aḥmad al-Maqdasī Ibn Qudāmah, *al-Mughnī 'ala Mukhtaṣar al-Khirqī*, vol. 4, (Beirut: Dār al-Fikr, 1405H), p. 90.

<sup>17</sup> Aḥmad ibn Idrīs al-Qarāfī, *al-Dhakhīrah*, vol. 1, (Beirut: Dār al-Gharb, 1994), p. 120, 132.

<sup>18</sup> Muḥammad ibn Aḥmad al-Khaṭīb al-Sharbīnī, *Mughnī Al-Muḥtāj Ilā Ma'rifat Ma'ānī Alfāz Al-Minhāj*, Vol. 2, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994), p. 470.

<sup>19</sup> Mansūr ibn Yūnus al-Buhūti, *Kashshāf Al-Qinā' 'An Matn Al-Iqnā'*, (Beirut: Dār al-Fikr, 1402H), p. 201.

<sup>20</sup> Muḥyī al-Dīn Yaḥyā ibn Sharaf al-Nawawī, *Rawḍat al-Ṭalībīn Wa 'Umdat Al-Muḥtājīn*, vol. 3, (Beirut: al-Maktab al-Islāmī, 1991), p. 334.

<sup>21</sup> Abu Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' Al-Ṣanā'i' fī Tartīb Al-Sharā'i'*, p. 244.

<sup>22</sup> Aḥmad ibn Idrīs al-Qarāfī, *al-Dhakhīrah*, vol. 1, (Beirut: Dār al-Gharb, 1994), p. 152.

<sup>23</sup> Muḥammad ibn Aḥmad al-Khaṭīb al-Sharbīnī, *Mughnī al-muḥtāj ilā ma'rifat ma'ānī alfāz al-minhāj*, vol. 2, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994), p. 470.

<sup>24</sup> Abd Allāh ibn Aḥmad al-Maqdasī Ibn Qudāmah, *al-Mughnī 'ala mukhtaṣar al-Khirqī*, vol. 4, (Beirut: Dār al-Fikr, 1405H), p. 90.

transferring it, then, *qabḍ* occurs by transferring or moving it out of the seller's premises. All this is based on the situation or '*urf*'.<sup>25</sup>

The majority of scholars in Islamic law '*urf*' can be used as an argument to establish law. According to Imam Hanafi uses '*urf*' in argument when there is no law in the nash of the Qur'an and Hadith, Ijma' and qiyas and Istihsan. The Malikiyya school abandons qiyas when it is contrary to '*urf*', specializing in the general and binding in the absolute. Imam Syafie can accept '*urf*' if '*urf*' does not contradict nash. And the scholars of Hanabilah accepted '*urf*' as long as it did not contradict the nash. For example, buying and selling land in customary mechanisms on the basis of mutual trust.<sup>26</sup> Therefore, '*urf*' can be used as an argument or postulate in Islamic law.<sup>27</sup>

However, it should be remembered that accepting the *qabḍ ḥukmī* in all cases stated earlier is only allowed when *qabḍ ḥaqīqī* cannot be implemented due to reasonable impediments.

### Determining *Qabḍ Ḥukmī* According to '*Urf*'

For each pronouncement (*lafẓ*) of the syarak that is absolute (*muṭlaq*), its details are referred to practices and '*urf*' when a particular pronouncement is uttered, which is similar to the pronouncement "*qabḍ*". al-Nawawī stated that:

فكلما عدّه الناس بيعًا كان بيعًا كما في القبض والحرز وإحياء الموات وغير ذلك من الألفاظ المطلقة فإنها كلها تحمل على العرف

Meaning: "What is presumed by humankind as sales and purchase, is considered a sales and purchase, as in *qabḍ*, *ḥirz* (place of custody), *iḥyā' al-mawāt* (cultivating idle land) etc. in the *muṭlaq* pronouncement category".<sup>28</sup>

al-Suyūṭī<sup>29</sup> also said that *qabḍ* is one of the problems that is referred to '*urf*' when trying to determine it (*qabḍ*).

<sup>25</sup> 'Āṣim ibn Maṣṣūr ibn Muḥammad Abāḥusayn, *al-Qabḍ al-ḥukmī fi al-amwāl: dirāsah fiḥhiyyah taḥbīqīyyah*, vol. 1, (Riyad: Dār Kunāz Ishbiliya li al-Nashr wa al-Tawzī', 2015), p. 155.

<sup>26</sup> Zulfan Wandī, "Eksistensi '*Urf*' dan Adat Kebiasaan Sebagai Dalil Fiqh," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 2, No. 1 (2018), p. 181.

<sup>27</sup> Yayuk Nur Hikmah and Gunarto Gunarto, "Sale & Purchase of Land Under Hand With Testimony Sign by Village Head or Customary Head" *Sultan Agung Notary Law Review* 3, No. 4 (2021). Yunus Al Imron, "Legal Consequences of Default in Land Sale and Purchase Agreements Under The Hand," *International Journal of Educational Research & Social Sciences*, (2022).

<sup>28</sup> Muḥyī al-Dīn Yahyā ibn Sharaf al-Nawawī, *al-Majmū' Sharḥ al-Muhadhdhab*, Vol. 9, (Kaherah: Idārah al-Ṭibā'ah al-Muniriyyah, 1344H), p. 163.

<sup>29</sup> 'Abd al-Raḥmān ibn Abī Bakr al-Suyūṭī, *al-Ashbāh wa al-nazā'ir*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1990), p. 90.



According to previous discussions by the ulama, we understand how they made *'urf* as a factor in determining the form of *qabd* that is accepted. When we search for more views by the ulama on this problem, we find that their views are varied. This is because they refer to the *'urf* of a particular place that has become a practice in the business world at that time. The differences in opinion in the debates actually does not complicate the situation, on the contrary it is proof that differences in the *'urf* play a role in accepting or rejecting a particular *qabd*. Al-Khaṭṭābī said:

القبوض تختلف في الأشياء حسب اختلافها في أنفسها وحسب اختلاف عادات الناس فيها فمنها ما يكون بأن يوضع المبيع في يد صاحبه ومنها ما يكون بالتخليّة بينه وبين المشتري، ومنها ما يكون بالنقل من موضعه ومنها ما يكون بأن يكتال

Meaning: “*Qabd* differs according to differences in items and human customs.

There are some that occur by putting the subject matter in the hands of the buyer, some occur with *takhliyyah* to the buyer, some occur by transferring it, some occur when the buyer measures it....”<sup>30</sup>

Contemporary developments in technology have created very different *'urf* transactions. Those who agree (*‘āqid*) do not interact physically with the subject matter. The use of cheques as a substitute for cash money is the norm in the current banking system. Rapid development in the digital field has seen the convenient transfer of money from one account to another done online and debited instantly from the account using a card. In these circumstances, the seller and buyer do not hold physical cash money, however, *takhliyyah* and *tamkīn* has occurred and certified through the *'urf* and legal means.

Besides *takhliyyah* and *tamkīn*, there are several forms of *qabd ḥukmī* that were discussed by the ulama. Among the current researchers, some have concluded that *qabd ḥukmī* could occur in the following circumstances:<sup>31</sup>

#### 1. Occurrence of *takhliyyah* and *tamkīn*

When a buyer is given full access to a subject matter without any objections, *takhliyyah* and *tamkīn* then occur, although the buyer did not take the subject matter physically. Hence, if the item is destroyed, it is already under the buyer’s *ḍamān*. There are other related examples, such as:<sup>32</sup>

<sup>30</sup>Hamd ibn Muḥammad ibn Ibrāhīm al-Khaṭṭābī, *Ma’ālim Al-Sunan Sharh Sunan Abī Dawūd*, vol. 3, (Aleppo: al-Maṭba’ah al-‘Ilmiyyah, 1351H), p.136.

<sup>31</sup> Ḥammād, Nazīh, *Qadāyā Fiqhiyyah Mu’āṣirah fī Al-Māl Wa Al-Iqtisād*, (Damascus: Dār al-Qalam, 2001), p. 86-87. Maṣṣūr ‘Abd al-Laṭīf, *Al-Qabd wa atharuh fī al-‘uqūd*, (Nablus: Jāmi’at al-Najāh al-Waṭaniyyah, 2000), p. 32-41.

<sup>32</sup> ‘Alī Haydar, *Durar Al-Ḥukkām Sharh Majallat Al-Aḥkām*, p. 251; Nazīh Ḥammād, *Qadāyā Fiqhiyyah Mu’āṣirah fī Al-Māl Wa Al-Iqtisād*, (Damascus: Dār al-Qalam, 2001), p. 86.

- a. The seller uses the subject matter before surrendering it to the buyer and that use is based on the permission of the buyer as well as the interest of the buyer.
- b. The buyer gives a bag to the seller and the seller puts the subject matter into the bag.
- c. The wheat buyer asks the wheat seller to pound the wheat and the seller does it.

In all the examples, although the use of the subject matter, putting it into the bag and giving it to the buyer and pounding the wheat by the seller before it is delivered physically to the buyer, it is already considered as *qabd hukmī*.

## 2. *al-Muqāṣāh* (Set-Off)

*al-Muqāṣāh* refers to debt settlement by a contra transaction, which causes both parties to settle their debts between them. For example, A owes RM10 to B and B also has a RM10 debt to A. Debt between both debtor and creditor is considered settled in a set-off. A set-off is presumed to be *qabd hukmī*, which takes the place of *qabd haqīqī* in this case.

## 3. Continuing the Earlier *Qabd*

For example: A borrows a book from B. Then, B sells the book to A. The book being in the hands of A is presumed to be *qabd hukmī* and A does not have to renew *qabd*. *Qabd*, such as this is, apparently practiced by Islamic financial institutions in products such as *al-Ijārah Thumma al-Bay'* (AITAB), because maintaining the subject matter in the tenancy contract (*ijārah*) in the hands of someone is presumed to be *qabd hukmī* when he enters into a sales and purchase contract on the same subject matter.

## 4. *Itlāf* (Destroying the Subject Matter)

Thus, if the buyer destroys or damages the subject matter that is still in the hands of the seller, it is presumed to be *qabd hukmī*. This is because the buyer has had excess to the subject matter and it was under his control.

So, if you observe all the four situations stated above, you will find that all of them return to the first situation because it has the elements of *takhlīyyah* and *tamkīn*. Actually, the last three situations were only examples of *takhlīyyah* and *tamkīn*.

## The Basic Agreement in the Sale and Purchase of Gold

Gold is purchased for several reasons. Some buy gold in the form of jewellery because they want it for decorative purposes. Some buy gold in the form

of shillings or coins or ingots as a form of investment to make profits or least, as a form of hedging with the presumption that price of gold would rise in the future.

No matter what the reason, the basic agreement is known according to the discipline of Islamic commerce as *bay' al-ṣarf*. al-Zuhaylī defined *bay' al-ṣarf* as the exchange of one monetary form for another in the same or different genera, i.e. gold for gold, silver for silver, gold for silver, whether it is in the form of jewellery or minted coins.<sup>33</sup>

*Bay' al-ṣarf* has several specific conditions based on several hadith, among them:

عَنْ عَبْدِ بْنِ الصَّامِتِ، قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ "الذَّهَبُ بِالذَّهَبِ وَالْفِضَّةُ بِالْفِضَّةِ وَالْبُرُّ بِالْبُرِّ وَالشَّعِيرُ بِالشَّعِيرِ وَالنَّمْرُ بِالنَّمْرِ وَالْمَلْحُ بِالْمَلْحِ مِثْلًا بِمِثْلِ سِوَاءٍ بِسِوَاءٍ يَدًا بِيَدٍ فَإِذَا اِخْتَلَفَتْ هَذِهِ الْأَصْنَافُ فَبِيعُوا كَيْفَ شِئْتُمْ إِذَا كَانَ يَدًا بِيَدٍ

Meaning: ‘Ubadah ibn al-Samit narrated. The Messenger of Allah (may peace be upon him) exhorted: Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like and same for same, hand to hand. But if these commodities differ, then sell as you like, as long as it is hand to hand (Muslim, Sahih Muslim, the of *musāqāh* and *mu’āmalah*, chapter exchange and selling gold for silver on the spot).<sup>34</sup>

According to this hadith, the fuqaha concluded that the four conditions that must be fulfilled in *bay' al-ṣarf*, namely taking possession (*qabḍ*) before leaving one another, equal interest in the transaction, contract is binding i.e. devoid of any conditional options (*khiyar al-sharṭ*) and contract in the absence of any deferment.

*Qabḍ*, before being separated from *bay' al-ṣarf*, was a condition agreed upon by the Hanafi, Maliki, Syafie and Hanbali sects. Moreover, al-Nawawī<sup>35</sup> and Ibn al-Mundhir<sup>36</sup> alleged that it was the *ijmā'* (consensus of opinion) of the mujtahid. This is clearly stated in the hadith narrated by ‘Ubadah ibn al-Samit.

<sup>33</sup> Wahbah ibn Muṣṭafā al-Zuhaylī, *Al-Fiqh al-Islāmī wa adillatuh*, vol. 5, (Damascus: Dar al-Fikr, 2011), p. 3659.

<sup>34</sup> Abū al-Ḥasan Muslim ibn al-Hajjāj Muslim, *Ṣaḥīḥ Muslim, Kitāb Al-Musāqāh, Bāb Al-Ṣarf Wa Bay' Al-Dhahab Bi Al-Wariq*, vol. 3, (Beirut: Dār Iḥyā' al-Turāth, n.d.), p. 1210.

<sup>35</sup> Muḥyī al-Dīn Yahyā ibn Sharaf al-Nawawī, *al-Minhaj sharḥ ṣaḥīḥ Muslim ibn al-Hajjāj*, vol. 11, (Beirut: Dār Iḥyā' al-Turāth al-‘Arabī, 1392H), p. 14.

<sup>36</sup> Muhammad ibn Ibrahim Ibn al-Mundhir, *al-Ijmā'*, (Beirut: Dār al-Muslim li al-Nashr wa al-Tawzī', 2004), p. 133.

The saying “*yad bi yad*” literarily means ‘hand-to-hand’. Al-‘Asqalānī<sup>37</sup> explained that the meaning of “*yad bi yad*” is the act of *qabd* by the two parties in the same contract ceremony (*majlis al-‘aqd*).

### Contemporary Issues of *Qabd* in the Sales and Purchase of Gold

As stated earlier, technological developments have greatly influenced the trend of sales and purchases, including that of gold. The physical delivery of gold could be difficult in certain situations and shortcomings. Currently, the Islamic pawn-shop industry or also known as *al-Rahn*, is growing and expanding in Malaysia<sup>38</sup>. It emerged as a micro-credit system, which was an alternative to conventional the pawn-shop system in Malaysia. *Al-Rahn*, which became a practicing financial institution in Malaysia, is a hybrid product from several contracts, such as *al-qard al-ḥasan* (interest-free loans), *al-rahn* (collateral), *al-wadī’ah* (savings) and *al-ujrah* (saving fees).<sup>39</sup> Jewellery or gold ornaments are usually collaterals as a guarantee against loans obtained by the customer. Thus, if the customer fails to repay the loan after a stipulated period has lapsed according to the agreement, the financial institution will initiate an auction. The purchase transaction in an auction is done online. The customer can pay according to the spot by transferring money from his account to the auctioneer’s account. Hence, the customer would face difficulties when implementing *qabd* according to the spot on the gold purchased because the location could be far away.

In addition, financial institutions including Islamic financial institutions have also introduced savings accounts and gold current accounts or gold investment accounts. Usually, customers do not keep the gold they have purchased. Therefore, physical delivery usually does not happen. Customers only keep an account book either in physical form or in the form of a smart application that contains statements about the gold they own. Even so it involves buying and selling money with gold which is subject to the law of “*bay’ al-ṣarf*.”

In these two situations, the issue of *qabd* according to spot arises, which is an important condition in the sale and purchase of gold or *bay’a al-ṣarf* that was discussed earlier. Based on earlier discussions, gold was categorised as *manqūl* property (movable property). According to the ulama from the Hanafi

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<sup>37</sup> Aḥmad ibn Ali ibn Muḥammad al-‘Asqalānī, *Faṭḥ al-Bārī sharḥ saḥīḥ al-Bukhārī*, vol. 4, (Beirut: Dār al-Ma’rifah, 1379H), p. 378.

<sup>38</sup> Kentaro Kambara, “Economics of Ar-Rahnu (Islamic Pawnbroking): Issues And Cases In Brunei Darussalam”, *Jurnal Hadhari*, Special Edition, (2017), p. 87-96.

<sup>39</sup> S. Hisham et al., “The Concept and Challengers of Islamic Pawn Broking (*Al-Rahnu*)”, *Middle-East Journal of Scientific Research* 13, (2013), p. 98-102.

sect, one of Imam Syafie's *qawl* and a narration by the Hanbali sect, stated that *qabḍ ḥukmī* according to *takhliyyah* and *tamkīn*, can be accepted in *manqūl* property that is *muqaddar*. Hence, can *qabḍ ḥukmī* be implemented in this situation?

In order to fulfil this condition, the normal practices implemented by financial institutions are:

- a. To issue certificates of ownership containing the name of the buyer as well as the serial number or code.
- b. To record purchases.
- c. To make marking by tagging the gold that has been sold.

The issuing of ownership certificates is a normal practice (*'urf*) in the current sale and purchase of gold. Moreover, human trust on ownership of gold certificates long ago had created a generation of extremely powerful goldsmiths who have been issuing goldsmith notes that eventually led to the use of paper currency and banks<sup>40</sup>. The use of ownership of gold certificates as a substitute for gold in *qabḍ ḥukmī* is a stipulation *Shari'ah Standards* stated by AAOFI in Shari'ah Standard No. 57 on Gold and Gold Trading Controls:

“3/4 Sale of Gold Ingots for Currencies: When gold ingots are sold for currencies, the counter-values must be exchanged during the contracting session. Possession of the ingot by the buyer, or his agent, is realized either physically or constructively. Constructive possession is realized by allocation of the ingot and by enabling the buyer to dispose of it, or by holding a certificate that represents ownership of a specified ingot that is distinguishable (an allocated ingot) from others, by serial numbers or other distinct marks from other ingots”<sup>41</sup>

Hence, although tagging is not explicitly stated in the standard texts, based on the term “allocation of the ingot and by enabling the buyer to dispose” it is understood to mean *takhliyyah* and *tamkīn*. Moreover, if a certificate is not issued although it has been presumed as the best *qabḍ ḥukmī* it actually possesses the elements of *takhliyyah* and *tamkīn* that has been certified by legislation. All charges due to the gold, such as safe-keeping charges, would be transferred to the buyer. Thus, if the safe-keeping charges are on the original owner then it is an offence as it contradicts the agreed contract. Extra charges will be returned to the original owner because *qabḍ ḥukmī* has occurred. As from the aspect of *takhliyyah* and *tamkīn*, recording the ownership in the name of the buyer and initiating allocation by tagging the physical gold is stronger compared to the gold

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<sup>40</sup> Ryan Filbert and Fachmi Jaidi, *Gold Trading Revolution*, (Jakarta: PT. Gramedia, 2015).

<sup>41</sup> *Shari'ah Standards*, (Manama: Accounting and Auditing Organization for Islamic Financial Institutions (AAOFI), 2017), p. 11.

owner's certificate because it can be manipulated. A certificate could be issued but the allocation and tagging will not be done. Hence, if this happens, the *takhliyyah* and *tamkīn* aspects would not be completed and inevitably cause non-shariah compliant issues. At best, it is suggested that all three actions stated earlier, such as issuing gold ownership certificates, recording the sales and tagging the physical gold in this case. Recording of sales and tagging must be made on the day the contact occurs (Trade Date T+0) so that the issues of *ribā al-nasī'ah* does not happen because *qabḍ* “*yad bi yad*” has occurred according to *ḥukmī*. This tagging process can also indirectly ensure the physical existence of gold.

The use of *qabḍ ḥukmī* as a justification in this issue is a current necessity. This is also consistent with the method:

تصحيح العقد واجب ما أمكن

Meaning: Making a contract valid is necessary as long as possible.

However, its implementation should be done carefully to avoid any violation of the principle of *bay' al-ṣarf*. Operators buying and selling gold online must provide a detailed standard operating procedure, so it can be implemented in an organized and controlled manner.

## Conclusion

In general, the ulama had agreed to accept *qabḍ ḥukmī* as a substitute for *qabḍ*. However, they differed in opinion regarding the details of the subject matter that can be applied in *qabḍ ḥukmī*. When determining whether a *qabḍ ḥukmī* can be accepted or otherwise, many of the ulama had referred to ‘*urf*. Thus, their examples were not strictly confined or limited but rather realistic examples that occurred during that time. When ‘*urf* changes according to current developments, the *qabḍ ḥukmī* in some of the current contracts need to be reviewed by referring to the current ‘*urf*. As long as *takhliyyah* and *tamkīn* exists, it could be accepted as *qabḍ ḥukmī*, including for transactions that involve gold. Presently, the use of gold ownership certificates is a substitute for physical gold in transactions. Since the issuing of gold ownership certificates can still be manipulated, it must be ensured that the allocation steps, such as tagging of the physical gold, is implemented on the day of the contract according to spot (T+0) to avoid *ribā al-nasī'ah*. All these actions are important in ensuring *takhliyyah* and *tamkīn* stipulated as conditions by the ulama in *qabḍ ḥukmī* are fulfilled.

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