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-Qurʾān and al-Sunnah have not specifically mentioned the form of qabḍ in a sales and purchase transaction, the ulama has made customary practice (ʿurf) 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 ʿurf as a reference in the validity of qabḍ. The study is a normative legal study using ʿusūl al-fiqh and fiqh al-muʿāmalāt 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-nasīʿah.

Keywords: Qabḍ ḥaqīqī, qabḍ ḥukmī, sale and purchase of gold, Islamic economics

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-luzām (conditions that make a contract binding) condition, as in hibah and hadiyah, 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:
Meaning: Changes in rulings due to changed circumstances should not be objected to.¹

Hence, discussions on qabḍ, especially qabḍ ḥukmī, is constantly renewed based on current developments. The issue of qabḍ 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 qabḍ (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 qabḍ 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 qabḍ ḥukmī according to their view. The data collected were analyzed descriptively based on the integration of the basic disciplines of Sharia, namely the science of usūl al-fiqh and fiqh al-mu'amalāt. Current practices are also reviewed to ensure that discussions are founded on reality in business practice.

Definition of Qabḍ

Qabḍ is an adjective in Arabic that originates from the word qabada – 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 qabḍ. Then, the word qabḍ was used to refer to all forms of taking (akhdh), either by hand or otherwise.²

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

1. **Al-Anṣārī**:

رفغ خاصیتی تصرف المالک فیه علیه تصرف التمکن ملی للمختی أو ناثیه

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**:  

قولهم قیضست الدار والارض والعبد والبعیض یریدون بذلك الاستیلاء والتضکن من التصرف

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

3. **Al-Qarrah Daghi** defined *qabḍ* as:

التخلیة بین العاقد والمعقد عليه على وجه يتمکن 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 *qabḍ* is measured based on 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*).

**Qabḍ Ḥukmī**

*Qabḍ Ḥukmī* refers to *qabḍ* that does not involve the physical transfer of the subject matter (*ma’qūd ‘alayh*). All the three definitions adduced earlier only stated that *qabḍ* occurs when control is transferred to the new owner or when the original owner surrenders all control. The presumption of *tamakkun, istila’* 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

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qabḍ is that there are no hindrances to the transfer of control. This element corresponds with al-Kāsānī’s statement:⁶

Meaning: It is not required to submit by hand (physically) because the elements of submission are tamkīn and takhlīyāh and in fact all obstacles are removed from the point of ‘urf and customary practice. It is also in line with al-Zuhaylī’s⁷ view when referring to qabḍ ḥukmī:

Form of the subject matter (ma’qūd ‘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 (unmovable 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.

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Meanwhile, trees are included in the *mangūl* property (movable property) except if it is contracted together with the land.\(^9\)

Majority of the ulama from the Maliki, Syafie and Hanbali sects were of the view that ‘*aqār* property refers to land, buildings and trees.\(^10\) The ulama from the Hanafi, Maliki, Syafie and Hanbali sects unanimously allowed *qabā ḥukmī* in ‘*aqār* creating *takhliyyah* and *tamktīn*.\(^11\)

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\(^12\), such as:

- The seller states to the buyer that he surrenders the right to act on the subject matter to the buyer.
- The buyer is able to take the subject matter without any impediments.
- The subject matter must be free from the claim of rights of other parties.
- ‘*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. *Qabd Ḥukmī* in *Manqūl* Property

*Manqūl* property refers property that is transferrable or movable.\(^13\)

*Manqūl* property is divided into two forms:

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

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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, one was Imam Syafie’s qawlaw and another a narrative from the Hanbali sect, which stated that qabḍ ḥukmī according to takhlīyyah and tamkīn can be accepted in this case.

Hence, the Maliki, Syafie and Hanbali 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.

2). The manqūl ghayr muqaddar property:
According to the Hanafi sect, qabḍ ḥukmī by way of takhlīyyah and tamkīn is accepted in this case.

According to Maliki, Syafie and Hanbali 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

21Abu Bakr ibn Mas’ūd al-Kāsānī, Badā‘i’ Al-Ṣanā‘i’ fi Tarīb Al-Sharā‘i’i’, p. 244.

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transferring it, then, *qabd* occurs by transferring or moving it out of the seller’s premises. All this is based on the situation or ‘*urf’.\(^{25}\)

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.\(^{26}\) Therefore, ‘*urf* can be used as an argument or postulate in Islamic law.\(^{27}\)

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

**Determining Qabd 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 “*qabd*”. al-Nawawī stated that:

فكلما عهد الناس بيعا كان بيعا كما في القبض والحرز وإحياء الموتا 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 *qabd*, ḥirz (place of custody), *ihŷa*’ al-mawāt (cultivating idle land) etc. in the *muṭlaq* pronouncement category”.\(^{28}\)

al-Suyūṭī\(^{29}\) also said that *qabd* is one of the problems that is referred to ‘*urf* when trying to determine it (*qabd*).


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According to previous discussions by the ulama, we understand how they made ‘urf as a factor in determining the form of qabḍ 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 qabḍ. Al-Khaṭṭābī said:

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

Meaning: “Qabḍ 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….“

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 qabḍ ḥukmī that were discussed by the ulama. Among the current researchers, some have concluded that qabḍ ḥukmī could occur in the following circumstances:

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 damān. There are other related examples, such as:


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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 *qabḍ ḥukmī*.

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 *qabḍ ḥukmī*, which takes the place of *qabḍ ḥaqīqī* in this case.

3. Continuing the Earlier *Qabḍ*

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 *qabḍ ḥukmī* and A does not have to renew *qabḍ*. *Qabḍ*, 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 *qabḍ ḥukmī* 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 *qabḍ ḥukmī*. 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 *takhliyyah* and *tamkīn*. Actually, the last three situations were only examples of *takhliyyah* 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-Zuhayli 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.33

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

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\text{‘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 musaṣqāh and mu’āmalah, chapter exchange and selling gold for silver on the spot).}^{34}
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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-ṣarf) and contract in the absence of any deferment.

Qabḍ, before being separated from bay’ al-ṣarf, was a condition agreed upon by the Hanafi, Malikī, Syafī and Hanbali sects. Moreover, al-Nawawī35 and Ibn al-Mundhir36 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.


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The saying “yad bi yad” literally means ‘hand-to-hand’. Al-‘Asqalānī\textsuperscript{37} 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\textsuperscript{38}. 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-wad’ah (savings) and al-ujrah (saving fees).\textsuperscript{39} 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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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. 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”.

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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41 *Shari’ah Standards*, (Manama: Accounting and Auditing Organization for Islamic Financial Institutions (AAOFI), 2017), p. 11.

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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 tamkîn 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 ribâ al-nast’ah does not happen because qab’d “yad bi yad” has occurred according to ḥukmî. This tagging process can also indirectly ensure the physical existence of gold.

The use of qab’d ḥukmî as a justification in this issue is a current necessity. This is also consistent with the method:

\[
\text{تصحيح العقد واجب ما يمكن}
\]

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 qab’d ḥukmî as a substitute for qab’d. However, they differed in opinion regarding the details of the subject matter that can be applied in qab’d ḥukmî. When determining whether a qab’d ḥukmî 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 qab’d ḥukmî in some of the current contracts need to be reviewed by referring to the current ‘urf. As long as takhliyyah and tamkîn exists, it could be accepted as qab’d ḥukmî, 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 ribâ al-nast’ah. All these actions are important in ensuring takhliyyah and tamkîn stipulated as conditions by the ulama in qab’d ḥukmî are fulfilled.

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