

Shari'ah Standard No. (18)

Possession (Qabd)



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IN THE NAME OF ALLAH, THE ALL-MERCIFUL, THE MOST MERCIFUL

All praise be to Allah, the Lord of all the worlds, and blessings and peace be upon our master, Muhammad, and his household and all his companions

Preface

The purpose of this standard is to elaborate actual possession in contracts along with its related Shari'ah rules as well as the significant applications undertaken by Islamic financial Institutions (Institution/Institutions).⁽¹⁾

(1) The word (Institution/Institutions) is used here to refer, in short, to Islamic financial institutions including Islamic Banks.

Statement of the Standard

1. Scope of the Standard

This standard covers possession in contracts and what acts as a constructive substitute for it (constructive possession). It elaborates the mode of its realisation in immovable and movable property as well as in things that are ascertained and those established as a liability by description. The standard also identifies the person responsible for its costs (maintenance and expenses) in various types of contracts along with their modern applications.

The standard does not cover acts other than contracts, like possession in usurpation (*Ghasb*) and the like. Further, it does not cover the nature of possession with respect to liability for compensation or otherwise, nor to possession in set-offs, as these have their specific standards.

2. Definition of Possession

Possession is the gathering of a thing or what takes its rule, according to the requirements of customary practice.

3. Mode of Taking Possession

3/1 The basis for determining the mode of possession in things is custom ('Urf). It is for this reason that possession of things has differed in accordance with the nature of things and differences among people with respect to things.

3/2 Actual possession is realised in immovable property through relinquishment and enabling transactions in it.

3/3 Actual possession takes place in movables through physical corporeal delivery. Constructive possession, in ascertained movables as well as in those established as a liability by description, takes place -after their ascertainment by means of one of the methods known for their

ascertainment- by relinquishing (releasing) the thing for the person entitled to it enabling him to deliver it without any obstacle even when no transportation or transmission has taken place. This takes place irrespective of the thing being one that is acquired by hand in practice or is one in which delivery (transmission) is stipulated through one of the customary units of measure -cubic measure, weight or linear measure- or it is a commodity to which these measures do not apply due to their inapplicability or with the possibility of their applicability, but the measures are not applied, as in the case of sale by estimate.

- 3/4 Constructive possession includes the registration of a mortgage of immovables and (hypothecation) 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 rules and legal effects.
- 3/5 The possession of documents, like bills of lading and warehouse receipts, issued in the name of the possessor or acknowledging his interest therein is deemed constructive possession of what the documents represent if the ascertainment of commodities, goods and appliances is attained through them along with the ability of the possessor to undertake transactions in them.
- 3/6 Prior possession of a tangible thing stands in place of subsequent lawful possession due to a cause acknowledged by the Shari'ah irrespective of the possession of the prior possessor being on the basis of the liability to bear loss (Daman) or one of trust (Amanah) and irrespective of the subsequent constructive possession entailing liability for loss or a burden of trust (Amanah).
- 3/7 Reciprocal possession stipulated in the contract of *Sarf* (transaction in gold, silver and currencies) is delivery and acceptance of delivery within the session of the contract on a spot basis (*Yadan Bi Yadin*). [see item 2/6 of Shari'ah Standard No. (1) on Trading in Currencies]

4. Expenses of Possession

4/1 Expenses of possession in financial commutative contracts

- 4/1/1 The expenses of delivering the sold commodity -for presenting it if it is absent, for ascertaining it through one of the customary units where that entails a claim for ascertainment like wages of employing a cubic measure, weight, linear measure and counting- is the responsibility of the seller. As for the expenses of delivering the price, if any, it is the responsibility of the buyer, unless there is a stipulation or customary practice to the contrary, in which case it is binding to follow such stipulation or practice.
- 4/1/2 The expenses of conveyancing, witnessing, preparation of instruments that record a sale and the formalities of registration are borne as stipulated by the parties to the contract. If there is no such stipulation on their part, customary practice is relied upon.
- 4/1/3 Where it is stipulated by the buyer for the seller that the sold commodity be delivered at a particular place, other than the one where it is present at the time of the contract, and that it be delivered at the expense of the seller, the seller is bound to deliver it at the specified place and the expenses of transporting it to such place will be borne by the seller.
- 4/1/4 The rules for the expenses of possession explained in items 4/1/1, 4/1/2 and 4/1/3 apply to all financial commutative contracts, like Salam, Istisna'a and others. Accordingly, the expenses of delivering the Salam commodity will be borne by the seller, the expenses of delivering the capital (Ras al-Mal) will be borne by the Rab al-Salam (the buyer); the expenses of taking possession of the leased property will be borne by the lessor, the expenses for the delivery of possession of the lease value (wages) shall be borne by the lessee; and the expenses for delivering the subject matter of Istisna'a will be borne by the manufacturer, while the expenses for the delivery of the price shall be borne by the orderer. In all these cases, if there is a customary practice or stipulation to the contrary, then, such practice or stipulation shall be observed.

4/2 Expenses for delivery of possession in a loan (Qard)

4/2/1 The expenses for delivery and recovery in a contract for loan, expenses that pertain to its ascertainment through one of the customary units of measure and the like, shall be borne by the borrower.

4/2/2 The expenses for the drawing up of documents, promissory notes, title deeds and the like that are required for transacting a loan contract; its implementation or documentation shall be borne by the borrower. [see Shari'ah Standard No. (19) on Loan (Qard), item 8]

4/3 Expenses for delivery of possession in a deposit (Wadi'ah)

The expenses of deposit and withdrawal in a contract of deposit shall be borne by the depositor (the owner of the deposit).

5. Key Modern Applications of Possession

5/1 Possession by the beneficiary of a bank draft or personal cheque is deemed constructive possession of the amount payable by the drawee bank. This is deemed possession of the payable amount even though there is delay in the payment of the actual amount, keeping in view what is laid down in Shari'ah Standard No. (1) on Trading in Currencies (item 2/6/5) as well as what is laid down in the Shari'ah Standard No. (12) on Commercial Papers (items 6/1 and 6/2).

5/2 Payments for a credit card are deemed constructive possession of such payments. [see Shari'ah Standard No. (2) on Debit Cards and Credit Cards (item 4/4)]

5/3 A deposit by a person of an amount in a bank account maintained for a debtor, upon his demand or with his consent, is deemed constructive possession irrespective of the deposit being by way of cash, by endorsement or by cheque drawn upon a bank with which an account is maintained, and the depositor is absolved of liability when he is indebted to the extent of such amount.

6. Date of Issuance of the Standard

This Standard was issued on 30 Rabi' I, 1425 A.H., corresponding to 19 May 2004 A.D.

Adoption of the Standard

The Shari'ah Standard on Possession was adopted by the Shari'ah Board in its 12th meeting held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1424 A.H., corresponding to 15-19 May 2004 A.D.

Appendix (A)

Brief History of the Preparation of the Standard

In its meeting No. (8) held during the period of 28 Safar to 4 Rabi' I, 1423 A.H., corresponding to 11-16 May 2002 A.D., in Al-Madinah Al-Munawwarah, the Shari'ah Board decided to issue the Exposure Draft of Shari'ah Standard on Possession (Qabd).

On 24 Rajab 1423 A.H., corresponding to 1 October 2002 A.D., the Shari'ah Standards Committee decided to assign to a Shari'ah consultant the responsibility of preparing the Exposure Draft of the Shari'ah Standard on Possession (Qabd).

The Shari'ah Standards Committee (1), in its meeting No. (7), which was held in the Kingdom of Bahrain on 16 Muharram 1424 A.H., corresponding to 19 March 2003 A.D., discussed the Shari'ah study and required the consultant to incorporate certain necessary amendments in the light of the discussion and the comments made by the members.

In its meeting No. (8) held on 16-17 April 2003 A.D., in the Kingdom of Bahrain, the Shari'ah Standards Committee (1) discussed the exposure draft of the Standard on Possession in the light of the discussions and the observations of the members, just as the Committee discussed the exposure draft in its meeting held during the period of 25-26 Rabi' II, 1424 A.H., corresponding to 25-26 June 2003 A.D., and made necessary amendments to the draft in the light of the discussion and observations of the members.

In its meeting No. (9) held in Amman, the Hashimite Kingdom of Jordan, during the period of 23-24 Jumada I, 1424 A.H., corresponding to 23-24 July 2003 A.D., the Committee discussed the exposure draft and made necessary amendments in the light of the discussions and the observations of the members.

The revised exposure draft of the Standard was presented to the Shari'ah Board in its meeting No. (11) held in Makkah Al-Mukarramah during the period of 2-8 Ramadan 1424 A.H., corresponding to 27 October - 2 November 2003 A.D. The Shari'ah Board incorporated amendments to the exposure draft of the Standard and decided that it be distributed among specialists and interested parties in order to obtain their comments as a preliminary to the discussion in a public hearing.

A public hearing was held in the Kingdom of Bahrain on 29 Dhul-Qa'dah 1424 A.H., corresponding to 21 January 2004 A.D. The public hearing was attended by more than fifteen participants representing central banks, institutions, accounting firms, Shari'ah scholars, academics and others interested in the field. The members of the Shari'ah Standards Committees (1) and (2) responded to the written comments that were sent prior to the public hearing as well as to the oral comments that were expressed in the public hearing.

The Shari'ah Standards Committees (1) and (2) in a joint meeting in the Kingdom of Bahrain on 30 Dhul-Qa'dah 1424 A.H., corresponding to 22 January 2004 A.D., discussed the comments that were made during the public hearing as well as the observations received in writing. The Committees made amendments that were deemed suitable.

The amended exposure draft was presented to the Drafting Committee in its meeting held in the Kingdom of Bahrain on 25 Safar 1425 A.D., corresponding to 15 April 2004 A.D.

The Shari'ah Board in its meeting No. (12) held in Al-Madinah Al-Munawwarah during the period of 26-30 Rabi' I, 1425 A.H., corresponding to 15-20 May 2004 A.D., discussed the amendments suggested by the Shari'ah Standards Committee and the Drafting Committee, and incorporated the amendments deemed suitable. The Shari'ah Board unanimously adopted some of the items of the Standard and some items were adopted by the majority vote of the members of the Shari'ah Board, as recorded in the minutes of the meetings of the Shari'ah Board.

Appendix (B)

The Shari'ah Basis for the Standard

Realisation of Possession in the Shari'ah

- The basis for the realisation of actual possession with respect to gold, silver and currencies through actual physical possession is the sound tradition reported from Ubadah Ibn Al-Samit (may Allah be pleased with him), that the Messenger of Allah (peace be upon him), said, *"Gold for gold, silver for silver. . . ,"* till he said, *"like for like, equal for equal, from hand to hand. If these species differ, then sell as you like as long as it is from hand to hand".*⁽²⁾
- The basis for acknowledging custom ('Urf) as the basis for the realisation of possession is the consensus (Ijma') of the Jurists (Fuqaha). It is in this regard that Al-Khatib Al-Shirbini says: "The reason is that the Law-giver has used the term possession in an unqualified sense and has deemed it the basis of rules. He did not elaborate it, and there is no definition for it in the language. It is for this reason that recourse is to be had to custom ('Urf)".⁽³⁾ Ibn Taymiyyah said, "As long as there is no definition for it in the language or in the Shari'ah, recourse must be had to the custom of the people, like possession mentioned in the words of the Prophet (peace be upon him): *'He who buys food is not to sell it until he takes possession of it.'*"⁽⁴⁾ Al-Khattabi says: "Forms of possession differ for things in accordance with a difference in their own forms and in accordance with the varying practices of the people with respect to them."⁽⁵⁾
- The basis for the realisation of possession in immoveable property through relinquishment is customary practice. The opinion of the

(2) Related by Muslim in his "Sahih".

(3) "Mughni Al-Muhtaj" [2: 72].

(4) "Majmu' Al-Fatawa" by Ibn Taymiyyah [3: 272].

(5) "Ma'âlim Al-Sunan Li Al-Khattabi", [3: 136].

majority of the jurists among the Hanafis, Malikis, Shafi'is, Hanbalis and Zahiris, as well as others besides them, is that possession in immovable property is delivered through relinquishment and the facilitating of transactions in it.⁽⁶⁾ Hanafi jurists have stipulated that if a lock is placed on the immovable property, then, it is sufficient for the delivery of possession to deliver the key along with relinquishment so as to provide the facility to the possessor to open it without difficulty.⁽⁷⁾

- The basis for considering registration of immovable property as constructive possession in the case of mortgage (Rahn) is custom and its practice (in countries that have adopted the system of registration of property) whereby registration of mortgage of immovable property by entry in a page of the register of mortgages is deemed delivery of possession under the law (constructive possession) and it acts as a substitute for actual delivery of possession with respect to its legal effects and results. This applies even if the property has in it the household assets of the tenant or is attached to the rights of the lessor over this property, because in such a case too they are considered possession constructively and in fact.⁽⁸⁾
- Add to this the fact that official mortgage grants to the creditor (mortgagee) a personal right over the mortgaged property, which gives him, as a result of the death of the owner or his insolvency, a right prior to all the creditors for the satisfaction of his claim from this property.⁽⁹⁾

Possession of Ascertained Moveable Property

- The basis for the realisation of possession in ascertained moveable property, as well as liabilities by description, through relinquishment in favour of one entitled to it and in a manner that enables him to deliver it without any

(6) *"Al-Fatawa Al-Hindiyyah"* [3: 16]; *"Radd Al-Muhtar"* [4: 561], passim; *"Rawdat Al-Talibin"* [3: 515]; *"Al-Majmu' Sharh Al-Muhaddhab"* [9: 276]; *"Mawahib Al-Jalil"* [4: 477]; *"Kashshaf Al-Qina"* [3: 202]; *"Al-Mughni"* [4: 333]; *"Al-Muhalla"* [8: 89]; see article (263) in *"Majallat Al-Ahkam Al-'Adliyyah"*; article (435) in *"Murshid Al-Hayran"*; and article (335) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

(7) *"Radd Al-Muhtar"* [4: 561]; *"Al-Fatawa Al-Hindiyyah"* [3: 16]; see articles (270) and (271) in *"Majallat Al-Ahkam Al-'Adliyya"*; and articles (435) and (436) in *"Murshid Al-Hayran"*.

(8) *"Al-Madkhal Al-Fiqhi Al-'Amm Lil-Zarqa"* [1: 278] and [2: 648] marginal note.

(9) *"Al-Mudhakkirah Al-Idahiyyah Li Al-Qanun Al-Madani Al-Kuwayti"*, (P. 339) as quoted by Muhammad Wahid Al-Din Suwar in his book on Islamic Fiqh, (P. 94).

restriction, whether or not the moveable property needs to be delivered through one of the customary units of measure, is that delivery of a thing literally means delivering it completely without any impediments, so that no one shares it with the possessor, and this is possible by relinquishment. Further, the person who is under an obligation to deliver must have a way through which he can be discharged of his obligation, and what is in his ability is to relinquish it and remove all obstacles. As for actual physical possession (by hand), it is not within his ability to provide that for it is a voluntary act of taking possession. If the obligation to make such a delivery is imposed on him, it would become difficult for him to meet such an obligation.⁽¹⁰⁾ This rule, as well as its basis, has been supported by a resolution of the Islamic Fiqh Academy (OIC).⁽¹¹⁾

- The basis for considering the registration of pledges (hypothecation) of mobile moveable property like cars, steamers, airplanes and trains in the official register for the beneficiary (in countries where a system of registration has been adopted for such moveable property) is deemed constructive possession for what it represents. It is the governing custom that considers official registration as the delivery of constructive possession to the beneficiary and acts as a substitute for actual possession with respect to its legal effects and consequences.
- The basis for stipulating the ascertainment (setting aside) of moveable property through customary units of measure for the realisation of possession are the words of the Prophet (peace be upon him): *"He who buys food (wheat) is not to sell it until he has measured it."*⁽¹²⁾ insofar as they indicate that possession in this case is not attained except by the use of the cubic measure. Thus, ascertainment in what is estimated by cubic measure is through cubic measure and the remaining types are assigned

(10) *"Bada'i' Al-Sana'i"* [5: 244]; *"Al-Fatawa Al-Hindiyyah"* [3: 16]; *"Radd Al-Muhtar"* [4: 561]; *"Sharh Al-Majallah Li Al-Atasi"* [2: 200 and after]; *"Al-Mughni"* [4: 111]; *"Al-Ihsah Li-Ibn Hubayrah"* (P. 224); articles (272) to (275) of *"Majallat Al-Ahkam Al-'Adliyyah"*; and articles (437) and (438) in *"Murshid Al-Hayran"*.

(11) Resolution No. 53 (4/6) in its 6th Session (Sha'ban 1410 A.H./March 1990 A.D.).

(12) Related by Muslim in his *"Sahih"*, [10: 169]; Abu Dawud in his *"Sunan"* [2: 252]; and Al-Nasa'i in his *"Sunan"* [7: 285].

a similar rule on the basis of analogy.⁽¹³⁾ This is the view of the majority of the Jurists from among the Malikis, Shafi'is and Hanbalis upholding that possession in things that are estimated by cubic measure, weight, linear measure and counting is attained by taking delivery through these measures accompanied by relinquishment.

- The basis for considering the delivery of documents pertaining to commodities, appliances and goods (like bills of lading and warehouse receipts) as constituting constructive possession of what they represent is the customary practice in this respect seeking support from the view of the Malikis that the mode of possession in moveable property that is not subjected to estimation is recourse to custom ('Urf).⁽¹⁴⁾ Further, the basis for stipulating cubic measure for the soundness of possession in food that is estimated by cubic measure in the tradition from the Prophet (peace be upon him) is the custom that was prevalent during the period of the Prophet (peace be upon him) to the effect that possession in things subjected to cubic measure is through cubic measure and for the rest analogy is to be employed. As the determination of the issue of possession in contracts is based on custom, therefore, everything that is taken by custom to be possession in a certain period is to be deemed as possession from the perspective of the Shari'ah. If the custom of the people changes in this respect, the consideration of that mode as possession ceases. The reason is that where the constructive basis of rules is custom, the rules will alter with a change in custom,⁽¹⁵⁾ except for those things that have been specified by the Shari'ah. As far as the custom prevalent in our times is based upon the consideration of the delivery of documents for moveable commodities and goods -even where these are subjected to estimation- as amounting to possession of these commodities and goods, it will be deemed valid from the perspective of the Shari'ah. The basic principle here is what is stated by Al-Wansharisi, "A thing that is acted upon by the people and is preferred by their custom and practice must

(13) "*Mughni Al-Muhtaj*" [2: 173]; "*Kashshaf Al-Qina*" [3: 201]; and Ibn Qudamah, "*Al-Mughni*" [4: 111].

(14) "*Sharh Al-Khirashi*" [5: 158]; Al-Dardir, "*Al-Sharh Al-Kabir*" [3: 145]; and Al-Baji, "*Al-Muntaqa*" [6: 97].

(15) "*Al-Mughni*" [6: 188]; "*Al-Furuq*" [1: 176]; and Al-Qarafi, "*Al-Ihkam Fi Tamyiz Al-Fatawa 'An Al-Ahkam*", (P. 231).

be accommodated through the Shari'ah even against disagreement and opposition, as far as possible".⁽¹⁶⁾

- The basis for considering prior possession of a certain thing as a substitute for subsequent possession on grounds that are acknowledged by the Shari'ah, when it represents it, is that the purpose behind the realisation of possession is to establish control over, and the ability to undertake transactions in, the thing possessed. If this state is found possession is found too. This is based on what is upheld by the Malikis and Hanbalis to the effect that if a person sells a thing, or gives it away as gift or pledges it, while the thing is in the possession of a usurper, borrower, bailee, hirer, agent or another, then prior possession represents absolutely subsequent entitled possession through the contract, irrespective of the nature of possession exercised by the possessor being that of liability or trust and irrespective of the entitled possession being in the nature of trust or liability. As for what arises from this with respect to the possessor being liable for the thing possessed or holding it as a trustee, it has no connection with or effect upon the reality of possession.⁽¹⁷⁾

Expenses of Possession

- The basis for the view that the expenses of possession of the sold commodity are borne by the seller is that the delivery of the sold commodity is obligatory on the seller by virtue of the contract, and the contract is not completed without it; and a thing without which an obligation cannot be fulfilled is also obligatory. Accordingly, this is what was upheld by the majority of the Jurists to the effect that meeting the expenses of the delivery of the sold commodity -by presenting it if it is absent and by ascertaining it if it needs to be ascertained by a customary unit of measure- is the responsibility of the seller. The basis for the view that expenses, if any, of taking delivery of the price are the responsibility of the buyer, is that payment of the price to the seller is obligatory upon the buyer, thus, it is binding on him to bear the burden of all that is required by such delivery. The basis for qualifying this rule to impose the expenses on both parties insofar as there

(16) Al-Wansharisi, *"Al-Mi'yar"* [6: 471].

(17) *"Mayyarah 'Ala Al-Tuhfah"* [1: 111]; *"Bidayat Al-Mujtahid"* [2: 229]; Majd Ibn Taymiyyah, *"Al-Muharrar"*, [1: 374]; Ibn Taymiyyah, *"Nazariyyat Al-'Aqd"*, (P. 236); *"Kashshaf Al-Qina"* [3: 249 and 373], [4: 253]; and Al-Qarafi, *"Sharh Tanqih Al-Fusul"* (P. 456).

is no condition to the contrary, is extended from the ruling of the majority of the Jurists of upholding conditions. As for the qualification that "there is no custom to the contrary," it is based on the view of the Jurists, insofar as it is stated in their texts that if there is a stipulation or custom to the contrary, then, it is binding to follow such stipulation or custom.⁽¹⁸⁾

- The basis for the buyer bearing the expenses of constructive possession of what he has purchased, as represented by official registration and attestation for the sale of immovable property or its mortgage in countries that have adopted a system of registration of transfer of immovable property, as well as the sale of some mobile moveable property like cars, vehicles, steamers and airplanes or their pledging (hypothecation) in countries that have adopted a system of officially registering such things, and as well as the purchase of shares of corporations -whose trading is permissible according to the Shari'ah in markets for financial paper- is the customary practice in all these things. Further, such a practice secures the interest of the buyer and is supported by the rule that gain is linked to the bearing of expenses. It is also supported by derivation of the rule from what has been stated by the Hanafi Jurists to the effect that the expenses of the drafting of documents, promissory notes and of witnessing, which confirm the transaction of sale, are to be borne by the buyer as long as there is no custom or stipulation to the contrary.
- The basis for the seller bearing the expenses for the delivery of the sold commodity to the buyer with the stipulation of a known place (other than the place of contract where it is present) is what has been stated by the Hanafis and the Hanabalīs affirming that such expenses are borne by the seller in case of a stipulation to this effect.⁽¹⁹⁾

(18) *"Al-Zurqani 'Ala Khalil"* [5: 158]; *"Hashiyat Al-Dusuqi"* [3: 144]; *"Al-Bahjah 'Ala Al-Tuhfah"* [2: 144]; Al-Dardir, *"Al-Sharh Al-Saghir"* [3: 197]; *"Al-Mughni"* [6: 188]; *"Sharh Muntaha Al-Iradat"* [2: 192]; *"Mughni Al-Muhtaj"* [2: 73]; *"Bada'i' Al-Sana'i"* [5: 243]; Al-Atasi, *"Sharh Al-Majallah"* [2: 221]; articles (45-242) in *"Majallat Al-Ahkam 'Ala Madhhab Al-Imam Ahmad"*; articles (288-91) in *"Majallat Al-Ahkam Al-'Adliyyah"*; and articles (67-466) in *"Murshid Al-Hayran"*.

(19) *"Durar Al-Hukkam"* [3: 230]; *"Kashshaf Al-Qina"* [3: 180]; *"Sharh Muntaha Al-Iradat"* [2: 161]; articles (353), (446) in *"Murshid Al-Hayran"*; article (287) in *"Majallat Al-Ahkam Aal-'Adliyyah"*; and article (342) in *"Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad"*.

Expenses of Possession in Qard (Loan)

- The basis for the borrower bearing the expenses of delivery and acquisition, which refer to taking of delivery through customary units of measure in a contract of Qard, is that the lender has undertaken a good act, and costs are not to be imposed on one who does a good act.⁽²⁰⁾ Linked to these with respect to the rule are the expenses of the drawing up of documents, promissory notes and so on, which are matters that are needed for the implementation, execution or verification of the contract of Qard (loan), it is the borrower who bears these costs insofar as these are the requirements or appendages of raising a loan, which is for his interest. The lender is undertaking an act of donation of the benefits of his wealth and the person doing good is not to be made to bear costs over and above his granting of a thing, because “No ground (of complaint) can there be against those who do good.”⁽²¹⁾ If it is made binding on him to bear the costs of lending and recovery as well as attestation, it would run counter to his good act, and it would lead to the preventing to those who own wealth from lending it.

Expenses of Possession in Deposit (Bailment)

- The basis for the depositor bearing the costs of deposit and recovery in a contract of *Ida'* (deposit) is that “The burden of possession on each thing is binding upon the one who benefits from its possession, due to the principle: Gains are based on the bearing of costs.”⁽²²⁾ It is known that the benefit in deposit and its return belong to the depositor alone, thus, the expenses that are incurred on its deposit and recovery are binding upon him.⁽²³⁾

Key Modern Applications of Possession

- The basis for considering the possession of a bank draft or a personal cheque, accepted for payment by the drawee, as constructive possession of

(20) “*Al-Zarqani 'Ala Khalil*” [5: 158]; Al-Dardir, “*Al-Sharh Al-Saghir*” [3: 197]; and “*Hashiyat Al-Dusuqi*” [3: 144].

(21) [Al-Tawbah (Repentance): 91].

(22) “*Durar Al-Hukam*” [2: 333].

(23) “*Al-Bahr Al-Ra'iq*” [7: 276]; “*Durar Al-Hukam*” [2: 272]; “*Al-Mughni*” [9: 269]; “*Kashshaf Al-Qina*” [4: 203]; “*Asna Al-Matalib*” [3: 84]; “*Tuhfat Al-Muhtaj*” [7: 124]; “*Al-Muhalla*” [8: 278]; articles (793) in “*Majallat Al-Ahkam Al-'Adliyyah*”; and articles (1340) in “*Majallat Al-Ahkam Al-Shar'iyyah 'Ala Madhhab Al-Imam Ahmad*”.

the amount accepted is customary banking practice and trading transactions in this respect. The confirmation of this is laid down in a resolution of the International Islamic Fiqh Academy.⁽²⁴⁾

- The basis for considering a payment on a credit card as constructive possession of the amount of repayment is banking practice in this respect. Likewise, in the consideration of a deposit by a person of an amount in a bank account of the client, irrespective of this being cash, a bank endorsement, or a cheque accepted for payment by the drawee bank, as constructive possession by the beneficiary. This has been confirmed by a resolution of the International Islamic Fiqh Academy.⁽²⁵⁾

(24) Resolution No. (53) 4/6 in its 6th Session (Sha'ban 1410 A.H./March 1990 A.D.).

(25) 25 Resolution No. (53) 4/6 in its 6th Session.

Appendix (C)

Definitions

Al-'Aqar (Immoveable Property)

It is something that has a permanently affixed foundation and it is not possible to transfer it or move it, along with the subsistence of its shape and form, like land and houses.

Al-Manqul (Moveable Property)

It is something that can be transferred and moved. Thus, it includes cash, loans, animals, cars, ships, airplanes, trains, things subjected to cubic measure or weight.

Bay' Al-Juzaf (Sale by Random Estimate)

It is the sale of something whose precise quantity is not known, and its quantity is known through estimation without employing a cubic measure, weight, linear measure, count.

Al-Qabd Bi-Sifat Al-Daman (Possession Creating a Liability for Return)

It is the acquisition of a thing that leads to the liability for the return of the thing, if it is a fungible commodity, that is, its return to its owner as long as the thing exists, and its value, if it is non-fungible, on its loss or conversion, whatever the cause of this, and this when it occurs without the permission of the owner (as a wrongful act, delict, tort), like the possession by a thief or usurper, or with the permission of the owner, but with the intention of owning it, like the possession of one bargaining for it or one who has expressed the intention to own it. Some Jurists have deemed the possession by the borrower, the mortgagee (pledge), lessor and the independent contractor to be of this nature.

Al-Qabd Bi-Sifat Al-Amanah (Possession Creating a Trust)

It is the acquisition of a thing that leads to its treatment as a trust in the possession of the possessor insofar as he does not bear the liability of its

loss, and as long as he has not committed a tort or negligence in its safe-keeping. This occurs with the permission of the owner when there is no intention to own it rather it is for the interest of the owner, like the bailee, agent, dedicated servant, Wali and Wasi, or it is for the interest of the person acquiring it, like the tenant, borrower, and mortgagee, or for their common interest, like the Mudarib, partner, tenant and irrigator.

'Urf (Custom)

It is what is practised by the people and what they have come to follow in terms of words, acts or relinquishment. The 'Urf that is acknowledged by the Shari'ah is the one that meets the following conditions:

1. That it should not contradict the Shari'ah. If the 'Urf goes against a Shar'iah Text or one of the principles of the Shari'ah, it is a custom that is void.
2. That the 'Urf should be continuous or predominantly so.
3. That the 'Urf be prevalent at the time of the undertaking of the transaction.
4. That the two parties to the contract should not have expressly stipulated against it. If they express such a stipulation the 'Urf is not admissible.



