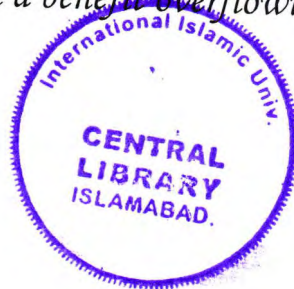


*In the Name of ALLAH
The compassionate the merciful
He is the most omniscient.
(And he to whom wisdom is grante
reciveth indeed a benefit overflowing)*





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TITLE OF THESIS:

**SHARIAH MAXIMS ON POSSESSION AND THEIR APPLICATIONS IN
CONTEMPORARY ISLAMIC FINANCE**

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Dedication

I dedicate my this humble effort to the Holy Messenger of Allah (SWT) Muhammad (SAW), who is forever a source of guidance and knowledge for humanity.

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Abstract

'Shariah Maxims' (*Al-Qwaid-al-Fiqhiyya*) is an important field of Islamic Law that has obtained a considerable amount of interest from the Muslim Jurists. Especially in the past few years the Muslim Jurists and scholars, as well as the modern Fiqh institutions heavily relied on 'Shariah Maxims' and deducted various 'Fiqh Rulings' and religious fatawa. That is why a various number of significant and substantial contributions on 'Shariah Maxims' have appeared in the last few years. The discipline of 'Shariah Maxims' has obtained renewed attention in the modern times and it has become a specialized study in the field of Islamic Commercial Law.

The 'Shariah Maxims' (*Al-Qwaid-al-Fiqhiyya*) also serve as a deductive and interpretative aid with the help of which a large number of 'Judicial Rulings' (*Fiqhi-Ahkam*) may be deducted and interpreted. That is why the lawyers and legislators of Middle Eastern countries have incorporated 'Shariah Maxims' in their legislative codes as a substantive law.

One of the essential element for the validation of a financial transaction is the existence of 'Possession' of the object in trade i-e "*mahall al-aqd*" or "*maqud alayh*" at the time of transaction. It is essential because the sale and purchase transactions take place for the purpose of transference of ownership and possession of the "object of sale" to the "buyer" and "price" to the "seller". That is why if the condition is not fulfilled in any financial transaction shall be considered "Invalid Sale" (*Al-bya Al-fasid*). The sale is also called "Sale of non-existing object" (*Al-bay Al-madum*).¹ The issue of the seller taking 'Possession' of the sold

¹Wahbah Az-Zuhaily, *Al-Fiqh Al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984))5, 389. Also see Sarakhsi, *Al mabsut* (Beruit: Darul marif: 1978)30, 56.

goods before sale contract is known in Islamic jurisprudence and chapter 2 and chapter 4 of the thesis contains its detail description.

Since early times, Muslim Scholars have described a detailed description of "Possession" (*Qabd*) for sale and purchase contracts particularly and for other contracts generally. There has been found a difference of opinions of 'Muslim Jurists' (*Fuqaha*) about possession and its various modes. The issue is, whether it is essential that the sold property be given in the physical possession of buyer or is it enough to award him constructive possession. These issues have been thoroughly discussed in chapter 4 of the research.

The majority of jurists have specified some modes of 'Possession' to holding physically, taking to one's control and custody, evacuation (*takhliyah*), and retention (*habs*). But 'Imam Ibn Taymiyah' has not inferred such restrictions, rather he strictly denied such interpretations that neither the Arabic language nor the Shariah permit. All the modes and forms of 'Possession' especially evacuation (*Takhliyah*) vary from object to object, market to market and era to era. Thus the manner in which 'Possession' takes place is not always the same. Therefore, the precise mode and manner of 'Possession' (*Qabd*) may be determined by reference to the 'Shariah Maxims' which clearly manifests 'Judicial Rulings' and interprets the various modes of 'Possession' according to the prevailing customs².

There is also a difference of opinion in the interpretation of the Hadith of the Messenger (SAW); "Do not sell anything until you receive it"³ "لا تبع ما ليس عندك". The prominent scholars and contemporary Islamic research institutions and Fiqh Academies have resolved the

² Al-Dasuqi. *Hashiyat al Dasuqi Al sharh al kabeer*. (Cairo: Dar Ihya al kutub al Arabiyyah, nd), 3/195.

³ Sunan Abi Dawud, (Syria : Dar al-Hadith, 1973), 3, 768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith, 1973), 4, 228, hadith No 1232; Sunan Al-Nasa'i, (Syria : Dar al-Hadith, 1973), 7, 289, hadith No 4613.

applications of 'Possession' in the contemporary Islamic Finance such as 'Intellectual assets and intangible properties', 'Salam', 'Sukuk', 'Short Selling', 'Hibah' and 'Murabaha Finance'.

INTRODUCTION

Thesis Statement

The newly generated various modes of possession of different properties due to the massive growth and a substantial increase in the whole business industry throughout the world inspires the 'Muslim Jurists' to make proper contributions through taking guidance from the main stream of 'Shariah Maxims' thoroughly deducted by the 'Muslim Jurists'.

Significance and Scope of the Research

'Shariah Maxims' (*Qwaid-ul-Fiqqah*) are hypothetical abstractions and comprehensive declarations of the 'Aims and Objectives of Shariah' (*Maqasid-al-shariah*). That is why the majority of 'Muslim Jurists' have declared these maxims a branch of 'Objectives of Shariah' (*Maqasid-al-shariah*). The 'Legal Maxims' are declarations of the doctrines which are deducted after a comprehensive study of 'Jurisprudential Rulings'. The inclusive exposition of Fiqh empowered the Jurists to reduce and develop various principles of jurisprudence in the form of intellectual statements⁴.

The specific wording of 'Shariah Maxims' is more often the efforts of 'Islamic Jurists' and prominent scholars, then successively developed by others. In rare cases the wording of 'Legal Maxims' are also taken from 'The Quran' and Ahadiths.⁵

Especially nowadays in business life throughout the world a huge and massive growth and a substantial increase have taken place in all aspects, for conducting business, investing

⁴ Jasser Auda, *Maqasid al Shariah An Introductory Guide*, IIJT, 2008, p.22.

⁵ Knut S. Vikør, *Between God and the Sultan: A History of Islamic law* (Oxford: Oxford University Press: 2006), 165.

money, contracting validly and legally and for saving from disputes, the application of different 'Shariah Maxims' are to followed.

Primarily, business activities inducted by several 'Islamic Financial Institutions', but as a result of rapid growth and development in Islamic finance, many legal complications and confusions have arisen. The need for a specific way of Islamic legal system is highly demanding the contributions of Muslim scholars. Muslim Jurists have contributed a lot in framing the issue of Islamic finance. They have not only answered several rising queries but also framed many of the rules and regulations of an alternate Islamic 'Commercial System' in place of conventional finance. They have based their new legislation on classical jurisprudence and especially the legal maxims laid down by them.

Secondly, "Possession" is selected as a topic for research study because of its major role in Islamic finance and high importance in each and every contractual transaction. Besides this, Islamic Fiqh has laid down various 'Jurisprudential Rulings' on basis of possession. Muslim Jurists in so many cases deem it a boundary line between valid and invalid investment on halal profit and interest, that is why it is being considered by 'Muslim Scholars' thoroughly.

Importance in Contemporary Islamic Finance

Islam is a complete code of life having its own rules and principles different and distinct from others. It provides guidance about every field of human life. Field of economy is very important and 'Islamic Law' related to economics and business matters has laid down rules and principles of each and every section. Same is the case of 'Possession', the modern Islamic financial applications have highly emphasized the 'Possession'.

However, the 'Islamic Financial System', after a long interval of rest, is rapidly evolving which inspires the 'Muslim Jurists' to make proper contributions as the time demands. So possession also takes place in such newly generated modes and fresh forms, never

the earlier Jurists has thought. A person goes through various contracts within no time. So new study is highly important. And the new study can take guidance from the main stream of 'Shariah Maxims' laid down by the earlier jurists⁶.

Literature Review

Over all, the 'Hanafi Jurists' were the first to contribute and develop this branch of Fiqh. It is reported that Imam Abu Tahir al-Dabbas, an eminent early Hanafi jurist, was the first to develop seventeen maxims, which were increased by 'Abul Hasan al-Karkhi' to thirty nine. After Karkhi, another 'Hanafi Jurists', 'Abu Zaid Ubaidullah al-Dabbusi', compiled a treatise on maxims which contains a considerable number of 'Shariah Maxims'. In the middle of twelve century of hijrah, another Hanafi scholar, 'Allamah Mohammad Abu saeed Khadimi',⁷ compiled about one hundred and fifty four maxims in his book on 'Hanafi Fiqh' titled; '*Majami al-Haqaiq*'. With the passage of time, these maxim were refined and précised. The importance of these maxim is highly exposed by presenting the application of these maxims in the form of articles in the '*Majallah al-Ahkam al-Adaliyyah*'.⁸

The next major attempt on the subject have been done in 1879, by Mufti of Damascus, Muhammad Nasib Hamza. He organised the maxims according to the headings of books of jurisprudence and named his compendium as; "*Al-Faraid al-Bahiyyah fi al-Qawaid wa al-Fawaid al-Fiqhiyyah*".⁹

⁶ Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance religion, Risk and Return* (Cambridge: Cambridge University Press, 1998), 35.

⁷ Abu Saeed Mohammad bin Mustafa bin Uthman Al husaini Al mufti Al khadimi Al hanafi, *Majami al Haqaiq*, Muhammad bik publishing company: 1318A.H)vol.1.

⁸ Commonly referred to as the Majallah, the first attempt at the codification of Islamic law, done between 1870-1876 during the Ottoman caliphate, under the supervision of Ahmad cevdet Pasha (d.1985), the then Minister of justice.

⁹ Mustafa Ahmad Al Zarqa, *Madkhal al-Fiqhi al-Amm* (Damascus: Damascuss University Press, 1959)2, 943.

Sometime during the eighth century of hijrah, many scholars started to refer to the study of maxims as '*Al-Ashbah wa al-Nazair*' (similitudes and resemblances). The first work published with the title of *Al-Ashbah wa al-Nazair* was by *Taj al-Din al-Subki*.¹⁰

The Jurisprudential history tells us that the people who for the first time focused on the subject of 'Shariah Maxims' were the Hanafi's. Later on 'Sufyan Ibn Tahir ad-Dabbas', an early Iraqi jurist, piled up 17 basic rules of 'Shari'ah Maxims'. Subsequently, a contemporary of 'Sufyan Ibn Tahir ad-Dabbas', Abul-Hassan Karkhi, wrote various 'Shariah Maxims' (*Al-Qawaid Al-fiqhiyah*) in his book "*Al-Usul*"¹¹.

Another prominent scholar 'Ad-Dabbusi' wrote a book "*Ta'sis an-Nadhr*" in which he compiled eighty six maxims of shariah. Subsequently, 'Ibn Al-Nujaim', an eminent Hanafi Scholar, wrote a well known book on 'Shariah Maxims' titled "*Al-Ashbah wa al-Nadhahir*". Following the 'Hanafi Scholars', the 'Shafiis', then the 'Hanbali Scholars', and then the 'Maliki Scholars' enhanced their contributions to the literature on 'Shariah Maxims'¹².

A prominent 'Shafii Scholar', 'Izz ud-Din 'Abd us-Salam' authored a book known as "*Qawa'id al-Ahkam fi masalih al-Anam*" which is considered as the striking contribution to the field of 'Shariah Maxims', yet the compilation of '*Majalla*' is the most progressive stage in the whole jurisprudential history.¹³

The '*Majalla*' is a compilation of about 1850 maxims and articles, of the 'Hanafi Jurisprudence' that was a widely accepted codified version in 'Shariah Courts' throughout the 'Muslim world'. DG Demetriades, CR Tyser and HI Effendi have translated the '*Majalla*' with

¹⁰ Knut S. Vikør, A History of Islamic law (Oxford: Oxford University Press: 2006), 175.

¹¹ Ali Hayder, *Durar al-Hukkam Sharh e Majallah*. (Beirut: Dara al kutub al ilmiyyah: n.d) Vol. I, P.17

¹² Mustafa Ahmad Al Zarqa, *Madkhal al-Fiqhi al-Amm* (Damascus: Damascuss University Press, 1959) 2, 48.

¹³ Salim Rustum Baz, *Sharh al majallah*, (Beirut: Dar Ihya al Turath al Arabi, n.d) vol.1, 74.

the title "*The Mejelle: Being the English Translation of Majallah el-Ahkam el-Adliya and A Complete Code of Islamic Civil Law.*"

Some of the celebrated works of the main schools are as follows:

Anwar al-Baruq fi Anwa' al Furuq. by Shihab al-Din al-Qarafi (d.684/1285).

Al-Qawaid al-Kubra fi Furu' alHanabilah. by Najm al-Din Sulayman al-Tufi (d.710/1310).

Al-Qawa'id by Abu; Abdullah Muhammad bin Muhammad bin Ahmad al-Maqqari al-Maliki (d. 758/1356).

Al-Ashbah wa al-Nazair by Taj al-Din Subki (771/1369)

Al-manthur fi Tartib al-Qawaid al-Fiqhiyyah by badr al-Din Muhammad b.abdallah al-Zarkashi (d.790/1391).

Asma al-Maqasid fi Tahrir al-Qawaid by Muhammad bin Muhammad al- Zubayri (d. 808/1405).

Al-Qawaid by Taqi al-Din Muhammad al-Husayni al-Hisni al-Shafi' (d. 829/1421).

Al-Qawaid wa al-Dawabit. by Ibn 'Abd al-Hadi (d. 880/1475).

Al-Ashbah wa al-Nazair by Jalal al-din al-Suyuti (d. 911/1505).

Al-Ashbah wa al-Nazair by Ibn Nujaym al-Hanafi (d.970 A.H).

Following the Sunni Scholars, the shiah scholars have also compiled books on Shariah Maxims'. In Shia Scholars' "Allama al-Hilli, (d.726A.H) was the first who richly contributed this branch of jurisprudence and authored a book known as "Al-Qawaid". Subsequently, "Al-Shahid Al-Awwal Jamal al-din al-'Amilis", (d.786A.H) followed Him and authored a book known as "Al-Qawaid wa al-Fawaid" which contains about three hundred maxims .

Among the modern scholars, Mustafa Ahmad al- Zarqa has very richly contributed to the science of legal maxims. He has not only explained the Maxims of Al-Majallah, but has made valuable addition to the existing list of Maxims. The works of “Mohammad bin Mohammad Nasib Hamza” titled: “*Al- Fraid al-Bahiyyah fi al-Qawaid wa al-Fawaid al-Fiqhiyyah*”, “Ali Ahmad Nadwi” titled “*al-Qawaid al-Fiqhiyyah*”, “Muhammad Sidqi al-Burnu” titled “*Al- Wajiz fi Idah Qawaid al-Fiqh al-Kulliyyah*”, “Kurdi” “*Al-Qawaid al-Fiqhiyyah*” are among some of the celebrated modern works on Shariah Maxims¹⁴.

The issue of possession has also been discussed in almost all classical jurisprudential books of ‘Muslim Jurists’ such as *Al-Mughni* and *Al-Shrah-ul-Kabeer* of ‘Ibn-e-Qudmah’, *Mughni-ul-Muhtaj* by ‘khateeb Al-Sharbini’, *Badai-al-Sanaii fi Tarteeb-e-Sharaii* by ‘Al-kasani’, *Bidayatul Mujtahid* by Imam Ibn-ur Rushd .*Kitab-ul-Umm* by ‘Imam Al-Shafii’, *Muatta Imam Malik* .*AL-Fiqh-Al-Mazahib-alarbaa* by ‘Imam Aljazayri’ ,*Nail-ul-Awtar* by ‘Imam Shawkani’, *Al Mabsooth* by ‘Imam Sarakhsi’, *Al-Muhalla* by ‘Imam Ibn-e-Hazam’ , *Ahkamul-Quran* by ‘Imam Abu bakar Al Jasad’, *Raddul-Mukhtar* by ‘Imam Ibn-e-Abideen Al-shami’, *Al-Ashbah wa al-Nazair* by ‘Ibn Nujaym al-Hanafi’ and so many other books of ‘Classical Fiqh’. The classical books of Fiqh have discussed the topic of possession comprehensively. Almost all the Jurists deemed the possession an important element for a valid transaction. Yet they differed in various modes of possession. ‘Imam Ahmad Ibn-e- Hambal’ thinks possession essential only in contract consist of food stuff. He quotes the Hadith¹⁵ , narrated by ‘Imam Abu Dawud and Imam Al Tirmidhi’ in their books. The other Jurists make the addition of all those stuff which may be measured thorough “kail”(a specific instrument of measurement) or *wazan* (weight)¹⁶.

¹⁴ Knut S. Vikor, A History of Islamic law (Oxford: Oxford University Press: 2006), 185.

¹⁵ Sunan Abe Dawud, 3/768, (Syria : Dar al-Hadith,1973) Hadith No 3503; Sunan Al Tirmidhi, (Syria : Dar al-Hadith,1973) 4/228, Hadith No 1232 ; Sunan Al- Nasa’i, 7/289 , (Syria : Dar al-Hadith,1973) Hadith No 4613.

¹⁶ Knut S. Vikor, Between God and the Sultan: A History of Islamic law (Oxford: Oxford University Press: 2006), 170.

The Hanafi School of thought thinks possession essential in all commodities except land (Iqar) stipulating the condition for land to be safe from damaging. Their argument is based on a legal maxim "*Al-Kharaj bi-al-Daman*" or "*Al Ghunm bil ghurm*"¹⁷ hence the legal maxims play an active role in deduction of Ahkam. Our most respected teacher Dr. Muhammad Tahir Mansori (Shariah Academy IIUI) has valuable contributions in introducing and developing Islamic Financial System and its modern interpretations. He has written a valuable book "*Shariah Maxim Modern Application in Islamic Finance*" about the legal maxims. He says in the preface of his book;

"It is a specialized study in the field of Islamic Commercial Law. However, the discipline of Qawaid has received renewed attention in the modern times. Like Maqasid-Al-Shariah, the maxims convey the spirit, logic and philosophy of Islamic Jurisprudence and thus help a jurist in determining the possession of shariah on the issue that await descision from him. A judge may also have resource to the qawaid in passing a judgment, in case where he does not find applicable text, since they aid in a proper comprehension of the 'Objective of Shariah'.¹⁸ Similarly he has described in detail the application of legal maxims and proved, that how the shariah rules may be interpreted with the help of 'Shariah Maxim'.

The old traditional book of 'Shariah Maxims' is "*Al-Maja-llat-ul-Ahkam Al-Adlia*. Ibne Rajab Hanbali also wrote a very comprehensive book '*Al-Qawaid fil Fiqh-il-Islami*. He in his book quoted several of maxims along with legal comments, explanations and examples. In the first page of second volume of his book, he very comprehensively discussed maxims of possession.

¹⁷ Sunan Abe-Dawud, (Syria : Dar al-Hadith,1973), Hadith No.3508.

¹⁸ Dr. Muhammad Tahir Mansori ,*Shariah Maxim Modern application in Islamic finance (Islamabad: Shariah Academy IIUI: 2012)*p.vii-viii.

Firstly, He divided possession in two modes. The one which doesn't provide ownership again classified in three types. Another classification of maxims with respect to possession, being essential for a contract or not. Similarly He has classified the maxims with respect to "Dhman" and "Tasarruf".¹⁹

The most prominent work on qawaid is the encyclopedia of shariah maxims by 'Muhammad Sidqi Burnu' and 'Abu Harith Ghazi' in thirteen volumes published by 'Muassasah Al-Risala' of Beirut. Another important scholarly work which has received great acclamation is "*Mawsooa-Al-Qawaid-Wal-Dhawabit-Al-Fiqhiyyah-Al-Hakimah-Lil-Muamalat-Al-Maliah-Fil-Fiqh-Al-Islami*" by "Dr. Ali Ahmad Al-Nadwi".²⁰

Firstly the book was in one volume later on addition was made and I studied the book compiled in 3 volumes. Short comments are also available under some maxims.

(AAOIFI) 'The Accounting and Auditing Organization for Islamic Financial Institution' contain a separate standard for 'Possession'.

Keeping in view, the high importance of research topic in current finance it has been discussed comprehensively. First the nature, history and legal status of maxims are discussed, then 'Possession' and its various modes and finally the application of maxims to 'Possession' which may clarify the status of 'Possession' in 'Islamic Finance'.

Framing of Legal Issues

1. What is the legal status of 'Shariah Maxims'?

¹⁹ Knut S. Vikor, *A History of Islamic law*, (Oxford: Oxford University Press: 2006), 165.

²⁰ Dr. Ali Ahmad Al Nadwi, *mawsooat-ul-qawaid-wal-dhawabit-alFiqhiyyah-alhakimah-Lilmuamalat almaliah fil Fiqh el islami*, (Damascus: Dar al Qalam, 1991).

2. What is the legal status of 'Possession'?
3. What are the 'Shariah Maxims' on 'Possession'?
4. How shall the 'Shariah Maxims' be interpreted?
5. What are the modes of applications of 'Shariah Maxims' in 'Islamic Finance'?
6. How we may be benefited by the various modes of possession through taking guidance from 'Shariah Maxims'?

Research Methodology

The quantitative research methodology shall be used, principally composed of classical jurisprudence, legal documents, 'Shariah Maxims', guiding principles, objectives, phenomena lying beyond and descriptions of various jurists. Besides comparative and critical study shall be significant part of research.

Focus of the Research

This study will mainly focus on legal aspects of 'Shariah Maxims', 'Possession' and the application of maxims to 'Possession' and its various modes.

The research shall be limited to 'Islamic Finance' irrespective of 'Possession' in conventional finance or land laws and property laws. Similarly the emphasis of the discussion shall be only on the basic 'Fiqh Rulings' pertaining to financial transactions not on the minor issues arising out of such main maxims and rules pertaining to financial transactions.

Scheme of Chapters

The first chapter includes introduction, historical background, definitions, nature and function, sources, classification and legal status of "Shariah Maxims". The second chapter of thesis contains meaning, nature, status and various modes of 'Possession' in the Shariah

perspective. The third chapter is about intellectual properties and intangible assets. It contains definition and classification of intangible assets. It also have a detail description of the concept of 'Mal' according to Hanafi's and other jurists. The fourth chapter is the main body of the thesis and is named as "Shariah Maxims and its Applications". As the name shows it has a detailed description of "Shariah Maxims" and its applications on contemporary "Islamic Finance". At the end, the thesis has been concluded with the most important results and conclusions.

CHAPTER 1

SHARIAH MAXIMS

1.1 Introduction to 'Shari'ah Maxims'

The contemporary discipline of 'Islamic Finance' seems to be young but its roots have been taken from the basic sources of 'Shariah'. The 'Islamic Financial System' mentions the 'Jurisprudential Rulings' about transactions, operations and services of financial market that meet the terms of Islamic ethics and jurisprudential rules and principles. The 'Jurisprudential Rulings' on financial transactions are classified into a separate section of the Islamic Jurisprudence (*Fiqh*) known as '*Fiqh al-Moa'malaat*', which institutes a significant and specific branch of Islamic law relating to the issues of various forms of financial transactions.²¹

'The Islamic Financial System' has various significant features. Its most interesting feature is that it develop social objectives of society.²² Because the socio-economic justice is central to Islam. In contrast to 'Islamic Financial System' 'The Conventional Financial Systems' ignore the social objectives of the society and concentrate on only the economic objectives of society. 'The Islamic Financial System' gives emphasis to the ethical, social, and economical market dimensions, in order to enhance the economical and social justice for the benefit of society.²³ As for instance; Islam carries out mandatory financial obligation called *Zakat*; this is an obligatory rule of shariah to be given to the poor people of the society. The

²¹ "Fiqh", Literally means "knowledge", "understanding" and "comprehension"; and mo'amalat means "civil transactions". see Muhammad Ibn Ya.,qûb Al-Fairozabadî, *Al-Qâmûs Al-Muhîd*, (Lebanon: Dâr lhyâ Al-Turâth Al-,Arabi, nd), 5, 279.

²² Zamir Iqbal, "*Islamic Financial Systems*", (Oxford: Oxford University Press: 1997).2, 34.

²³ Ibid.

Qura'n has described the most significant purpose of *zakat*. It states that; "the wealth should not circulate only among the rich people."²⁴

In this regard the remarks of Imam Al-Ghazali are worth mentioning which state as; "The very objective of the Shariah is to promote the well-being of the people, which lies in safeguarding their faith (*din*), their self (*nafs*), their intellect (*'aql*), their posterity (*nasl*), and their wealth (*mal*). Whatever ensures the safeguard of these five serves public interest and whatever hurts them is against public interest and its removal is desirable"²⁵.

The 'Jurisprudential Maxims' (*Al-Qawaid Al-fiqhiyyah*) are the expressions of principles preserved by various jurists which are deducted after a deep study of 'Jurisprudential Rulings' on various themes. These detailed descriptions empowered the jurists to reduce these maxims into theoretical statements of principles.²⁶

'Shariah Maxims' aim to expedite good understanding of Shariah and its growth and expansion is parallel to that of the 'Islamic Jurisprudence' (*Fiqh*) itself. In the first three centuries of 'Islamic History' the 'Muslim Scholars' highly contributed and developed these maxims.²⁷

The most inclusive and wide-ranging maxims which apply to the entire range of 'Islamic Jurisprudence' without any specification are called "*Al-Qawa'id al-Fiqhiyyah al-'Asliyyah*". There is normally no difference of opinions among all Schools of 'Islamic Jurisprudence' in the applications of "*Al-Qawa'id al-Fiqhiyyah al-'Asliyyah*". The 'Islamic Jurists' (*fuqaha*) of early times pulled out five objectives of shariah (safeguarding the faith

²⁴ The Qur'an 59:7

²⁵ Jasser Auda, *Maqasid al Shariah An Introductory Guide*, IIIT, 2008, 22.

²⁶ See Hussain Hamid, *An Introduction To The Study of Islamic Law*, 67-72.

²⁷ *Ibid*.

(*din*), self (*nafs*), wealth (*mal*), intellect (*aqal*), and posterity (*nasl*) in order to extract the essence and spirit of shariah. Hence according to 'Shihab al-Din al-Qarafi' ;

"A judicial decision is reversible if it violates a generally accepted maxim."²⁸

Thus 'Shariah Maxims' (*Qwaid-ul-Fiqqah*) present a general picture about the nature, spirit and Philosophy of Islamic law and it provide a criterion for a jurist to judge the legitimacy and illegitimacy, of the case presented to him for judgment.²⁹

'Shariah Maxims' are actually the statements formulated in precise legal form which are based on 'Fiqh Rulings' relating to different subjects scattered in different chapters. The 'Shariah Maxims' representing a general rule or principle group these rulings under a specific theme which covers a large number of 'Judicial Rulings' (*Fiqhi-Ahkam*) relating to a particular theme.

1.2 Definitions of Shariah Maxims

A renowned modern Muslim jurist, Sheikh Mustafa Ahmad Al-Zarqa defines Shariah Maxims as;

*"Universal Principles of Fiqh formulated in a concise legal form, embodying broad general rulings in cases that fall under their subject."*³⁰

A famous commentator of Majallah Ali Hayder has defined it as;

²⁸ Al-Dasuqi. Hashiyat Al-Dasuqi Al-sharh Al-kabeer, (Cairo: Dar Ihya al kutub al Arabiyyah,nd) , 3/195. Also see Al-Qarafi, Shihab al -Din,Kitab al Furuq, 4,40.

²⁹ Knut S. Vikor, *A History of Islamic law*, (Oxford: Oxford University Press: 2006), 165.

³⁰ Al-Dasuqi, Hashiyat al Dasuqi Al sharh al kabeer.(Cairo: Dar Ihya al kutub al Arabiyyah,n.d) , 3/195. Also see Mustafa Ahmad Al Zarqa, *Madkhal al-Fiqhi al-Amm* (Damascus: Damascuss University Press, 1959) 2,33.

*"The comprehensive or pre-dominant rule which is brought in order to know its particulars."*³¹

Another commentator of *Majallah*, 'Saleem Rustam Baz' has defined Shariah Maxims as;

*"comprehensive or predominant rule which is applicable to all of its particulars, or most of them"*³²

Muhammad Anis Ubadah propounds that:

"It is the universal concept from which the rulings of legal issues that fall under that concept's general area of coverage may be derived".³³

1.3 Nature and Function of 'Shariah Maxims'

'Shariah Maxims' (*Qwaid-ul-Fiqqah*) occupy a prominent place in Islamic juristic literature. It is a special type of legal literature which was developed during thirteen and fourteen century.³⁴ The purpose of which was to abstract the rules of each school into small summaries which the students could easily memorize. Such maxims in their extreme form are so compact that a particular school was able to reduce them into four or five pithy statements.³⁵ These maxims are the general legal rulings which the classical Muslim jurists have identified through a process of induction from many 'Judicial Rulings'.³⁶

³¹ Ali Hayder, *Durar al-Hukkam Sharh e Majallah*. (Beirut: Dara al kutub al ilmiyyah:n.d) 1, I7.

³² Salim Rustam Baz, *Sharh e Majallah al-Ahkam al-adliyyah*, (Beirut: Darul ihya al turath al-arabi:n.d), I7.

³³ Muhammad Anis Ubaidah, *Tarikh al-Fiqh al-Islami*, (Cairo: Dar al-Tiba'ah, 139 5A.H), I, I07.

³⁴ Christian era, corresponding with 7th to 9th century Hijri.

³⁵ Knut S. Vikor, *A History of Islamic law*, (Oxford: Oxford University Press: 2006), I65.

³⁶ Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance religion, Risk and Return* (Cambridge: Cambridge University Press, 1998), 35.

1.4 Sources of Shariah Maxims

The guidelines and models of 'Shariah Maxims' are deducted from the Shariah, as the Shariah comprises the entire body of ethical and jurisprudential rules. Therefore, the 'Muslim Jurists' consider the study of this 'Jurisprudential Institution' for adequately treating Shariah-based financial transactions.

As discussed earlier, there are two main sources of Shariah i-e "The Quran" and "The *Sunnah*". "The Quran" is deliberated as a primary and first foundation for 'Shariah Maxims' which institutes those revealed messages of Almighty Allah to His Messenger (SAW) which are general and eternal.³⁷ The "*Sunnah* or *Hadith*" is next in importance to the Quran and is considered as a secondary source of 'Shariah Maxims'. The saying and practice of Messenger (SAW) is known as "*Hadith*, or *Sunnah*", which have been transferred from generation to generation. The *Sunnah* denotes the customs, habits or usages, and behaviour of the Messenger (SAW) under various circumstances.

1.4.1 "The Quran" the First Foundation For 'Shariah Maxims'

The Quran is the fundamental foundation for instituting basic 'Islamic Principles' and 'Jurisprudential Rulings' covering the whole and entire aspects of Deen. It offers a perfect guideline for each and every aspect of living, social etiquette, human relations and behaviours. It contains a complete framework for whole human life.

In spite the fact that all the verses of the Quran are not related to legal matters, however a minor portion of Quranic text are regarded as legal document. The legislative issues,

³⁷ The Quran, 53:3-4.

executive rules and legal documents of the Quran revealed in accordance with the requirements of Muslim society laid down by the Messenger (SAW) in “Madina”..³⁸

1.4.2 “The Sunnah” the Second Foundation for ‘Shariah Maxims

“The Sunnah” is in fact the instructions, representative practices of the Messenger (SAW), and endorsement of the practices of people and society. “The Sunnah” verified the brief injunctions of the Quran elaborated the legislative rulings and practically interpreted the executive orders which are concisely stated in the Quran.³⁹

The Messenger Muhammad’s (S.A.W) explained what is permissible and what is forbidden in ‘Shariah’. As the Quran states, the sunnah is the inspiration of by Allah (SWT),⁴⁰ and compliance to it is the duty and obligation of every believer.⁴¹

1.5 Function of Shariah Maxims

The legal maxims have a prominent role in simplifying Shariah and setting out its rulings, whereby, its diverse and scattered divisions are unified under one concept. Thus, the main function of the science of Shariah Maxims is to group and consolidate identical Shariah rulings under certain universal and comprehensive rules. The Majallah has explained this function in the following words:

³⁸ Abu Umar Faruq Ahmad. *Islamic Banking in Bangladesh*. (2003) An unpublished Master’s Thesis. University of Western Sydney.334.

³⁹ Kamali, “*Principles of Islamic Jurisprudence*” (The Islamic Texts Society, 2003), 3.

⁴⁰ The Quran: 53:3.

⁴¹ The Qur’an, 4:80; 59:7.

“The jurists have grouped the Shariah rulings under certain universal rules, each of which embrace a large number of rulings, which in the treatise of Islamic jurisprudence, are taken as justification to prove and verify these rulings.”⁴²

The preliminary study of Maxims facilitates the comprehension of the rulings and serves to fix them in mind. It would be useful to mention that major legal maxims generally express and convey the spirit and philosophy of Islamic Law and in this way they are akin to Maqasid al-Shariah (*Objectives of Shariah*). For instance, the maxim: “Basis of all acts is objective thereof”,⁴³ demonstrates that for judging validity, or invalidity of a juridical act, its motivation and purpose has to be taken into account, beside its external form. The maxim: “*Hardship begets ease*”,⁴⁴ conveys that the spirit of Islamic law is facilitation, convenience and removal of hardship. The maxim “Harm has to be redressed”⁴⁵ suggests that redress of harm is the philosophy and objective of Islamic law.

1.6 Legal Status of Shariah Maxims

The Shariah Maxims serve primarily as legal aids and interpretative guides for understandings the Shariah rulings. Although they do not have the force of a legal text i.e text of the Quran and Hadith, however, in certain situations; they may be relied upon by a jurist in issuing a fatwa, and by a court in passing a judgment. A judge, or mufti, may have recourse to a legal maxim in a case where there is no explicit text or authority available.

⁴² Ali Hayder, *Durar al-Hukkam Sharh e Majallah*. (Beirut: Dara al kutub al ilmiyyah: n.d), I, I7.

⁴³ *Majallah al-Ahkam al-Adliyyah* (Karachi: Karkhanaah Tijarat-e-kutub, 1968), Art. 2.

⁴⁴ Ibid, Art. I6. المشقة تجلب التيسير

⁴⁵ Al-Dasuqi, *Hashiyat al Dasuqi Al sharh al kabeer*. (Cairo: Dar Ihya al kutub al Arabiyyah, nd) , 3/195. Also see Al-Qarafi, *Shihab al-Din Kitab al-Furuq*, (Cairo: Maktabah Dar Ihya al-Kutub al-Arabiyyah, 1346 A.H) 4, 40.

Imam Qarafi, an eminent jurist, does not see any harm in basing a judgment on 'Shariah Maxims'. He states that; "A judicial decision is reversible if it violates a generally accepted maxim".⁴⁶

Al-Hariri, a modern scholar of Islamic jurisprudence, also supports this approach. He writes:

*"It can be said that if there is definite evidence from the sources that deals directly with a certain issue, the reliance should be on that particular evidence. But if there is no evidence whatsoever, to that issue, then there is no objection for these Maxims to be evidence for the issue, Provided that these Maxims do not deviate from the ayat of the Holy Quran, Sunnah of the Messenger (S.A.W) or general principles of Islamic law"*⁴⁷

Realizing this fact, the legislators in the Middle Eastern countries have incorporated these maxims in their civil codes, as part of substantive law. The courts in these countries have recourse to Shariah Maxims in cases where there is no explicit provision dealing directly with the case in trial.

Hence it may be concluded that although Shariah Maxims may not necessarily be considered sufficient to become independent sources in exercising ijtihad, or passing judgment, yet, their role is not merely consultative, as it is generally. A mufti or judge, while passing a judgment, may rely on Maxims, besides having recourse to other sources and evidence. He may certainly base his judgment on such Maxims which are directly deducted from the text of the Quran or the sayings of the Messenger (SAW). As far as other maxims are concerned, he can have recourse to them when there is no direct evidence to the issue under discussion.

⁴⁶Ibid.

⁴⁷ Ibrahim Muhammad Al-Hariri, *al-Madkhal ila al-Fiqhiyyah al-kulliyah*, (Jaddah: Dar Ammar, n.d), 70.

1.7 Difference between Shariah Maxims (*Qwaid-Ul-Fiqqah*) and Principles of Jurisprudence (*Usul-Ul-Fiqqah*)

The difference between principle of jurisprudence and Shariah Maxims is that principals of Fiqh are mainly concerned with rules of interpretation of legal texts and methodology applied in the deduction of general principle from original sources. For example, the principle that "Amr, (Communication in the form of command) creates obligation" is a principle of jurisprudence.⁴⁸ All the obligatory acts such as establishment of Salah, payment of Zakah, fulfillment of contracts are derived from relevant texts after applying this principle⁴⁹. So it applies to all such acts which have obligatory status is Islamic law. While the focus of Shariah Maxims is on bringing together similar legal provisions which are governed by the common underlying cause.

1.8 Classification of Maxims

The Shariah Maxims with regard to their origin and sources can be classified in to the following categories:

In first category the maxims are derived from the Qurahic aya`at and Ahadith of the Messenger (SAW). For example, the maxim: "*basis of all acts is objective thereof*" is derived from the famous Hadith "Acts are judged by intentions"⁵⁰ Similarly, the maxims: "*harm is to be redressed*"⁵¹ and "*hardship begets ease*"⁵² is based on a number of Quranic aya`at and texts of Ahadith such as ;the Hadith "*La darara wa la dirar*"⁵³ the Quranic ayat "*Allah desireth for*

⁴⁸ Zuhaili, *Al usul Al fiqh al islam*(Beirut: dar ul fikr,nd)vol. 1,67.

⁴⁹ See Yusuf al-Qaradawi, 'Fiqh Al-Zakah' (Cairo: Published by alRisalah, 15th ed, 1985) 1, 29.

⁵⁰ Muhammad Ibn Ismail Al-Bukhari, *Sahih* (Riyad: Maktabah Al-Rushd,2004), Hadith No. I.

⁵¹ Majallah al-Ahkam al-Adliyyah (Karachi: Karkhanaah Tijarat-e-kutub,1968), Art. 19.

⁵² Ibid; Art. 16.

⁵³ Al-Bayhaqi, *al-Sunan al-Kubra*, vol. 6, p. 252, (Riyad: Maktabah Al-Rushd,2004), Hadith No I2099.

you ease: He desireth not hardship for you"⁵⁴, and the ayat: *"He hath not laid upon you in religion any hardship"*.⁵⁵

Maxims which were originally the ahadith of the Messenger (SAW), but they subsequently became popular as legal maxims such as:

"Harm may neither be inflicted, nor reciprocated in Islam".⁵⁶

"Entitlement to profit depends upon liability for loss".⁵⁷

"Hudud should be averted by doubt".⁵⁸

"Do not sell what you do not have".⁵⁹

In second category some maxims are based on Fiqh rulings which are scattered in different chapters of the Fiqh books. These maxims have been derived by the Muslims Scholars through inductive surveys of the provisions of Islamic law.

While the maxims which are originated from Usul al-Fiqh⁶⁰ aim to explain and elaborate the jurisprudential principles. They are not related directly to Fiqh rulings. Such as;

⁵⁴ The Quran, 2:185.

⁵⁵ The Quran, 22:78.

⁵⁶ Al-Bayhaqi, *al-Sun al-Kubra*, vol. 6, p. 252, Hadith No. 12099.

⁵⁷ Ibid .vol. 5, p. 523, Hadith No. 10880.

⁵⁸ Jamal al-Din Al-Zaylai, *Nasb al-Rayah*, shamila library.

⁵⁹ Ali Ahmad al nadwi, *Mawsu'ah Al-Qawaid al-Fiqhiyyah*, (Damascus: darul Quran, 1999), vol. 12, 441.

⁶⁰ Usul al-Fiqh i.e. Principles of Islamic jurisprudence - principles which are employed by a jurist to deduce Shariah rulings from the Quran and Sunnah. See Zuhaili, *Al usul Al fiqh al islam (dar ul fikr, Beirut) 1*, 23.

"Certainty is not dispelled by doubt" ⁶¹ This rule is based on Istishab which is a known principle of Islamic jurisprudence.⁶²

"Ijtihad is not reversed by its equivalent" ⁶³

"No ijtihad is permissible where there is text".⁶⁴

"Public interest takes precedence over individual interest".

⁶¹ Ali Ahmad al nadwi, *Mawsu'ah Al-Qawaid al-Fiqhiyyah*, (Damascus: darul Quran, 1999), Vol, I2, 441.

⁶² 'Urf (Customs) enjoy permissibility (Ibadah) provided they are not contradictory to any text of the Quran or Sunnah. Husain Hamid Hassan, *The study of Islamic law*, p.224. Also see principle of *Islamic Jurisprudence*, p.363 and p.56.

⁶³ Ali Ahmad al nadwi, *Mawsu'ah Al-Qawaid al-Fiqhiyyah*, (Damascus: darul Quran, 1999), vol 12, I30.

⁶⁴ Ibid. p. I48.

CHAPTER 2

THE CONCEPT OF POSSESSION IN ISLAMIC LAW

2.1 Possession (*Qabd*) in Islamic Jurisprudence

One of the essential element for the validation of a financial transaction is the existence, ownership and possession of the object in trade i-e “*mahall al-aqd or maqud alayh*” at the time of transaction. It is essential because the sale and purchase transactions take place for the purpose of transference of ownership and possession of the “object of sale” to the “buyer” and “price” to the “seller”. That is why if the condition is not fulfilled in any financial transaction shall be considered “Invalid Sale” (*Al-bya Al-fasid*). The sale is also called “Sale of non existing object” (*bay al-madum*).⁶⁵ The issue of the seller taking possession of the sold goods before sale contract is known in Islamic jurisprudence and chapter 4 of the thesis contains its detail description.

2.2 Meaning of Possession (*Qabd*)

For ‘Possession’ the terms used ‘Shariah’ are ‘Qabd and Taqabud’. In Arabic, ‘*Qabd*’ literally means “to grip with the hand” or “to take or catch something” while Taqabud means “a bilateral connotation of mutual taking of possession”.⁶⁶

⁶⁵Wahbah Az-Zuhaily, *Al-Fiqh Al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984))5,389. Also see Sarakhsi, *Al mabsut*(Beirut:Darul marif: 1978)30,56.

⁶⁶ Al-Fayyumi, *al-Mu'been al-muneer fe ghareeb sharh al-kabeer*, (Cairo: Wazarat al-Maarif , 1922 5th ed.) 2, 936.

Since early times, Muslim Scholars have described a detailed description of “Possession” (*Qabd*) for sale and purchase contracts particularly and for other contracts generally. There has been found a difference of opinions of ‘Muslim Jurists’ (Fuqaha) about possession and its various modes. The issue is, whether it is essential that the sold property be given in the physical possession of buyer or is it enough to award him constructive possession. These issues will be thoroughly discussed in chapter 4 under the discussion of a maxim; i-e “Evacuation is complete possession”⁶⁷.

2.3 Nature of Possession in Islam

The concept of ‘Possession and Ownership’ is well known to Islam. Similarly, the rights and liabilities of the owner and possessor over all varieties of properties are well postulated in ‘Islam’. ‘Islam’ also laid down some rules and regulations and hence managed its protection. Consequentially, the power and authority thereby accorded to possessors will not be abused.

It is a recognised fact in Islam that Allah (SWT) is the owner of all things the man being His creature has the right to share with the common property. As the Quran states; “Allah (SWT) is the Creator, Owner and Possessor of all things that are in the heavens and on the earth”.⁶⁸ Subsequently, He has deputed and substitute some limited rights and authorities to mankind to utilize the resources in a right way which He has kindly bestowed upon them.⁶⁹

Allah (SWT) has said in the Quran:

وَلِلَّهِ مَا فِي السَّمَاوَاتِ وَمَا فِي الْأَرْضِ .

⁶⁷ Mausooa al qawaid al fihiyya mada al*Qabd* (Makkah: Umm al-Qura University, n.d), 32/262-265.

⁶⁸ Afzal-ur-Rahman, *Economic Doctrines of Islam*, Vol.II, (Lahore: Islamic Publications Ltd, 1980), 20; See also Ahmad Ibrahim, "Islamic Concepts and Land Law in Malaysia," *Malayan Law Journal*, ed.by Ahmad Ibrahim & Judith Sihombing, Pte. Ltd.(1989), 189.

⁶⁹ D.S.M. Yusuf, *Economic Justice in Islam*, (Lahore, 1977), 19.

"And to Allah belongs all that is in the heavens and all that is in the earth."⁷⁰

وَلَهُ مَا فِي السَّمَاوَاتِ وَالْأَرْضِ.

"To Him belongs all that is in the heavens and all that is in the earth." ⁷¹

وَلِلَّهِ مُلْكُ السَّمَاوَاتِ وَالْأَرْضِ وَمَا بَيْنَهُمَا

"His is the Kingdom of the heavens and the earth and all that lies between them".⁷²

Allah (SWT) states in 'Sura Al-Mulk' as:

هُوَ الَّذِي جَعَلَ لَكُمُ الْأَرْضَ ذُلُولًا فَامْشُوا فِي مَنَاكِبِهَا وَكُلُوا مِن رِّزْقِهِ وَإِلَيْهِ النُّشُورُ .

"He it is Who has made the earth subservient to you so walk in the paths thereof and eat of His provision and to Him will be the Resurrection".⁷³

The above quoted Quranic ayat manifests that kingdoms, realms and all other forms of ownership and possession basically belongs to Allah (SWT) and thus no one would act or assume as if he is the absolute owner or possessor because the real possession and ownership rests solely with Allah (SWT). Islam considers man a trustee answerable before his Lord Allah (SWT).⁷⁴ Islam gives the concept that one should keep in mind that the rights granted to him are bounded by some limits that Allah (SWT) has described and shall be practised according to the descriptions of 'Shariah'.⁷⁵

⁷⁰ The Quran 4 : 126.

⁷¹ The Quran 16 :52.

⁷² Surah Al-Maidah stated again that: "For to Allah belongs the dominion of the heavens and the earth and what is between them. He creates what He pleases." (surah Al-Maidah (5) : 18 and 40). In Surah Al-A'raf it is stated to the effect: "The earth belongs to Allah, He gives to His servants as He pleases and the end is (best) for the righteous." (Surah Al-A'raf (7): Part of ayat 128).

⁷³ The Quran, 67: 15

⁷⁴ Al haj Adeleke Dirisu Ajijola, *The Islamic Concept of Social Justice*, (Lahore: Islamic Publications, 1977), 60.

⁷⁵ Muhammad Nejatullah Siddiqi, *Islam's Approach to Right of Property: Some Aspects of the Islamic Economy*, (Lahore: Islamic Publications, 1978), 49.

In Surah An-An'am Allah (SWT) states as;

وَهُوَ الَّذِي جَعَلَكُمْ خَلَائِفَ الْأَرْضِ وَرَفَعَ بَعْضَكُمْ فَوْقَ بَعْضٍ دَرَجَاتٍ لِيَبْلُوَكُمْ فِي مَا آتَاكُمْ إِنَّ رَبَّكَ سَرِيعُ
الْعِقَابِ وَإِنَّهُ لَغَفُورٌ رَحِيمٌ.

“And it is He Who has made you generations coming after generations replacing each other on the earth. And He has raised you in ranks, some above others that He may try you in that which He has bestowed on you. Surely your Lord is swift in retribution, and certainly He is Oft-Forgiving, Most Merciful.”⁷⁶

‘The Quran’ clearly stipulates the status of mankind as a vicegerent of ‘Allah (SWT)’ on earth. In “Surah Yunas” It states as:

ثُمَّ جَعَلْنَاكُمْ خَلَائِفَ فِي الْأَرْضِ مِنْ بَعْدِهِمْ لِنَنْظُرَ كَيْفَ تَعْمَلُونَ.

“Then we made you successors after them, generations after generations in the land that We might see how you would work.”⁷⁷

As in Islam the mankind is given some limited rights of utilising and having an access to their owned and possessed properties.⁷⁸ That is why in Islam the concept of trusteeship and delegation is the focal point of the concept of possession and ownership. According to the rulings given by ‘Shariah’, the concept of ownership and possession comprises both rights and liabilities. The rights are; “The enjoyment of the profits, Freedom of user, The rights to lay legal claim to his property, The right not to be interfered with”. Along with the

⁷⁶The Quran 6: 165

⁷⁷ The Quran 10 : 14.

⁷⁸ Aidit Ghazali & Syed Omar bin Syed Agil, *Readings in the Concept & Methodology of Islamic Economics* (Sidney: Pelanduk Publications, 1989), 76.

abovementioned rights some burdens are also imposed by 'Shariah'. For instance, obligations, liabilities and disabilities.⁷⁹

The Quran has assumed the absolute rights as a cause of harms and ruin of a portion of human community. That is why the Quran on many occasions speaks of the people and nations arrogated themselves and likewise claimed absolute rights transgressing the limits, liabilities and obligations imposed on them. They claimed the status exclusively reserved to Allah (SWT).

The People of 'Messenger Shuaib', when they went astray, have been warned by 'The Quran' as;

فَإِنْ تَوَلَّوْا فَقَدْ أَبْلَغْتُكُمْ مَا أُرْسِلْتُ بِهِ إِلَيْكُمْ وَيَسْتَخْلِفُ رَبِّي قَوْمًا غَيْرَكُمْ وَلَا تَضُرُّونَهُ شَيْئًا إِنَّ رَبِّي عَلَى كُلِّ شَيْءٍ حَفِيزٌ .

"So if you turn away, still I have conveyed the Message with which I was sent to you. My Lord will make another people succeed you, and you will not harm Him in the least. Surely, my Lord is Guardian over all things."⁸⁰

Hence it may be concluded that absolute right of possession and ownership is completely shunned in Islam due to two main reasons.

- 1) It is similar to claim an equal status with the 'Allah (SWT)'.
- 2) It results in monopolization of property i-e concentration in the hands of the few.

2.4 Right to Private Ownership and Possession under the Shariah

⁷⁹ Siddiqi, *Islam's Approach to Right of Property: Some Aspects of the Islamic Economy*, 89.

⁸⁰ The Quran 11 : 57.

"And the male thief and the female thief, cut off their hands as a recompense for that which they committed, a punishment by way of example, from Allah from Allah. And Allah is All-Powerful, All-Wise."⁸³

The basic purpose of the above said punishment for theft is to provide sanctity of the right of individual ownership and possession. For further protection the Quran again says in Surah An-Nisa;

وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تَعْنُوا فِي الْأَرْضِ مُفْسِدِينَ

"And defraud not people by reducing their things, nor do evil, making corruption and mischief in the land."⁸⁴

In another verse of 'Surah al Baqarah' the Quran says that:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدْلُوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

"And eat up not one another's property unjustly nor give bribery to the rulers that you may knowingly eat up a part of others property."⁸⁵

A hadith of the Messenger (SAW) which clearly protects possession of private property or ownership is;

⁸³ The Quran 5: 38

⁸⁴ The Quran 26 : 183

⁸⁵ The Quran 2: 188

"If anyone takes a span of land unjustly, its extent taken from seven earths will be tied around his neck on the Day of Resurrection. If He who took a span of land without his right he would be made to wear around his neck seven earths on the Day of Resurrection."⁸⁶

The above mentioned Quranic Aayaat and Ahadith of the Messenger (S.A.W) grants a person or proprietor lawful permission for ownership and possession along with the right of private defence over his legal possession of property.⁸⁷

Islam has protected the right of private possession so that the no any individual or even the State can hinder or obstruct other's property without any reason accepted by Islamic Law. So the state can only achieve the property of any person with his consent and with adequate payment of compensation.⁸⁸

Ahadith of the Messenger (S.A.W) are very clear on this point:

"What belongs to a Muslim is forbidden to others except by virtue of his consent."⁸⁹

"Surely no man's property is lawful for you, save only with the goodwill of the owner."⁹⁰

"Everything which belongs to a Muslim is forbidden to his fellow Muslims, his property, his life and his honour."⁹¹

⁸⁶ Hadith narrated by Said bn Zaid bn. Amr bn. Nufail; Sahih Muslim, Kitab al-Buyu, p. 847; See also Miskat Al-Masabih, (English translation by James Robson) (Syria : Dar al-Hadith, 1973) 2, 629.

⁸⁷ Ahmad Al-Maamiry, *Private Ownership and Its Limitations in Islam: Economics in Islam*, (New Delhi: Lancer Books, 1987), 55.

⁸⁸ Kamali, "*Principles of Islamic Jurisprudence*" *The Islamic Texts Society*, 344. The Shari'ah law recognized certain grounds for valid transfer of

Property such as sale, gift (hibah), inheritance etc.

⁸⁹ See Abu Bakr Ahmad Al-Bayhaqi, *Sunnah Al-Kubra*, Vol. 10, (Beirut Dar Al Fikr) (n.d.) III, 10).

⁹⁰ *Miskat Al-Masabih* (Karachi: Karkhanaah Tijarat-e-kutub, 1968), Vol. I & II, p. 630 reported by Abu Hurrah Ar-Raqashi and Baihaqi transmitted it in Shu'ab Al-Imn & Daraqutni in Muftaba.

⁹¹ Kamali, "*Principles of Islamic Jurisprudence*" *The Islamic Texts Society*, 344; See also Sunan Ibn Majah (Syria : Dar al-Hadith, 1973), 2, 1297. Hadith no. 3933.

Another aspect, is the ways and modes of transference of possession. A person is not free to possess as he designs or chooses. Islamic law has laid down some terms and conditions for delivering and obtaining possession and ownership.

Islam forbids taking possession through unlawful means such as deception, cheating or fraudulent, stealing, or taking without compensation.

All the means of possession are prohibited in Islam which cause harm to a single person or the whole community. Allah(SWT) states in the Quran ;

Islam guides and suggest the adoption of legal and valid means of possession of property and condemn those possession which involve evil or void methods.

2.5 The Status of Possession (*Qabd*) in Shariah

So many Ahadith has mentioned the necessity of *Qabd*:

“Ibn e Abbas narrated that the Prophet (peace be upon him) prohibited that a man sell food he has not yet received.”⁹²

In another Hadith, Ibn e Umar states that the Messenger (S.A.W) said: “Whoever buys food, he should not resell it before he has received it.”

Generally, the ‘Islamic Scholars’ of ‘Islamic Jurisprudence’ divide possession (*Qabd*) into two types such as;

1. ‘Physical Possession’ (*Qabd Hisse or Haqeque*)
2. ‘Legal Possession’ (*Qabd Hukme*).

⁹² Badr al-Den al-Aynee, *Umdat al-Qare*, 17:439, in al-Maktabah al-Shamilah, Version 3.28.

2.5.1 Physical or Actual possession (*Qabd Hisse or Haqeque*)

This mode of *Qabd* means the explicit way of obtaining possession or if the buyer holds and achieves the sold property or he is observed while having a control over the property or taking an immovable property to his custody. This type of possession generally appears in two types of properties.

1. Movable properties
2. Immovable properties

Physical Possession in Movable Property

In the case of 'Movable Property' (*Manqool*) such as commodities, food, vehicles etc. 'Physical or Actual Possession' (*Qabd Hisse or Haqeque*) is valid and effective if the buyer achieves the property or physically takes the goods to his custody upon paying the price.⁹³

Physical Possession in Immovable Properties

In 'Immovable properties' (*Iqar*) like land properties or buildings, 'Physical or Actual Possession' takes place if an absolute permission or complete access to the property is given to the buyer by the seller to utilise the property as he wants without hindrance. The requirement for the completion of this mode of possession of such assets is the appearance of the name of new owner on the certificate of title and ownership.

2.5.2 Legal or Constructive Possession (*Qabd Hukme or Qabd Maanawe*)

Unlike 'Physical and Actual Possession' (*Qabd Haqeque*), Constructive Possession '*Qabd Hukme*' means the implicit way of gaining possession or taking possession in a nonphysical or abstract form. However, it is interesting to note that the legal status of both the kinds of possession i.e 'Constructive Possession' (*Qabd Hukme*) and 'Actual Possession'

⁹³ Mustafa Al zarqa, *Al-Madkhal al-Fiqhi al-amm, (lebonon; Dqr ul kutub al ilmiyya, 2010)* 2, 33.

(*Qabd Haqeque*) is same, as it has been mentioned under the discussion of Shariah Maxim; Constructive possession may be given the status of physical possession.⁹⁴

2.6 Various Modes of 'Actual Possession or Constructive Possession' (*Qabd Hukme or Qabd Maanawe*)

First Mode, 'Constructive Possession' (*Qabd Hukme*) may be achieved when a seller grants the buyer absolute authority, full control and complete access to the property without any interruptions and interferences which is legally known as "*Al-tamken wa Al-takhliya*". As for instance, the seller while giving the keys of a house to the buyer who has purchased some of its goods, says to him: "I have given you full access and permission to take the object of sale." By doing so, it is considered that the goods bought has been transferred to the buyer's possession without any interference of the seller.⁹⁵

Second mode, 'Constructive Possession' (*Qabd Hukme*) may also takes place through a contra-debt in which the debt is settled implicitly among the parties. Consequently neither party have a loan from the other. As for instance, Aslam gives Ahmad Rs.2000. Then Ahmad incurs a similar amount of debt to Aslam. Consequently both the parties settle their debts and are no longer in debt to each other. Hence in the form of 'Constructive Possession' (*Qabd Hukme*) the debts are possessed and settled by both the parties.⁹⁶

Third Mode, 'Constructive Possession' (*Qabd Hukme*) may also have effect after an earlier action of 'Physical Possession' that has been established earlier. However, it must be noted that this earlier mode of *possession* should be different from the later mode. As for

⁹⁴ Mausooa al qawaid al fiqhiyya mada al *Qabd* (Makkah: Umm al-Qura University, n.d), 32/262-265.

⁹⁵ Haidar Ali, Durr al-Hukkam, (Beirut; Dar al-kutub al ilmiyyah, n.d), 251.

⁹⁶ OIC, Majallah Majma' al-Fiqh, No. 6, vol. 4, pp.726-727.

'Dr. Al wahba Al-Zuhayle' stated as;

*"Ownership (al-milkiyyah) is an Islamic legal term which signifies the relationship between a human being and property which renders the property specifically attached to him, thus, giving the owner the right to deal in that property unless there is a legal impediment preventing him from such dealing. The Hanafis consider usufruct and Legal right as owned item and not as property hence rendering ownership a more general concept than Property"*¹³⁶.

Perhaps Imam Ibn al Hamam has quoted the most appropriate definition of ownership. He stated as;

*"Ownership is an exclusive association of the owned item with its owner, which gives the owner the right to deal in what he owns in any way that is not legally forbidden"*¹³⁷

The detailed description of definitions concludes that ownership is in fact the capability of obtaining a legal right for utilising property by the owner himself or his representative.

4.3.3 Division of Private Ownership

Private ownership can be classified into two broad divisions which are complete ownership and incomplete ownership.¹³⁸

4.3.3.1 Complete Ownership

In this type of ownership the owner has full ability to use and utilise his property according to a lawful way. In this type of ownership he has the authority of selling his property, giving it as a gift to someone with or without compensation, creating a waqf or giving it to

¹³⁶ Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 3340-3398.

¹³⁷ Al-Dasuqi. *Hashiyat al Dasuqi Al sharh al kabeer*. (Cairo: Dar Ihya al kutub al Arabiyyah, nd) 3, 195.

¹³⁸ Ibn Al-Humam, *Fath al Qadeer*: (Ibn al-Humam, Darul kutub al ilmiyya, n.d) 5, 127.

others after death by making a will. This form of ownership is continued to exist as long as the owner does not transfer the property to the others through valid contract.¹³⁹

Hence it may be concluded that both legal and beneficial rights over property are attained by the owner in such type of ownership.

4.3.3.2 Incomplete Ownership

It may be classified into three types, which are ownership over rights, ownership over a property only and ownership over usufruct only.¹⁴⁰

Ownership over Rights

This type of right is refer to the right included in a land such as;

- 1). Right of irrigation.
- 2). Right of water.
- 4). Right of passage.
- 5). Right of upper or lower neighbours and others.

These rights are included to the immovable property. As these rights cannot be traded independently therefore these are transacted along with the immovable property. Therefore, anyone who owns the land owns these rights and he may sell or transfer these rights along with the land¹⁴¹.

b. Ownership over a property only (Milk al-A'yn)

This ownership refers to a situation where a property is owned by one person and its usufruct is enjoyed by another. For instance, a house is legally owned by lessor while the

¹³⁹ Ibid

¹⁴⁰ Kasani, *Bada'i al-Sana'I fi tarteeb al-Shara'i*, (Cairo: Almatba al imam:1972)5,431.

¹⁴¹ Ibid

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⁹⁴ Mausooa al qawaid al fihiyya mada al *Qabd* (Makkah: Umm al-Qura University, n.d), 32/262-265.

⁹⁵ Haidar Ali, Durr al-Hukkam, (Beirut; Dar al-kutub al ilmiyyah, n.d), 251.

⁹⁶ OIC, Majallah Majma’ al-Fiqh, No. 6, vol. 4, pp.726-727.

instance, a person in an "Islamic Hire-Purchase Contract" (*Al-Ijrah Al-muntahiya Bit-tamlik*), holds a rental possession first and thus he possesses the rented premises. Then, at the end of transaction the premises is sold to him. Consequently 'Constructive Possession' (*Qabd Hukme*) takes place, although the 'Actual Possession' (*Qabd Haqeqe*) occurs before the sale and purchase contract.⁹⁷

Fourth Mode, 'Constructive Possession' (*Qabd Hukme*) may also takes place due to spoiling (*itlaf*). As for instance, a buyer (Ahmad) spoils purchased goods while he has not yet taken the goods to his physical possession, even then he is considered a legal possessor and recipient of the goods, i.e. 'Constructive Possession' (*Qabd Hukme*) has taken place, and he is legally responsible for the price. The effective reason (*Illa*) behind it is providing full access and control over the property and goods.⁹⁸

⁹⁷ OIC, Majallah Majma' al-Fiqh, No.6, vol.4, p.729.

⁹⁸ OIC, Majallah Majma' al-Fiqh, No. 6, vol. 4, pp.731-732; Also see Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 388-393.

CHAPTER 3

POSSESSION OF INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS FROM SHARIAH PERSPECTIVE

3.1 ‘The Intangible Assets’; Definition:

‘Intangible Assets’ are defined by AAOIFI, in its Shariah Standard No. 42 as:

“property rights that apply to intangible matters, entitling their owners to the exclusive right to any proceeds arising from them”⁹⁹.

IFA-OIC, in a Resolution No. 43 (5/5), has a well-defined description, saying:

“Business name, corporate name, trademark, literary production, invention or discovery, are rights belonging to their holders and have in contemporary times, financial value which can be traded. These rights are recognized by Shariah and should not be infringed”

3.2 Classification According to the Types

According to AAOIFI ‘Intangible Rights’ should be classified on the basis of their types. The relevant AAOIFI Shariah Standard 42 (2012) states:

“Types of intellectual rights: There are various types of moral rights, including: trade name, commercial title, trademark, commercial license, intellectual property, and artistic, manufacturing, and innovation rights.”

At the beginning the jurists determined the rank of these rights, by naming them “*literary rights*” and “*creative rights*”.

⁹⁹ (AAOIFI, 2012, Article 3/3/1).

3.3 Possession of Intangible Rights

The discussion is based on “*The Concept of Mal*” in Islam. That is why we should first examine the concept of mal in Shariah, whether it acknowledges intangible rights as a form of mal and property or not. The four schools have a difference of opinions about the issue. There is a disagreement about the proper criterion for what could be considered *mal* or money.¹⁰⁰

3.4 The concept of Mal According to Hanafi Jurists

The ‘Hanafi Scholars’ consider ‘Physical or Actual Possession’ (*Qabd Hisse* or *Haqueq*), as the only essential standard for *Mal*. They consider only tangible property as *Mal*, and valuable property. They accept intangible property, rights or usufructs (*Manfa’a*), as *Mal* only if they become the subject of a financial transaction..¹⁰¹ The Hanafi scholars have stipulated four essential features and properties of “*Mal*”

- I) It shall have corporeal structures;
- II) It may be reserved for a length of time;
- III) It may be benefited;
- IV) It is of benefit to mankind.

Consequently, all the intangible assets such as usufruct (*manfaah*) and intellectual rights (*huquq al-mujarrada*), shall not be considered “*Mal*” and property. In contrast to the majority of the Hanafis some Hanafi Scholars have opined that the definition of “*Mal*” is not confined to tangible properties only. The intangible assets like usufruct are also *mal*. Imam

¹⁰⁰ Al-Dasuqi. *Hashiyat al Dasuqi Al sharh al kabeer*, (Cairo: Dar Ihya al kutub al Arabiyyah, n.d), 3, 235.

¹⁰¹ see Kamali, “Principles of Islamic Jurisprudence” *The Islamic Texts Society*, at 1–2, Also see FATHI AL-DERENY, *The Right To Create In Contemporary Islamic Jurisprudence* (3d ed., Al-Resalah 1984), 20-22.

Kasane (1986, 7:385) an eminent Hanafi Scholar, clearly states that, “*Mal* covers the corporeal (*Aayn*) as well as usufruct (*manfaah*).”

3.5 Majority Jurist’s Concept of ‘Mal’

All the jurists other than Hanafis have opined that the essential standard should be “usefulness.” Thus, they consider both the tangibles and intangibles as ‘Mal’ and property.

From the definitions given, it can be concluded that the required criteria for considering something to be *mal* or property in the view of the majority jurists are as follows:

Like the Hanafi scholars they also have stipulated four essential features and properties of “*Mal*”; 1) “ People consider it as a source of wealth (*tamawwul*)”, 2) “ It can be benefited from the Shariah point of view”, 3) “ It can be compensated (*al-iitiyad*)”, 4) “ It has value”.

The contemporary scholars have adopted the view of the majority classical Muslim jurists. Internationally recognized Shariah advisory institutions such as IFA-OIC and AAOIFI have also approved this view . It has stated as;

*“Intangible assets are property which inherent with monetary value that entitle it to legal protection and hence any violation is punishable”.*¹⁰²

The latest verdict (fatwa) of ‘Al-Azhar’ , and the view of Mufti Taqi Uthmani, an eminent scholar, have firmly supported the view of the majority of jurists.¹⁰³

¹⁰² Resolution no. 43 (5/5) of IFA-OIC and Article no 3/3/3/1 of AAOIFI Shari’ah Standards respectively.

¹⁰³ Mufti Taqi Uthmani, *Takmila Fathul Mulhim*, (Karachi: Maktaba Darululoom Karachi: 1994) 3, 257.

CHAPTER 4

SHARIAH MAXIMS AND ITS APPLICATIONS

As in the first chapter of the thesis we have concisely discussed the important role of “Shariah Maxims” in “Islamic Jurisprudence”. The ‘Shariah Maxims’ actually represents a general rule or principle which applies on a large number of ‘Judicial Rulings’ (*Fiqhi-Ahkam*). Some of the relevant maxims along with their some important applications are discussed here in below.

4.1 ‘Hadith Maxim’

“Do not sell what you do not possess”¹⁰⁴.

لا تتبع ماليس عندك

The ‘*Hadith Maxim*’ has been explained by various eminent Muslim Scholars and jurists in different ways which has provide a base for the whole discussion. So before highlighting its impacts we briefly describe the interpretations of various Muslim Jurists.

4.1.1 Hanafi Opinion

The ‘Hanafi Scholars’ does not consider ‘Possession’ (*Qabd*) as an essential prerequisite (*rukn*) of sale but adequately a secondary requirement for the completion of a valid contract. They evidently legalise a bonafide sale by a third party or unauthorized person who is not the owner or possessor of the object or agent of the seller but even then sell it without prior taking permission, possession or ownership. In this case, the ‘Hanafi Scholars’ consider the sale transaction valid but not effective. Its effectiveness shall depend only upon the owner’s consent¹⁰⁵. Therefore, According to the Hanafis, taking possession (*Qabd*) of a property before

¹⁰⁴ Sunan Abi Dawud, (Syria : Dar al-Hadith,1973), 3/768, hadith No 3503; Sunan Al-Tirmidhi (Syria : Dar al-Hadith,1973), 4/228, hadith No 1232; Sunan Al- Nasa’I (Syria : Dar al-Hadith,1973), 7/289, hadith No 4613.

¹⁰⁵ Al-Kasani, *Bada’i al-Sana’i*, (Cairo: Matba al imam,1972)5/148. Al-Dardeer. *al-Sharh al-Kabir*, 3/12, Al-Shirazi. *al-Muhadhab*, 1/262-263; Ibn Qudamah, *al-Mughni* (Beirut: Dar al-Fikr,1985) 6,295.

sale transaction, is not an essential condition or a prerequisite requirement of a valid contract and delaying possession to a later date is perfectly lawful. However in the transaction of ribawi goods (for example sale of gold with gold and silver with silver etc.), possession is an essential ingredient for both the seller and buyer at the time of exchange. 'Imam Abu Hanifah' has excluded immovable properties from the aforesaid maxim on the basis of another famous maxim; "*Al-Kharaj bi-al-Daman*"¹⁰⁶ or "*Al Ghunn bil ghurn*"¹⁰⁷ which means "Profit is based upon the corresponding liability for bearing loss". while in case of iqar (immovable properties) there is usually no liability therefore, possession is not a prerequisite of a valid contract¹⁰⁸.

4.1.2 Malikis Opinion

The Maliki Jurists have restricted the application of 'Hadith Maxim' to "Food Substances" only, which implies that the items except food articles for example; cotton, iron and wood etc. may be sold and purchased without taking possession both the items of exchange at the time of exchange. 'Ibn Rushd Almaliki' while confirming this opinion states, "There is no dispute in Maliki's school about the permissibility of selling thing, other than food, before taking possession and there is also no dispute in his school; about ribawi items (gold, silver, wheat, barley, dates and salt) that possession is a condition for its sale"¹⁰⁹.

4.1.3 Shafi'i Opinion

According to 'Imam Shafi' 'Possession' is an essential element for sale of all kinds of property. 'Imam Al Shafi' did not exempt any object or property making the Hadith of the

¹⁰⁶ Al-Dardeer. *al-Sharh al-Kabir*, 3/12, Al-Shirazi. *al-Muhadhdhab*, 1/262-263; Ibn Qudamah, *al-Mughni* (Beirut: Dar al-Fikr, 1985) 6, 295.

¹⁰⁷ See Sunan Abu-Dawud (Syria : Dar al-Hadith, 1973), Hadith No. 3508.

¹⁰⁸ Mufti Taqi Uthmani, *Takmilah Fathul Mulhim*, (Karachi: Maktaba Darululoom Karachi: 1994) 3, 257.

¹⁰⁹ Muhammad b. Ahmad Ibn Rushd al-Qurtubi, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*. Translated edition by Imran Ahsan Khan Nyazee, (Lahore: Al maktaba al-ilmiyyah, n.d) 2, 175-176.

Messenger (SAW); “Do not sell anything until you receive it”¹¹⁰ (“لا تبيع ما ليس عندك “) a base for his opinion. He firmly follows the literal and factual meaning of the Hadith to a large extent. According to Him all kinds of properties have to satisfy the requirement of possession prior to resale. In contrast to Imam Abu Hanifa He did not exclude immovable property to satisfy the aforesaid condition.¹¹¹

4.1.4 Opinion of ‘Imam Ibn Taymiyyah’ and ‘Imam Ibn al-Qayyim’

‘Imam Ibn Taymiyyah’ and His student ‘Imam Ibn al-Qayyim’ adopted a different view from majority of jurists and expanded the concept of possession (Qabd) through the consideration of urf and custom (i-e the common practices of the merchants and local community). The maxims on custom highly support their opinion. The detail description is given under the maxim;

“Possession Returns To Common Usage”¹¹²

“القبض مرجعه إلى عرف الناس”

They argued their view on the base of a principle that the source of ‘Fiqh Rulings’ is the Quran, the Sunnah or the religious opinions (fatwas) of the companions. As for the Messenger’s (SAW) ban of resale before taking possession, they deducted an effective reason (Illa) from the ‘Hadith Maxim’ and interpreted it as the ban and prohibition is directed to only those sales which contain risk and excessive uncertainty (*algharar al fahish wal mukhatarah*), where the object may be undeliverable (*ghair maqdoor at tasleem*), whether it exists or not. Hence the effective reason (Illa) of ban of resale before taking possession is not linked to existence or nonexistence thereof.¹¹³

¹¹⁰ Sunan Abi Dawud, (Syria : Dar al-Hadith,1973), 3,768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith,1973), 4,228, hadith No 1232; Sunan Al- Nasa’i, (Syria : Dar al-Hadith,1973), 7,289, hadith No 4613.

¹¹¹ Mufti Taqi Uthmani, *Takmila Fathul Mulhim*, (Karachi: Maktaba Darululoom Karachi:1994,3,257.

¹¹² Mausooa al qawaid al fihiyya mada alQabd (Makkah: Umm al-Qura University, n.d), 32/262-265.

¹¹³ Wahbah Az-Zuhaily, *Al-Fiqh Al-Islami wa Adillatuh*, (Damascus: Dar al-fikr,1984) 5, 3340-3398.

4.1.5 Application of Maxim on Salam Contract

Salam contract is a notable exception from the above said 'Hadith Maxim' of the Messenger (SAW); "Do not sell anything until you receive it"¹¹⁴ ("لا تبيع ما ليس عندك").

However the exception of salam contract is not absolute. Jurists have executed some conditions that must be fulfilled at the time of contract for legality of this sale.¹¹⁵

'Imam Ibn Taymiyah' and 'Imam Ibn al-Qayyim' have a quite different opinion. They did not recognise salam contract an exception to the '*Hadith Maxim*'. They specified the prohibition of the '*Hadith Maxim*' to the selling of objects and property which the seller is most probably not able to deliver (*ghair maqdoor at tasleem*). As we have discussed above the opinion of 'Imam Ibn Taymiyah' and 'Imam Ibn al-Qayyim' interpreted the Messenger's(SAW) prohibition of resale before taking possession, through a deducted effective reason (*Illa*) from the 'Hadith Maxim' and directed it to only those sales which contain risk and excessive uncertainty (*algharar al fahish wal mukhatarah*), where the object may be undeliverable (*ghair maqdoor at tasleem*), whether it exists or not. Hence the effective reason (*Illa*) of ban of resale before taking possession have no link the existence or nonexistence thereof.¹¹⁶

The majority of jurists have specified some modes of possession to holding physically, taking to one's control and custody, evacuation (*takhliyah*), and retention (*habs*). But 'Imam Ibn Taymiyah' has not inferred such restrictions, rather he strictly denied such interpretations that neither the Arabic language nor the Shariah permit. All the modes and forms of possession

¹¹⁴ Sunan Abi Dawud, (Syria : Dar al-Hadith,1973), 3,768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith,1973), 4,228, hadith No 1232; Sunan Al- Nasa'i, (Syria : Dar al-Hadith,1973), 7,289, hadith No 4613

¹¹⁵ al-Kasani, *Bada'i' al-Sana'I fi tarteeb al-Sharai'*, (Cairo: Almatba al imam:1972), 5/201; Ibn Qudamah. *al-Mughni*, 6/385.

¹¹⁶ Wahbah Az-Zuhaily, *Al-Fiqh Al-Islami wa Adillatuh*,(Damascus: Dar al-fikr,1984)5, 3340-3398.

especially evacuation (*Takhliyah*) vary from object to object, market to market and era to era. Thus the manner in which possession takes place is not always the same. Therefore, the precise mode and manner of possession (*Qabd*) shall be determined by reference to the prevailing custom¹¹⁷.

That is why, the deducted effective reason (*Illa*) from the 'Hadith Maxim' implies that the text of the maxim according to 'Imam Ibn Taymiyah' and 'Imam Ibn al-Qayyim' shall be "Do not sell things you are not able to deliver" and not, "Do not sell things you don't own". According to them the prohibition of sale prior possession is basically due to two possible reasons:

First Reason; when a person is selling a particular and specific object who himself is not the owner of that specific object, and the owner of that specific object is disagree to sell that. Since the person in this case is not able to deliver after sale contract so the sale is prohibited.

Second Reason; sale of objects that do not found in the market or found rarely. Since the object is not deliverable after sale contract therefore, the sale is prohibited and one is not allowed to initiate such transaction.¹¹⁸

Thus according to the interpretation of 'Imam Ibn Taymiyah' and 'Imam Ibn al-Qayyim' the Hadith emphasises on the ability of the seller to deliver the object of sale.

4.1.6 Conclusion of the Opinion of 'Imam Ibn Taymiyah' and 'Imam Ibn al-Qayyim'

It may be concluded from the above discussion that in contrast to the opinion of the majority of jurists 'Ibn Taymiyah and Ibn al Qayyim', have adopted a quite different and unique

¹¹⁷ Al-*Dasuqi*. Hashiyat al *Dasuqi* Al sharh al kabeer.(Cairo: Dar Ihya al kutub al Arabiyyah,nd) , 3/195.

¹¹⁸ Ibn al-Qayyim, *T'lam al-Muwaqqin*, (Cairo: Maktabah al-kulliyyah al-azhariyyah,1968), 2,19.

opinion. According to them the validity and effectiveness of a non salam sale transaction depends upon the capability of delivery of specific object at the time of delivery.¹¹⁹

4.1.7 Effective Reason Deducted From Maxim “Al-Kharaj bi-al-Daman*” or “Al Ghunm bil ghurm”¹²⁰

As discussed above the ‘Islamic Jurists’ assert the effective reason (illah) of prohibition of sale before taking possession (*Qabd*) is the presence of uncertainty and excessive risk (*al gharar al fahish wal mukhatarah*), which may cause damages and hindrances in fair delivery of goods of sale. These are the reasons which may lead to disputes and many rulings of ‘Shariah’ has banned all those transactions containing the factors which may cause disputes among the transacting parties. Also Islam clearly forbids any transaction which involves bay madum. Hence, the certainty of delivery of the subject matter has an effective role in the validity of a contract. The illa has been deducted from the well known maxim *al kharaj bi al dman*¹²¹.

The Hadith of the Messenger (SAW); “Profit is based upon the corresponding liability for bearing loss”¹²² is a central qualification to judge the validity for the entitlement of profit. This hadith is a base for the famous shariah maxim “*Al-Kharaj bi-al-Daman*” or “*Al Ghunm bil ghurm*”¹²³ and a standard criteria to judge the legitimacy of any benefit or compensation taken on the subject matter or the capital. The maxim clearly describes that one cannot entitles to profit until he bears the liability for loss.¹²⁴

¹¹⁹ Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984)5,238.

¹²⁰ Sunan Abe-Dawud (Syria : Dar al-Hadith, 1973), Hadith No.3508.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibn Qudamah, *al-Mughni*, (Beirut: Dar al Fikr, 1985,n.d)6,385.

Hence, the illa (effective reason) behind the Hadith Maxim is daman (liability for bearing loss). So the sale of a seller after taking daman of particular object is a valid sale even if the object is not physically possessed.

4.2 MAXIM; “Evacuation is a Complete Possession Requires Application of All the Rulings”¹²⁵ التخلية قبض تام يترتب عليه جميع الاحكام

The prominent scholars and jurists have declared evacuation (*al takhlia*) as one of the various modes of ‘Possession’. Although the modern finance is in great need of this mode of possession especially, in consecutive transactions, yet the ancient jurists have discussed evacuation (*al takhlia*) as a permanent mode of ‘Possession’.¹²⁶

Imam al nawwi in his well known book “*Al majmoo*” has narrated consensus of jurists and declared evacuation (*al takhlia*) as a mode of ‘Possession’ in immovable properties with no any difference of opinion among the jurists.¹²⁷

‘Imam Ibn Abideen Muhammad Ameen Al Shami’, a prominent jurist of ‘Hanafi School’ has stated that evacuation is also a mode of ‘Possession’ in moveable properties.¹²⁸ Likewise the opinions of the jurists have been described by various eminent scholars such as Imam al Qurafi, Imam al Kasani,¹²⁹ imam Ibn Qudama¹³⁰ Imam Mawardi¹³¹ and Imam al Nawwi¹³² etc.

¹²⁵ Mausooa al qawaid al fihiyya mada al-Qabd (Makkah: Umm al-Qura University, n.d)32,262-265.

¹²⁶ Ibn Qudamah. *al-Mughni* (Beirut: Dar al-Fikr,1985),4,220.

¹²⁷ Imam al nawwi, *Almajmoo* (Cairo: Maktabah Al-Asimah,1966), 9,265.

¹²⁸ Ibn al abideen, *Radd ul muhtar* (Quetta: Al-Maktaba Al-Majidia,1982),4,522, 4,561.

¹²⁹ Kasani, *Bada'i al-Sana'I fi tarteib al-Sharai*, (Cairo: Almatba al imam:1972)5,361.

¹³⁰ Ibn Qudama, *Almughni* (Beirut: Dar al-Fikr,1985),4,120.

¹³¹ Imam al Mawardi, *Al hawi* (Beirut: Dar Ihya al-turath al-arabi,n.d),5/226.

¹³² Imam al nawwi, *Al-majmoo*, (Cairo: Maktabah Al-Asimah,1966), 9,238 .

4.3 MAXIM “Possession is Substituent to Ownership”¹³³ القبض فرع للملك

The maxim clearly states that a legal possession requires prior ownership. So we discuss ownership first, as an essential necessity for valid and effective possession.

4.3.1 Introduction To Ownership

Ownership is actually the right of exploitation and utilization of wealth and other useful resources that Allah (S.W.T) has bestowed upon us. Also Allah (S.W.T) has described some legitimate methods for the transference of such rights. Thus, the owner of a wealth or property deserves all the relevant rights of Ownership and possession as long as he is utilizing it in a proper way. Likewise the owner of the property deserves the right of transference of property when he wants to transfer the property with or without taking any return or compensation. The jurists have a consensus of opinion that the “mal” shall be “something of value, permissible and capable of being possessed”¹³⁴.

4.3.2 Definition of Ownership

The ‘Muslim Jurists’ have defined ownership in many ways.

‘Imam Al-Qrafi’ stated as;

“Ownership is a legal statement, on something or on its utility that gives right to whom is granted to use the owned thing and to get compensation for it”.

‘Imam Ibn Taymiyyah’ stated as;

*“Ownership is ‘the legal ability to use something, defines ownership as the legal ability that allows someone to exclusively use and benefit from something”.*¹³⁵

¹³³ *Mausooa al qawaid al fihiyya mada al Qabd*, (Makkah: Umm al-Qura University, nd)32/262-265.

¹³⁴ Kasani, *Bada'i al-Sana'I fi tarteeb al-Sharai*, (Cairo: Almatba al imam:1972)5,361.

¹³⁵ Ibn Qudama, *Almughni* (Beirut: Dar al-Fikr,1985), 4,87.

‘Dr. Al wahba Al-Zuhayle’ stated as;

“Ownership (al-milkiyyah) is an Islamic legal term which signifies the relationship between a human being and property which renders the property specifically attached to him, thus, giving the owner the right to deal in that property unless there is a legal impediment preventing him from such dealing. The Hanafis consider usufruct and Legal right as owned item and not as property hence rendering ownership a more general concept than Property”¹³⁶.

Perhaps Imam Ibn al Hamam has quoted the most appropriate definition of ownership. He stated as;

“Ownership is an exclusive association of the owned item with its owner, which gives the owner the right to deal in what he owns in any way that is not legally forbidden”¹³⁷

The detailed description of definitions concludes that ownership is in fact the capability of obtaining a legal right for utilising property by the owner himself or his representative.

4.3.3 Division of Private Ownership

Private ownership can be classified into two broad divisions which are complete ownership and incomplete ownership.¹³⁸

4.3.3.1 Complete Ownership

In this type of ownership the owner has full ability to use and utilise his property according to a lawful way. In this type of ownership he has the authority of selling his property, giving it as a gift to someone with or without compensation, creating a waqf or giving it to

¹³⁶ Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 3340-3398.

¹³⁷ Al-Dasuqi. *Hashiyat al Dasuqi Al sharh al kabeer*. (Cairo: Dar Ihya al kutub al Arabiyyah, nd) 3, 195.

¹³⁸ Ibn Al-Humam, *Fath al Qadeer*: (lebonon, Darul kutub al ilmiyya, n.d) 5, 127.

others after death by making a will. This form of ownership is continued to exist as long as the owner does not transfer the property to the others through valid contract.¹³⁹

Hence it may be concluded that both legal and beneficial rights over property are attained by the owner in such type of ownership.

4.3.3.2 Incomplete Ownership

It may be classified into three types, which are ownership over rights, ownership over a property only and ownership over usufruct only.¹⁴⁰

Ownership over Rights

This type of right is refer to the right included in a land such as;

- 1). Right of irrigation.
- 2). Right of water.
- 4). Right of passage.
- 5). Right of upper or lower neighbours and others.

These rights are included to the immovable property. As these rights cannot be traded independently therefore these are transacted along with the immovable property. Therefore, anyone who owns the land owns these rights and he may sell or transfer these rights along with the land¹⁴¹.

b. Ownership over a property only (Milk al-A'yn)

This ownership refers to a situation where a property is owned by one person and its usufruct is enjoyed by another. For instance, a house is legally owned by lessor while the

¹³⁹ Ibid

¹⁴⁰ Kasani, *Bada'i al-Sana'I fi tarteeb al-Sharai'*, (Cairo: Almatba al imam:1972)5,431.

¹⁴¹ Ibid

usufruct is owned by the lessee. Also, the lessee has the right to take possession of the house and use it for the period of the lease. Therefore, during the period of lease the right of the owner over his own property is not complete as he cannot lease the same house to others or cannot sell it without the lessee's permission¹⁴².

c. Ownership over Usufruct (Milk al-Manfa'ah)

Usufruct refers to a person enjoys the benefits of the asset of another person. Thus, ownership over usufruct can be gained through borrowing and lease (ijarah), as for instance a person borrows a book or leases a house. Besides, beneficial ownership could also be obtained through *waqf*, where a person transfers a certain property to the ownership of Allah for the charitable purposes as recognized by the Islamic law.¹⁴³

4.3.4 The essentiality of possession:-

It is quiet obvious from the above discussion of majority of jurists that regarding the hadith of the Messenger (S.A.W) the ownership and possession of an asset is essential before obtaining allowance of sale of asset.

Having a deep study of the wordings in the Hadith Maxim that the Messenger (S.A.W) has advocated is "Do not sell that which you do not have"¹⁴⁴ (لا تبع ما ليس عندك), the preposition "inda" in the Arabic wording of Hadith Maxim (لا تبع ما ليس عندك) which is preceded to the singular pronoun of masculine "ka" clearly implies to the essentiality of possession. The apparent wordings of the hadith "that which you do not have" mentions that if an object of sale, despite of being in your ownership, is not in your possession its sale is invalid.

¹⁴² Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 23.

¹⁴³ Ibid

¹⁴⁴ Sunan Abi Dawud, (Syria : Dar al-Hadith, 1973), 3, 768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith, 1973), 4, 228, hadith No 1232; Sunan Al-Nasa'i, (Syria : Dar al-Hadith, 1973), 7, 289, hadith No 4613.

4.4 MAXIM; “Constructive possession may be given the status of physical possession”.¹⁴⁵

القبض الحكمي يقام مقام القبض الحقيقي

As it has been clearly described that the Hadith Maxim “Do not sell what you do not have”¹⁴⁶ لا تبع ما ليس عندك refers to all types and forms of possession. So the current maxim; “Constructive possession may be given the status of physical possession” clearly expressed the validity and legality of constructive possession in financial transactions¹⁴⁷.

When the owner has not obtained physical possession of a property, however it has come in his access and all the rights and benefits of the property are obtained by him along with the liabilities, risk and consequences of its depreciation and destruction (which is called daman by the classical jurists, i-e the commodity has come in the owner's daman) it is said he has constructive possession over the property¹⁴⁸.

4.4.1 Constructive Possession And Different Views of Shaikhain And Imam Muhammad

In terms of Hanafi Fiqh, the true and actual meaning of possession (*Qabd*) of a property is established by physical access and control over the property. But the Shaikhain's (Imam Abu Hanifah and Imam AbuYusuf) have adopted a different opinion from Imam Muhammad in regard to the sale of immovable property. ‘Imam Muhammad’ denies the concept of “Constructive possession”. The ‘Shaikhain’ allow the sale of immovable property before taking

¹⁴⁵ Ibid

¹⁴⁶ . The hadith is narrated by Abu Dawud in his Sunan (Syria : Dar al-Hadith,1973), 3/768, hadith No 3503; Al Tirmidhi in his Sunan (Syria : Dar al-Hadith,1973), 4/228, hadith No 1232 ; Al- Nasa'i in his Sunan (Syria : Dar al-Hadith,1973), 7/289 , hadith No 4613.

¹⁴⁷ Ibn Qudamah. *al-Mughni*, (Beirut: Dar al-Fikr,1985), 6/385.

¹⁴⁸ Ibid

possession of it, as in case of immovable property there are no odds and risks of causing damages and destructions commonly.¹⁴⁹.

4.4.2 Opinion of modern jurists

The 'International Fiqh Academy' has described various modes of possession, especially the modern forms and their rules in its Resolution No. 53 (4/6).

The Council of the 'International Fiqh Academy' has determined that "just as the possession of commodities may be physical, by taking the commodity in one's hand or measuring or weighing the eatables, or by transferring or delivering the commodity to the premises of the possessor, similarly the possession may also be an implied or constructive possession which takes place by leaving the commodity at one's disposal and enabling him to deal with it as he wills. This will be deemed a valid possession, even though the physical possession has not taken place. As for the mode of possession, it may vary from commodity to commodity, according to its nature and pursuant to the different customs prevalent in this behalf."

Hence the detailed description of the council clearly implies that constructive possession (*Qabd Hukmi*) is also a legal mode of possession and legally all the rulings of physical possession (*Qabd Hissi*) may be applied on constructive possession (*Qabd Hukmi*). Thus we may conclude that constructive possession (*Qabd Hukmi*) may be given the status of physical possession (*Qabd Hissi*).

"The 'International Islamic Fiqh Academy' (OIC) resolved its *fatwa* on various modes of possession (*Qabd*) in 1990:

¹⁴⁹ See Kasani, *Bada'i' al-Sana'I fi tarteeb al-Sharai'*, (Cairo: Almatba al imam:1972),5/452.

”أولاً قبض الأموال كما يكون حسناً في حاله الأخذ باليد أو الكيل أو الوزن في الطعام، أو النقل والتحويل إلى حوزة القابض، يتحقق اعتباراً و حكماً بالتخلية مع التمكين من التصرف، ولو لم يوجد القبض حسناً. وتختلف كيفية قبض الأشياء بحسب حالها واختلاف الأعراف فيما يكون قبضاً لها“.

“*Qabd* (taking possession) of assets may occur physically, e.g. when taking by one’s hands, or by measurement or weight for food, or transfer from the custody of one party to that of another. It can also be considered to have occurred in a legal (*hukme*) sense by providing access without hindrance in allowing [the buyer] to dispose of [the commodity] as he or she pleases, despite the absence of any physical ownership. The way in which ownership or control of sold goods occurs differs according to the state of the goods, and it differs according to customary practice as to what constitutes *Qabd*.”

AAIOFI in its Shariah standards on possession and currency trading has also accepted these *fatwas* of the Islamic Fiqh Academies.

Meanwhile, AAOIFI “Accounting and Auditing Organization for Islamic Financial Institution” has a highly detailed description and explanation of various modes of possession (*Qabd*) and their detailed rulings in its Shariah Standard No. 18. The whole standard has compiled the details about possession. It has resolved the delivery of bank drafts, guaranteed individual cheques, payments through credit- and debit-card as constructive possession (*Qabd hukme*). According to it the possession shall be considered current and constructive even if the account is credited or debited in the future.

4.4.3 Impacts Of Maxim On Sukuk

4.4.3.1 Definition of Sukuk

Basically, Sukuk are such securities, papers, notes, or certificates, which have the capability of tradability and liquidity.¹⁵⁰

¹⁵⁰ Refer to Securities Commission Malaysia, The Islamic Securities (Sukuk) Market, 8.

AAOIFI “Accounting and Auditing Organization for Islamic Financial Institution” has defined the term “Sukuk” as;

“Certificates of equal value representing undivided shares in ownership of tangible assets, usufructs and services or (in the ownership of) the assets of particular projects or special investment activity.”¹⁵¹

4.4.3.2 Issue of Possession in Sukuk

Among the contentious issues in Sukuk Finance is the issue of ownership and possession of the sukuk holders. ‘Ibn Manzur’¹⁵² mentions a hadith in which the companion of the Messenger (S.A.W) informs against taking the sukuk i-e “a written debt instrument” as it was correlated to the prohibition of the hadith “Do not sell what you do not have”. In the Hadith given below the term sikak is used in this athar :

”عن سليمان بن يسار أن أبا هريرة قال لمروان أحللت بيع الربا، فقال مروان ما فعلت، فقال أبو هريرة أحللت بيع الصكاك وقد نهى رسول الله صلى الله عليه وسلم عن بيع الطعام حتى يستوفي فخطب مروان، فنهى عن بيعها“.

“Sulyman Bin Yasar reported that Abu Hurayrah said to Marawan, You have permitted to sale of riba Marwan replied What I do ? Abu Hurayrah said you permitted the sale of sikak and it was forbidden by the Messenger of Allah to sell food before you take possession of it then Marwan prohibited people from this practice”.¹⁵³

The ‘Muslim Jurists’ have different opinions on the issue of sukuk. Some jurists have the opinion that the sale of sakk is absolutely forbidden in Islam. They based their view on the literal meaning of sakk as in the narration of Abu Hurayrah (R.A). While some have the opinion that sale of sukuk is permissible. They have based their view on the interpretation of the narration narrated by Abu Hurayrah (R.A). This group of jirists determined that the prohibition

¹⁵¹ AAOIFI (2010). Shariah Standards for Islamic Financial Institutions. Shariah Standard No. (17): Investment Sukuk. (Bahrain: AAOIFI). 307.

¹⁵² Ibn Manzur Abu al-Fath Jamal al-Din Muhammad bin Mukrim, *Lisan al-Arab*, (Beyrut: Dar Sader. 4th Edn.) Vol.8. 263.

¹⁵³ Imam Muslim, *Sahih Muslim*, *Kitabul Buyu* (Al-riyad: Dar al-salam, 2000), *Hadith No.1525*.

of sale of sukuk in the narration of Abu Hurayrah (R.A) is in the case where the buyer buys a property from a seller who produces the *sakk and delivers only the sakk not the property* and then sells it to a third person before taking possession of property. The second leg of the sale to the third party is forbidden. These jurists viewed that there is no prohibition for the first leg of sale in the narration because it is from the actual owner and possessor who keeps the property (Subject Matter) in his custody.

4.4.3.3 Historical Origon of Sukuk

The nature and structure of sukuk has varied from time to time. Its present shape and structure is different from the sukuk used in old times and the current structure of sukuk differs at a great extent from the conventional securitization. Historically, the Muslims in the middle ages traditionally used “sukuk” in shape of papers representing financial liability of a trader or merchant. While in current finance it is a practice in which the possession and title of the underlying assets is transferred to a great number of depositors and investors in shape of certificates representing their proportionate share of total assets.¹⁵⁴

4.4.3.4 Issue of Possession of Sukukholders Among Shariah Scholars

The sukuk represents its holders’ possession and ownership over certain underlying assets. Some scholars and jurists debated whether the status of possession of sukukholder is in accordance to the requirements of ‘Shariah’ or not. The earlier jurists have defined ownership (milkiyyah) as “a legal right by a person over an asset, to the extent that he is free to transact with it, and exclude others from dealing with that asset”¹⁵⁵.

¹⁵⁴ Global Islamic Finance Magazine, March 2011, 13. (retrieved 18th March 2011) Adam, Nathif J. & Thomas, Abdulkader. (2004). Islamic Bonds: Your Guide to Issuing, Structuring and Investing in Sukuk. (United Kingdom: Euromoney Books). 43.

¹⁵⁵ Nazih Hammad, “*Mu’jam Mustalahat al Maliyah wal Iqtisadiyah fi Lughat al Fuqaha*” (Damascus: Dar al Qalam, 2008) , 263.

The OIC Fiqh Academy has resolved that both legal and beneficial ownership and possession are recognized from Shariah perspective. In this concern, the “Shariah Advisory Council of Bank Negara Malaysia” has taken the same view with the Academy¹⁵⁶.

These resolutions, clearly describes that. in consequences of possession of sukuk, the beneficial ownership must result in all rights and liabilities attached to the purchased asset be attained by the buyers. The Shariah boards, Shariah scholars and jurists squarely meet the requirements of ownership and possession (*Milkiyyah* and *Qabd*) .Thus the holders of the sukuk will be understood as actual and physical owners and possessors of an asset. As the ‘Shariah Maxim’ clearly states;

“Constructive possession may be given the status of physical possession”.¹⁵⁷ القبض الحكمي يقام مقام القبض الحقيقي

Based on this arrangement, it can be argued that the Sukukholders have a complete ownership (*al milk al tam*) over the asset though they are not the registered owners legally.¹⁵⁸

From the Shariah perspective, the Sukukholders should have the authority of dealing freely with the underlying assets as they are the owners of the asset. But the requirements of (*milkiyyah*) ownership and (*Qabd*) possession shall be fulfilled earlier, which comprises principles of *tamkin wa takhliyah*, which denotes that the buyer as owner must have access to the purchased property (Subject Matter) without any hindrances.¹⁵⁹

¹⁵⁶ Cited from “Shariah Resolutions in Islamic Finance of BNM”, 2010, p.6. also OIC Fiqh Academy, “Majallah Majma’ al-Fiqh al-Islami”, 1990, no. 6, v. 1, p. 771.

¹⁵⁷ Ibid

¹⁵⁸ Rafe Haneef, “Recent Trends and Innovations in Islamic Debt Securities”: Prospects for Islamic Profit and Loss Sharing Securities, p 5.

¹⁵⁹ Al Kasani, Bada’i’ al-Sana’i fi tarteib al-Sharai’, (Cairo: Almatba al imam:1972)5,244, Ali Haydar, *Durar al Hukkam*, . 1, 216.

However, a question arises that under the asset based Sukuk, Sukukholders do not have an right to dispose the asset especially upon the occurrence of event of default. This requires a debate amongst Shariah scholars whether ownership is actually transferred to the Sukukholders, or otherwise, the relationship between the Issuer/Obligor and the Sukukholders is merely that of creditor-debtor¹⁶⁰.

The juristic status of the covered Sukuk seems to be perfectly in consonance with the requirements of ownership (milkiyyah) and possession (Qabd). The Sukukholders of the covered Sukuk or their agent should carefully examine the quality and the performance of the asset by conducting a proper due diligence to ensure that the income generated from the asset can meet the periodic distribution and in the event of disposal of the asset, the Sukukholders would be able to get back the principal and profit due from the originator/obligor. This clearly means that the Sukuk holders bear some risks associated to their holdings in the asset but yet they are entitled to the income generated by the asset. Some other maxims also manifest the view such as;

“Al-Ghunm bi al Ghurm” i-e “Reward is to be accompanied with risk”.

“al-Kharaj bi al Daman” i-e “Benefit must be accompanied with liability”,¹⁶¹

Thus the ownership and possession is valid from Shariah perspective and is not contrary with the *Hadith Maxim* *“Do not sell what you do not possess”¹⁶²* as mentioned above. Rather its validity may be deducted from the other maxims such as;

¹⁶⁰ Dubai Islamic Bank, Proceedings of the Seminar on Islamic Economics, (Madinah: 1983) 87-96.

¹⁶¹ Sharh al Qawaid a Fiqhiyya p.361. Also See Sunan Abu-Dawud, Hadith No.3508.

¹⁶² Sunan Abi Dawud, (Syria : Dar al-Hadith,1973), 3,768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith,1973), 4,228, hadith No 1232; Sunan Al- Nasa'i, (Syria : Dar al-Hadith,1973), 7,289, hadith No 4613.

*“Constructive possession may be given the status of physical possession”.*¹⁶³

القبض الحكمي يقام مقام القبض الحقيقي

*“Possession is Substituent to Ownership”*¹⁶⁴

القبض فرع للملك

*“Possession Returns To Common Usage”*¹⁶⁵

القبض مرجعه إلى عرف الناس

*“The custom which is most widely prevalent and operative is to be relied upon”.*¹⁶⁶

إنما تعتبر العادة إذا اطردت أو غلبت

4.5 MAXIM; “Registration of Land Property By Land Registrar Is Constructive Transference And Complete Possession”¹⁶⁷

التسجيل في السجل العقاري يعتبر في حكم التسليم والقبض التام

The maxim is very much clear in its wording, however the nature and various modes of possession in land properties is discussed in detail.

4.5.1 Classification of Land Property under the Islamic Law

Islamic law has classified land property into various kinds. ‘Possession’ is determined to take place by registration of each and every kind of land property.

4.5.1.1 Land Belonging to the Muslims

The lands of such territory whose residents are muslims. ‘Muslim Jurists’ agree solidly that these lands will remain in their possession. It may be supported by a hadith which states as;

¹⁶³ *Mausooa al qawaid al fihiyya mada alQabd* (Makkah: Umm al-Qura University, n.d) 32/262-265.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid, Also See Imam al Mawardi in *Al hawi* (Beirut: Dar Ihya al-turath al-arabi,n.d),5,227.

¹⁶⁶ *Majallat al-ahkam al-adaliyya* (Karachi: Karkhanaah Tijarat-e-kutub,1968), Art. 41.

¹⁶⁷ Mustafa Ahmad Al Zarqa, *Madkhal al-Fiqhi al-Amm* (Damascus: Damascuss University Press, 1959)2,932.

"A nation which embraces Islam secures its life and property."¹⁶⁸

Hence the property which a nation possess at the time of embracing Islam shall remain in their possession.¹⁶⁹

4.5.1.2 Contractual Lands

The Muslim State is responsible for the protection of possession of those non-Muslims who have entered into a pact or treaty of peace with the 'Islamic State'. However, the State shall deliver and achieve possession as stated in the contract.

4.5.1.3 Registration of Possession as Ushri And Kharaj Lands

The possessor of the "ushri land" not only entertains his usufructuary interest, but may also alienate it in a proper way i-e he may constitute waqf, sale, gift etc. While the holder of kharaj land enjoys property rights only. Thus, the effects of possession in both are distinguishable from each other.¹⁷⁰

4.5.2 Acquisition of Possession

Islamic Jurisprudence has the arrangement of acquisition of possession of property.¹⁷¹ The Muslim jurists have determined that the modes of attainment of possession of property are as follows:

1) Possession through Ihya al-Mawat

2) Possession Through Tahjir

¹⁶⁸ Imam Malik's *Al-Muwatta* (English translation) Book of Jihad, (Damascus: Dar al-Qalam, 1991)3, 205.

¹⁶⁹ Ibid.

¹⁷⁰ Outside Arabia, those left behind or who retained possession of their land were required to pay kharaj, levied and paid as land tax. It is viewed as rent payable by the owner to the State.

¹⁷¹ Knut S. Vikor, *A History of Islamic law*, (Oxford: Oxford University Press: 2006), 179.

3) Possession Though AI-Iqta

4.5.2.1 Possession through Ihya al-Mawat

Ihya al-mawat is a recognised form of taking possession whereby the possession of land is acquired from the State for the purpose of rehabilitation of mawat lands. The practice continued during the time of the Messenger (S.A.W) and Caliph Umar(R.A). An Islamic State may register lands possessed through this mode as it is a recognized type of land possession.¹⁷²

The Ahadith stating this mode of possession are as follow;

*"He who brings dead land back to life shall himself possess it and he who by force wants to make use of it has no right or title to it at all."*¹⁷³

*"Whoso quickens a dead land, it is his, there is no right of expropriation against him."*¹⁷⁴

*"Whoso cultivates and inhabit a land which is nobody's shall have the best right to it."*¹⁷⁵

4.5.2.2 Taking Possession Through Tahjir¹⁷⁶.

Tahjir signifies an act of making boundaries through stones or wooden stakes etc. The possession in this case may also be confirmed by clearing grass from the land or digging a ditch or drain for the purpose of reviving of dead (mawat) land.

The Majalla has stated as;¹⁷⁷

¹⁷² Richar Abraham Debs, *The Law of Property in Egypt: Islamic Law and Civil Code*, 16.

¹⁷³ Imam Al-Bukhari, *Sahih Al-Bukhari, Kitab Al-Muzaraat*, (Al-Riyad: Maktaba Al-Rushd, 2004) (English translation by Dr. M.M.Khan), Chapter 15, 3, 306.

¹⁷⁴ *Sunan Abe Dawud, Kitab Al-Kharaj*, (English translation by Ahmad Hassan), (Lahore: Ashraf Press, 184) 2, 874.

¹⁷⁵ Narrated by Aisha; Imam Al-Bukhari, *Sahih Al-Bukhari, Kitab Al-Muzaraat*, (Al-Riyad: Maktaba Al-Rushd, 2004) 3, 306; Also *Miskat al Masabih*, (Karachi: Karkhanaah Tijarat-e-kutub, 1968), 1, 639.

¹⁷⁶ Tahjir-literally mean setting up of mark or marking. see Muhammad Ibn Ya., qûb Al-Fairozabadî, *Al-Qâmûs Al-Muhîr*, (Lebanon: Dâr Ihyâ Al-Turâth Al-, Arabi, nd), 2, 279.

¹⁷⁷ *The Majallah al-Ahkam al-Adaliyyah* (Karachi: Karkhanaah Tijarat-e-kutub, 1968), Article 1277, p. 208.

"Tahjir may be through

- a) putting stones, or thorns or the dead branches of trees to enclose four sides of the land;*
- b) clearing away the grass or burning the thorns;*
- c) sinking of wells on the land."*

4.5.2.3 Possession Though Al-Iqta'

An Islamic State may issue possession of state lands to certain people which is commonly in two different ways:

- 1) The land is granted for the purpose of rehabilitation.
- 2) The land is given to people serving for state or community.

The main purpose of institution of Iqta' is improvement of productive factor, rehabilitation and cultivation of dead lands. That is why, Imam Shafie has stated as; *"it is the duty of the Ruler to grant iqta' to a Muslim who requests for such a grant."*¹⁷⁸

4.6 MAXIM Possession Returns To Common Usage¹⁷⁹

القبض مرجعه إلى عرف الناس

4.6.1 The Role Of Usage And Custom In Islam

The Messenger (S.A.W) said:

"If we appoint anybody on a job and pay him his subsistence and he then takes anything in addition to it, this is embezzlement".

¹⁷⁸ Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 23.

¹⁷⁹ *Mausooa al qawaid al fihiyya mada alQabd* (Makkah: Umm al-Qura University, n.d), 32/262-265.

The hadith clearly elaborates that subsistence and needs shall be decided on the basis of common practices and customs of the society. Another *Hadith* also support the same such as;

“Whoever gets an office in our administration he may marry if he is unmarried; he may get a house if he does not possess it; he may have a riding animal if he does not own any; he keep a servant if he does not have one. But if anybody hoards Wealth and rears a flock of camels Allah shall make him rise up as the one who misappropriates or cheats us.”¹⁸⁰

Hence it is obvious that the range of payment depends upon common practices and customs of the society. The custom and usage is an important source of interpretation of the principles of *Shariah*.

That is why Jurists has deducted a rule as;

“Custom is a source of judicial decisions: custom whether general or private is to be taken as a judicial decision to establish a rule of law”.¹⁸¹

But Jurists have also laid down some limitations and conditions for a valid custom.

*“The custom and usage should not be in defiance of the injunctions of the Sharia.”*¹⁸²

A maxim has laid down a condition for the legal effectiveness of a custom.

إنما تعتبر العادة إذا اطردت أو غلبت

¹⁸⁰ *Mishkat al-Masabih*, (Karachi: Karkhanaah Tijarat-e-kutub,1968), 1 640; Sunan Abe Dawud (Syria : Dar al-Hadith,1973), 874.

¹⁸¹ *Majallah al-Ahkam al-Adliyyah* (Karachi: Karkhanaah Tijarat-e-kutub,1968), Art. 36

¹⁸² Tyser's translation: “Custom is of force. That is to say, common use and custom, whether it be general or special, is made the arbitrator for the establishment of a Shar' judgment”.

"The custom¹⁸³ which is most widely prevalent and operative is to be relied upon".¹⁸⁴

العبرة للغالب الشائع لا للنادر

"Credence is to be given to that which is publicly and generally operative, and not to what is rare (or little seen)".¹⁸⁵

Thus the legal status and effectiveness of regular and recognised customs is highly emphasised the maxim given below;

المعروف عرفاً كالمشروط شرطاً

"What is a matter of common practice has the same effect as an express condition."¹⁸⁶

That is why if any one empowers any other person as his agent for the sale of a specific property on his behalf without stipulating any condition of price sale and unit of currency. The agent shall be treated according to customary rules.

Another rule supplementing the above **lays down as;**

"Custom has force to make void a fact".¹⁸⁷

الحقيقة تدرك بدلالة العادة

The Jurists have clarified that the universality of possession does not necessarily involve the whole population or entire community. It is quite possible that the merchants have their own practices and usages which they know and follow and the unconcerned people are not supposed to know. As like determined by the Maxim;

¹⁸³ Tyser's translation: "Custom is only given effect to, when it is continuous and preponderant".

¹⁸⁴ *Majalla al-Ahkam al-Adliyyah* (Karachi: Karkhanaah Tijarat-e-kutub, 1968), Art. 41.

¹⁸⁵ *Ibid*; Art. 42.

¹⁸⁶ *Ibid*; , Art. 43.

¹⁸⁷ *Ibid*; Art. 40.

*"Matter of common practice amongst merchants has the same effect as express conditions between them."*¹⁸⁸

4.6.2 Impacts of Urf on possession in contemporary Islamic Finance

The "International Islamic Fiqh Academy" of "OIC" in its fatwa on the variation of modes of possession according to custom in 1990 stated as;

"Possession of assets may occur physically, e.g. when taking by one's hands, or by measurement or weight for food, or transfer from the custody of one party to that of another. It can also be considered to have occurred in a legal (hukme) sense by providing access without hindrance in allowing [the buyer] to dispose of [the commodity] as he or she pleases, despite the absence of any physical ownership. The way in which ownership or control of sold goods occurs differs according to the state of the goods, and it differs according to customary practice as to what constitutes Qabd."

Based on the above discussion, even though there is no physical possession in 'Constructive Possession' (*Qabd Hukme*), even then it is similar to 'Physical Possession' (*Qabd Hisse*) in its legal status.

In February 1989, the contemporary fatwa of the "Islamic Fiqh Academy" of the "Muslim World League" and in 1990 the fatwa of the "International Islamic Fiqh Academy" has regarded all forms of credit into customers' accounts as *constructive possession* which contains cash deposits and money transfers (remittances, intra- or inter-bank account transfers).¹⁸⁹

¹⁸⁸Ibid; Art. 44.

¹⁸⁹ Extracted from Nazih Hammad, al-*Qabd al-hukme wa al-haqeque*, in *Majallat Majma al-Fiqh al-Islami*, session 6, vol.1, p. 709

“AAIOFI” in its Shariah Standard on currency trading has accepted these fatwa of the ‘Islamic Fiqh Academies’.¹⁹⁰ AAIOFI has also a detailed description about possession in its Shariah Standard No. 18.

According to ‘AAIOFI’ the delivery of guaranteed individual cheques, bank drafts, credit- and debit-card payments is ‘Constructive Possession’ (*Qabd Hukme*), even though the account will be credited or debited in the future.¹⁹¹

Hence these maxims clarify the validity of recently generated forms of possession for instance possession of relevant documents of property, possession of share papers, bonds, sukuk, cheques etc because the common usage of merchants has recognized and declared its validity.

4.6.3 Application of Maxims On Murabaha Finance, Moveable Properties and

Immovable Properties

Actually, the ‘Murabahah Finance’ of ‘Islamic Banking’ is composed of two transactions which take place in separate two stages. In first stage the purchaser or bank’s client is given an authority to act as an agent (*Wakeel*) of the bank at the same time in order to gain delivery on behalf of the bank. Hence the bank takes the possession as the possession of a client or the buyer is regarded as possession of bank. In second stage the possessed property is sold by bank to the buyer through ‘Murabahah Finance’.

4.6.4 The View of Shaykh Ibn Taymiya

A passage in form of question and answer from His prominent book “*Majmouat ul Fatawa*” is quoted in this regard;

¹⁹⁰ The original AAIOFI Standard no 1, related to currency trading, 2/6/5.

¹⁹¹ The original text AAIOFI Shariah Standard no. 18 related to *Qabd*, paragraph 5.

Question:

“I import goods for trade, then sell them before they arrive and I receive them. What is the ruling on that?”

Answer:

“Praise be to Allaah. Selling goods before they arrive is not permissible, because the Prophet (peace and blessings of Allaah be upon him) forbade selling goods in the place where they were bought, until the merchants have taken them to their own place. So it is essential first to take possession of them, then you can sell them. As for selling them when they are in another country, and you do not know whether they will arrive in good condition or not, this is not permissible. If someone were to say that the purchaser is obliged to take the goods whether they are faulty or not, we say: not even if he agrees to that, because he may agree to it when making the deal because he wants to make a profit, then after that he may regret it, and there may be a dispute between him and the seller. Islam – praise be to Allaah – has blocked all the ways that may lead to regret and disputes. Similarly if the goods are destroyed, there may be a conflict between the two parties. The point is that it is not permissible to sell goods until they reach their destination with the seller, then he may dispose of them.”¹⁹²

4.6.5 Impacts of Maxim on short selling

Generally, a short-seller borrows a stock, then sells the borrowed stock and then by buying get back the stock and return the stock when the price drops. Precisely it may be defined as;

“The selling of approved securities where the seller does not, at the time of the execution of the sale, have an exercisable and unconditional right to vest such securities in the purchaser but

¹⁹² Imam Ibn Taymiyah, al Fatawa al-kubra, (Beirut: Daral-kutub al-ilmiyyah, 1987), 29, 513.

has, prior to the execution of the sale, executed an agreement to borrow the approved securities as will enable delivery of the same to be made to the purchaser under the said sale, in accordance with the Rules relating to delivery and settlement.”¹⁹³.

4.6.6 Basic Fiqh Issue In Short selling

From the ‘Shariah’ perspective short selling falls in the category of sale of a non existing object as there is the sale of an object not owned by the investor at the time of transaction. As the basic condition for the validation of sale contract is the existence, ownership and possession of object in trade (*mahall al-`aqd or ma`qud `alayh*) at the time of contract. And as the transaction of sale is established for the purpose of transfer possession and ownership of an earlier existent subject matter. In essence, the short selling transactions are in controversy with the ‘Hadith Maxim’ “*Do not sell what you do not possess*”.¹⁹⁴

The “Shariah Advisory Council of Securities Commission” (SAC) of Malaysia in its “69th meeting” on 18 April 2006, resolved that “Regulated Short Selling” (RSS) is according to the ‘Shariah’ requirements. The main argument in the fatwa was that the effective reason (illah) of prohibition of sale prior taking possession (*Qabd*) as in the of sale of non existing object is actually due to the existence of an illegal element of “gharar” which is strictly prohibited.

SAC has also opined that the issue of gharar can be overcome and advised the inclusion of Securities Borrowing and Lending (SBL) principles in Regulated Short Selling (RSS) for the elimination of gharar. Hence, the inclusion of SBL increase the probability of delivery of sold shares which eliminate the element of gharar. The argument is basically based on a well-

¹⁹³ The Regulated Short Selling (RSS) Malaysian capital market Kuala Lumpur Stock Exchange at the end of 1995.

¹⁹⁴ Sunan Abi Dawud, (Syria : Dar al-Hadith, 1973), 3,768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith, 1973), 4,228, hadith No 1232; Sunan Al-Nasa’i, (Syria : Dar al-Hadith, 1973), 7,289, hadith No 4613.

known fiqh maxim: *“When an issue that impedes (the permissibility) is removed, then the activity which was initially forbidden becomes permissible”*.

Hence, we can say that the validity of short selling depends upon overcoming Shariah complaint i-e gharar.

4.7 Maxim Gift Does Not Complete Without Possession¹⁹⁵ الهبة لا تتم إلا بالقبض

5.21.1 Definition of Gift (Hibah)

The Scholars of Islamic Jurisprudence have defined the contract of hibah variously. Some definitions are as follow:

“Hiba is the making of another person the owner of the corpus of the property without taking its consideration from him”.¹⁹⁶

Some others stated that hibah is “a covenant that demands the making of a person immediately owner of a property without consideration in a manner that is free from an intention of nearness to Allah (S.W.T).”¹⁹⁷

4.7.1 Ingredients of Hibah Contract

According to Hanafis, the offer and acceptance are the main pillars of gift contract. As they analyse gift contract on the basis of its analogy with sale contract, they hold the offer and acceptance as its main pillars. Al-Sarakhsi, an eminent hanafi scholar added possession or reception as the third essential pillar for the completion of gift contract. Hence Unlike the sale contract possession is an essential element for instituting ownership in a gift contract.¹⁹⁸

¹⁹⁵ *Mausooa al qawaid al fihiyya mada alQabd* (Makkah: Umm al-Qura University, nd), 32/262-265.

¹⁹⁶ Tanzil-ur-Rahman, *Code of Muslim personal law* (Karachi: Hamdard Academy, 1978), 2, 272.

¹⁹⁷ Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 388.

¹⁹⁸ Tanzil-ur-Rahman, *Code of Muslim personal law* (Karachi: Hamdard Academy, 1978), 2, 237.

Thus, the Hanafis Jurists have opined that a gift contract becomes perfect by proposal and acceptance but the establishment of ownership shall be after gaining the possession of the gifted property. On the contrary, Imam Malik does not consider transfer of possession an essential element for establishing title of a property.

4.7.2 Essentiality of Possession By The Donee

Among the conditions laid down for the validity of gift contract the Hanafi and Shafii jurists consider 'Possession' by the donee an essential condition for the completion of gift contract. So the donee is not considered the owner of gifted property unless he receives and possesses it. They also argue that if either the donor or the donee dies before taking place the 'Possession' by the donee or his agent on his behalf, the gift contract shall be considered void. While the Malikis, do not insist on possession and do not consider 'Possession' an essential element for the validity of gift contract.

4.7.3 Separate possession of the gift object

According to Hanafis the 'Possession' to be delivered in a gift contract must be separate from other property otherwise it is invalid. According to them delivery of 'Possession' of a share in a divisible common property as a gift is invalid. Hence, the gift of 'undivided share' (musha) in a divisible property is nullified. Legally the term of 'musha' stands for the proprietary rights of more than one owner in a common property, where each co-owner entertains a right in every particle of the common property until partition. However, after partition of shares, subsequent delivery of possession of a separate share is a valid gift contract. The 'Hanafi Jurists' consider the gift of wool on sheep's back, gift of standing trees and gift of crops apart from the land as a gift of 'musha'. In contrast to 'Hanafi Jurists', Shafi'is, Maliki'is, and Hanbali'is opined that delivery of possession of an unidentified share in a common

property is valid and permissible. They have based their opinion on the analogy of the permissibility of selling an unidentified share.¹⁹⁹

4.7.4 Gift Reception and Taking Possession

As discussed above, the Hanafis and the Shafi'is Jurists consider 'Possession' as the most essential element and a condition for the completion of gift contract. According to them new ownership and title of the gifted object may not be established without transfer of possession and receipt. The basis of their argument is the narration of 'Aishah (R.A)' in which Her Father had allotted Her a portion of His property during His lifetime. when He became extremely ill, He said to His daughter;

"o daughter, after myself, you are my most beloved person, and you are the person whose property I am most intent on avoiding. Now, I gave you a gift out of my property, and had you already collected the gift, then it is yours. However, this property today belongs to all my heirs, including your two brothers and two sisters. Therefore, divide the property according to the role of inheritance detailed in the book of Allah".²⁰⁰

The Hadith clearly demonstrates that transfer of 'Possession' of the gifted property is required during the lifetime of both donor and donee. Without taking possession of the gifted property during one's lifetime no consequences shall arise out of this contract. However, if a donee is already in possession of the gifted property then no formal transfer of possession is required²⁰¹.

Besides gift, 'Possession' has been also declared an essential condition for the validity of some transactions for example debt, trust and pledge such as described by jurists²⁰².

“يشترط القبض للزوم بعض العقود كالهبة والقرض والوقف”

¹⁹⁹ Wahbah Az-Zuhaili, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 389.

²⁰⁰ Ibid.

²⁰¹ Tanzil-ur-Rahman, *Code of Muslim personal law*, (Karachi: Hamdard Academy, 1978).

²⁰² *Almawsueat alfiqahiat alkuaytiat* (kuwait: Ministry of Islamic affairs, 2012) vol.31, 201.

CONCLUSIONS AND RECOMMENDATIONS

Shariah Maxims are the "Universal Principles of Fiqh formulated in a concise legal form, embodying broad general rulings in cases that fall under their subject."²⁰³ Shariah maxims are actually the statements formulated in precise legal form and depict a universal and wide-ranging perception of the spirit, philosophy and objective of Islamic law and thus provide a touchstone and criterion for a jurist to judge the legitimacy and illegitimacy, of the case presented to him for judgment.

The 'Jurisprudential Maxims' (*Al-Qawaid Al-fiqhiyyah*) are the expressions of principles preserved by various jurists which are deducted after a deep study of 'Jurisprudential Rulings' on various themes. These detailed descriptions empower the jurists to reduce these maxims into theoretical statements of principles.²⁰⁴

'Shariah Maxims' aim to expedite good understanding of Shariah and its growth and expansion is parallel to that of the 'Islamic Jurisprudence' (*Fiqh*) itself. In the first three centuries of 'Islamic History' the 'Muslim Scholars' highly contributed and developed these maxims.²⁰⁵

The most inclusive and wide-ranging maxims which apply to the entire range of 'Islamic Jurisprudence' without any specification are called "*Al-Qawa'id al-Fiqhiyyah al-'Asliyyah*". There is normally no difference of opinions among all Schools of 'Islamic Jurisprudence' in the applications of "*Al-Qawa'id al-Fiqhiyyah al-*

²⁰³ Mustafa Ahmad Al Zarqa, *Madkhal al-Fiqhi al-Amm* (Damascus: Damascuss University Press, 1959)2,33.

²⁰⁴ See Hussain Hamid, *An Introduction To The Study of Islamic Law*, 67-72.

²⁰⁵ *Ibid.*

'Asliyyah". The 'Islamic Jurists' (*fuqaha*) of early times pulled out five objectives of shariah (safeguarding the faith (*din*), self (*nafs*), wealth (*mal*), intellect (*aql*), and posterity (*nasl*) in order to extract the essence and spirit of shariah. Hence according to 'Shihab al-Din al-Qarafi' ;

"A judicial decision is reversible if it violates a generally accepted maxim."²⁰⁶

The 'Shariah Maxims' (Qwaid-ul-Fiqqah) present a general picture about the nature, spirit and Philosophy of Islamic law and it provide a criterion for a jurist to judge the legitimacy and illegitimacy, of the case presented to him for judgment.²⁰⁷

'Shariah Maxims' are actually the statements formulated in precise legal form which are based on 'Fiqh Rulings' relating to different subjects scattered in different chapters. The 'Shariah Maxims' representing a general rule or principle group these rulings under a specific theme which covers a large number of 'Judicial Rulings' (Fiqhi-Ahkam) relating to a particular theme.

The Jurisprudential history tells us that the people who for the first time focused on the subject of 'Shariah Maxims' were the Hanafi's. Later on 'Sufyan Ibn Tahir ad-Dabbas', an early Iraqi jurist, piled up 17 basic rules of 'Shari'ah Maxims'. Subsequently, a contemporary of 'Sufyan Ibn Tahir ad-Dabbas', Abul-Hassan Karkhi, wrote various 'Shariah Maxims' (*Al-Qawaid Al-fiqhiyah*) in his book "*Al-Usul*"²⁰⁸.

An another prominent scholar 'Ad-Dabbusi' wrote a book "*Ta'sis an-Nadhr*" in which he compiled eighty six maxims of shariah. Subsequently, 'Ibn Al-Nujaim', an eminent Hanafi Scholar, wrote a well known book on 'Shariah Maxims' titled "*Al-Ashbah wa al-Nadhahir*". Following the 'Hanafi Scholars', the 'Shafiis', then the

²⁰⁶ Al-Dasuqi. *Hashiyat Al-Dasuqi Al-sharh Al-kabeer*, (Cairo: Dar Ihya al kutub al Arabiyyah,nd) , 3/195. Also see Al-Qarafi, Shihab al -Din, *Kitab al Furuq*, 4,,40.

²⁰⁷ Knut S. Vikor, *A History of Islamic law*, (Oxford: Oxford University Press: 2006), I65.

²⁰⁸ Ali Hayder, *Durar al-Hukkam Sharh e Majallah*.(Beirut:Dara al kutub al ilmiyyah:n.d) Vol. I, P.I7

'Hanbali Scholars', and then the 'Maliki Scholars' enhanced their contributions to the literature on 'Shariah Maxims'²⁰⁹.

Maxims are derived from the Quranic verses and Ahadith of the Messenger (S.A.W) and various maxims have been developed by the Muslims Scholars through inductive surveys of the provisions of Islamic law. Some Maxims are originated from Usul al-Fiqh i.e. Principles of islamic jurisprudence. Various maxims are based on doctrine of ijtiḥad, istishab and istislah.

Possession of intellectual property in Shariah and Fiqh al Islami has described by three groups Muslim Jurists.

The first group, represented by a number of scholars, is against intellectual property rights. According to them "the concept of ownership in Shari'ah is confined to tangible objects only."²¹⁰

Mufti Taqi Usmani, Himself has adopted a lukewarm position and generated an opinion of tanzul of rights in place of sale of rights of intellectual property.

Latest fataws of Muslims Jurists and AAOIFI statements have recognised intellectual rights.

The 'Hanafi Scholars' does not consider Possession (*Qabd*) as an essential prerequisite (rukṇ) of sale but adequately a secondary requirement for the completion of a valid contract. However in the transaction of ribawi goods (for example sale of gold with gold and silver with silver etc.), possession is an essential ingredient for both the seller and buyer at the time of exchange. 'Imam Abu Hanifah' has excluded immovable properties from the aforesaid maxim on the basis of another famous maxim;

²⁰⁹ Mustafa Ahmad Al Zarqa, *Madkhal al-Fiqhi al-Amm* (Damascus: Damascus University Press, 1959)2, 48.

²¹⁰ Mufti Taqi Uthmani, *Takmila Fathul Mulhim*, (Karachi: Maktaba Darululoom Karachi: 1994), 3, 276.

“*Al-Kharaj bi-al-Daman*”²¹¹ or “*Al Ghunm bil ghurm*”²¹² which means “Profit is based upon the corresponding liability for bearing loss”. while in case of iqar (immovable properties) there is usually no liability therefore, possession is not a prerequisite of a valid contract²¹³.

The Maliki Jurists have restricted the application of ‘Hadith Maxim’ to “Food Substances” only. ‘Ibn Rushd Almaliki’ while confirming this **opinion** states, “There is no dispute in Maliki’s school about the permissibility of selling thing, other than food, before taking possession and there is also no dispute in his school; about ribawi items (gold, silver, wheat, barley, dates and salt) that possession is a condition for its sale”²¹⁴.

According to ‘Imam Shafi’ ‘Possession’ is an essential element for sale of all kinds of property. ‘Imam Al Shafi’ did not exempt any object or property making the Hadith of the Messenger (SAW); “Do not sell anything until you receive it”²¹⁵ (“لا تبع “ ”ماليس عندك”) a base for his opinion.²¹⁶

‘Imam Ibn Taymiyah’ and ‘Imam Ibn al-Qayyim’ have a quite different opinion. They did not recognise salam contract an exception to the ‘*Hadith Maxim*’. They specified the prohibition of the *Hadith Maxim*’ to the selling of objects and property which the seller is most probably not able to deliver (ghair maqdoor at tasleem).

²¹¹ Al-Dardeer. *al-Sharh al-Kabir*, 3/12, Al-Shirazi. *al-Muhadidhab*, 1/262-263; Ibn Qudamah, *al-Mughni* 6/295.

²¹² See Sunan Abu-Dawud (Syria : Dar al-Hadith,1973), Hadith No.3508.

²¹³ Mufti Taqi Uthmani, *Takmila Fathul Mulhim*, (Karachi: Maktaba Darululoom Karachi:1994)3,257.

²¹⁴ Muhammad b. Ahmad Ibn Rushd al-Qurtubi, *Bidayat al-Mujtahid wa Nihayat al- Muqtasid*. Translated edition by Imran Ahsan Khan Nyazee, (Lahore: Al maktaba al-ilmiyyah,n.d) 2, 175-176.

²¹⁵ Sunan Abi Dawud, (Syria : Dar al-Hadith,1973), 3,768, hadith No 3503; Sunan Al-Tirmidhi, (Syria : Dar al-Hadith,1973), 4,228, hadith No 1232; Sunan Al- Nasa’i, (Syria : Dar al-Hadith,1973), 7,289, hadith No 4613.

²¹⁶ Mufti Taqi Uthmani, *Takmila Fathul Mulhim*, (Karachi: Maktaba Darululoom Karachi:1994,3,257.

According to them the validity and effectiveness of a non salam sale transaction depends upon the capability of delivery of specific object at the time of delivery.²¹⁷

‘Imam Ibn Taymiyah’ and ‘Imam Ibn al-Qayyim’ interpreted the Messenger’s(SAW) prohibition of resale before taking possession, through a deducted effective reason (Illa) from the ‘Hadith Maxim’ and directed it to only those sales which contain risk and excessive uncertainty (algharar al fahish wal mukhatarah), where the object may be undeliverable (ghair maqdoor at tasleem), whether it exists or not. Hence the effective reason (Illa) of ban of resale before taking possession have no link the existence or nonexistence thereof.²¹⁸

The majority of jurists have specified some modes of possession to holding physically, taking to one’s control and custody, evacuation (takhliyah), and retention (habs). But ‘Imam Ibn Taymiyah’ has not inferred such restrictions, rather he strictly denied such interpretations that neither the Arabic language nor the Shariah permit. All the modes and forms of possession especially evacuation (Takhliyah) vary from object to object, market to market and era to era. Thus the manner in which possession takes place is not always the same. Therefore, the precise mode and manner of possession (*Qabd*) shall be determined by reference to the prevailing custom²¹⁹.

Possession may be physical or constructive. Possession may be taken through actual transference or documentary possession (e.g sukuk bonds, debentures cheques and agreement of transactions). Possession may be of tangible assets (moveable or immovable properties) and intangible assets (rights and benefits e.g takaful benefits and tanazul i-e forgoing rights). Possession may be through evacuation or taking risk.

²¹⁷ Wahbah Az-Zuhaily, *Al-Fiqh Al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 238.

²¹⁸ Wahbah Az-Zuhaily, *Al-Fiqh Al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 3340-3398.

²¹⁹ Al-Dasuqi. Hashiyat al Dasuqi Al sharh al kabeer. (Cairo: Dar Ihya al kutub al Arabiyyah, nd) , 3/195.

Land property shall be under either form of possession i-e Private possession, Community or public possession, Government possession. Islam ensures the right of each and everyone within the limitations above discussed and without the interference of one in other's possession. Land may be possessed through land registration, iqta, tahjiir etc.

The Jurists have clarified that the universality of possession does not necessarily involve the whole population or entire community. It is quite possible that the merchants have their own practices and usages which they know and follow and the unconcerned people are not supposed to know.

"Short selling is the selling of approved securities where the seller does not, at the time of the execution of the sale, have an exercisable and unconditional right to vest such securities in the purchaser but has, prior to the execution of the sale, executed an agreement to borrow the approved securities as will enable delivery of the same to be made to the purchaser under the said sale, in accordance with the Rules relating to delivery and settlement."²²⁰

The "Shariah Advisory Council of Securities Commission" (SAC) of Malaysia in its "69th meeting" on 18 April 2006, resolved that "Regulated Short Selling" (RSS) is according to the 'Shariah' requirements. The main argument in the fatwa was that the effective reason (illah) of prohibition of sale prior taking possession (*Qabd*) as in the of sale of non existing object is actually due to the existence of an illegal element of "gharar" which is strictly prohibited.

SAC has also opined that the issue of gharar can be overcome and advised the inclusion of Securities Borrowing and Lending (SBL) principles in Regulated Short

²²⁰ The Regulated Short Selling (RSS) Malaysian capital market Kuala Lumpur Stock Exchange at the end of 1995.

Selling (RSS) for the elimination of gharar. Hence, the inclusion of SBL increase the probability of delivery of sold shares which eliminate the element of gharar. The argument is basically based on a well-known **fiqh maxim**: **“When an issue that impedes (the permissibility) is removed, then the activity which was initially forbidden becomes permissible”**.

“Hiba is the making of another person the owner of the corpus of the property without taking its consideration from him”.²²¹

According to the majority of jurists, the offer and acceptance are the main pillars of gift contract. Al-Sarakhsi, an eminent hanafi scholar added possession or reception as the third essential pillar for the completion of gift contract..²²²

In contrast to Shafi’is, Maliki’is, and Hanbali’ the ‘Hanafi Jurists’ have opined that the gift of ‘undivided share’ (musha) in a divisible property is nullified. The ‘Hanafi Jurists’ consider the gift of wool on the back of the sheep, gift of standing trees and gift of crops apart from the land as a gift of ‘musha’.²²³

The basis of their argument is the narration of ‘Aishah (R.A)’ in which Her Father had allotted Her a portion of His property during His lifetime. when He became extremely ill, He said to His daughter;

“O daughter, after myself, you are my most beloved person, and you are the person whose property I am most intent on avoiding. Now, I gave you a gift out of my property, and had you already collected the gift, then it is yours. However, this property today belongs to all my heirs, including your two brothers and two sisters. Therefore, divide the property according to the role of inheritance detailed in the book of Allah”.²²⁴

²²¹ Tanzil-ur-Rahman, Code of Muslim personal law (Karachi: Hamdard Academy, 1978), 2, 272.

²²² Ibid: 2,237.

²²³ Wahbah Az-Zuhaily, *al-Fiqh al-Islami wa Adillatuh*, (Damascus: Dar al-fikr, 1984) 5, 389.

²²⁴ Ibid.

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