

# **An Appraisal of the Principle of Khiyar al Majlis Under the Islamic Law and its Applicability in the Modern E-Transactions**

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## **Abstract**

*The Islamic Law of Transaction, Mu'amalat is the key area of Islamic Law which the Principle of Khiyar al Majlis (meeting place of transaction) stems from. This principle as propounded by jurists in the past envisaged physical meeting place of bargain in a transaction and this requires a formal place to stand in modern business dealings owing to its importance. This paper is focusing on the principle of Khiyar al Majlis as a cardinal aspect of Islamic Law of Transaction which the jurists in the past have made rules to govern having in mind physical interaction of parties only hence leaving a gap that cannot be said to have accommodated e-transactions of the modern day. The contemporary jurists have given their opinions on what could be used to determine this principle's applicability in e-transaction basing their arguments on Sources of the Shariah. Using the doctrinal approach, his paper found that the present day jurists are of the opinion that the rules of Khiyar al Majlis can apply safely in modern e-transactions. The need for a new standard set of rules to regulate e-transactions which does not necessitate physical contact is hereby suggested to temporarily settle the question of not only using the opinion of jurist but an actual control mechanism as set of rules by the Global Regulation Making Bodies of the Muslim Ummah.*

## **1.1 Contract Formation Under The Islamic Law**

For a contract to be formed under Islamic law, there has to be parties to the contract. The parties make their offer and acceptance to themselves in the medium of communication as understood by them and ensure that there is mutual consent to contract.

“Generally, the formation of contract in Islamic Law does not require any formality. All that is required is the mutual consent of the contracting parties”<sup>1</sup>

Mutual consent of the parties is to be made clearly and such that is made first is called offer and the second declaration is the acceptance (Ijab wal Qabul) both done in a meeting place and at the same time.

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<sup>1</sup> Bambale, Y.Y, Islamic Law of Commercial and Industrial Transactions, Malthouse Press Lagos, 2007,

In summary, there always has to be the formula which comprise of the offer, acceptance and meeting place, parties to the contract and subject matter of the contract for the contract to be valid. The parties to a contract must have agreed on their terms with respect to a definite subject matter through offer and acceptance in a meeting place (actual or otherwise) to constitute a binding contract.

## 1.2 Introduction (Definition of Khiyar Al Majlis/Majlisul Aqd)

Islam is a religion that is meant to guide the entire life of mankind from the beginning to the end of time. Hence, the Shari'ah as the Islamic Law is structured in a way that it carries alongside, all forms of advancement witnessed by man from generation to generation, making all its rules and regulations relevant based on derivations from the sources of the Shari'ah by Scholars and Jurists so that there can never be a time any development in form of either technological advancement or otherwise except that it finds a frame work for operation or interaction by the Muslims and mankind in general already in place to regulate its usage.

Literally, the word *al-khiyar* denotes a choice on the part of the holder of the right of option, who may either confirm the act or render it void<sup>2</sup>. Legally, *al-khiyar* means the option or right of withdrawal, i.e. the right for the parties involved to terminate the legal act unilaterally.<sup>3</sup>

*Khiyar al Majlis*, otherwise known as contractual meeting place has been defined as the time span during which the involving parties are together to engage with the forming of contract without being busy by something else not related to the negotiated bargaining by any of them.<sup>4</sup> The contractual meeting place (*Majlisul aqd*) is the place where the contracting parties exist. It commences from the time the declaration of the offer is made and it continues so far as the contracting parties devote themselves to the formation of the contract. When this meeting place changes either in fact or in law, it is assumed that the meeting place disappears without meeting of the minds. If after this disappearance an acceptance is declared, the acceptance is nugatory because it meets no offer and that means, no contract<sup>5</sup>

Al- Sana'ani recorded a tradition which was recorded by Ta'us. In this tradition, the Prophet SAW is said to have bought a camel from a Bedouin before his Prophet hood. After the transaction, the Prophet said to the Bedouin:

“Take your right of option (Ikhtar).” He looked at the Prophet SAW and said: May God perpetuates your life,

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<sup>2</sup> A.M Declambre El, vol, P 26.

<sup>3</sup> Hassan.A.A.H, Sales and Contract in Early Islamic Commercial Law, India. Nusrat Ali Nasri publishers, p 36.

<sup>4</sup> Al-Shafiy, J. Majlees al-Aqd fi al-fiqh al-Islami wal-Qanoon al-Wadhei, Dar al-Jameah al-Jadeedah. Alexandria, 2001, p90

<sup>5</sup> Zubair A.Q.. Principle of Islamic Law of Contract. 11C Publications, Lagos. 1991, p46

who are you? After his Prophet hood, the Prophet SAW instituted (or acknowledged) the law of *khiyar* after sale<sup>6</sup>.

The above hadith shows that the practice of *al-khiyar al majlis* had been recognized by the Arabs prior to Islam and practiced before the advent of Islam.<sup>7</sup> *Khiyar al Majlis* (a session) is the period during which contracting parties devote themselves to the business in hand and is terminated by any event such as physical departure from the place of business which indicates that negotiations are concluded or suspended<sup>8</sup>. The right of option of session (Sitting) called *khiyar al majlis*, is the inalienable right to repudiate unilaterally a contract concluded by both parties, so long as they have not yet separated, when the contract is *inter presentess*. Such a contract as bilateral transaction<sup>9</sup>.

### 1.3 Legal Basis and Nature of *Khiyar Al Majlis/Majlisul Aqd*

The basis for the right of option of the session (*Khiyar al majlis*) in a contract was reported to have been made by the Prophet SAW as is reported thus:

“Both parties in a business transaction have the right of option as long as they have not separated...”<sup>10</sup>

“The sale is contracted with mutual consent and the right of option is after the conclusion of the contract”<sup>11</sup>.

From the actions of the companions of the Prophet SAW, it is seen that they practiced and exercised this right in their transactions. Abdullahi bn Umar used to follow the instruction of the Prophet SAW given in this tradition whenever he bought any of the goods, he would get away, for a short while from the place where the transaction was stipulated, to end the session, and then come back to the place.<sup>12</sup>

Abdullahi bn Umar also said: “I bartered my property in khaybar to Uthman bn Affan (the commander of the believers) for his property in al-Wadi (a district near Madina). When we had finished the deal I left immediately and went out of the house lest he should cancel the deal...”<sup>13</sup>

It is noteworthy here that any claim of revocation in a transaction which was not valid or which had been made without the consent of the second party, would not be acceptable. The right of option existed as long as the parties to the contract, which was

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<sup>6</sup>San’ani, Al-Musannaf vol. VIII. p50

<sup>7</sup>Jawad A., Al-Mufasssal fi Tarikh al arab qabl al-Islam, Vol. VII. pp. 402-403

<sup>8</sup>N.J. Coulson, A History of Islamic Law pp. 237-238

<sup>9</sup>J. Schacht, An Introduction to Islamic Law pg145.

<sup>10</sup>Malik B.A., al-Muwatta (The version of Muhammad bn al-Hassan al-Shaybani)

<sup>11</sup>San’ani, op cit pg 51

<sup>12</sup>Al-Shafi’I, Kitab al Umm, vol.III, p4, San’ani op cit. p51

<sup>13</sup>Ibn Hazm, Kitab al Muhalla, vol. VIII, pp353-354.

made with mutual consent did not separate. This is the view of Ta'us<sup>14</sup> Shurayh<sup>15</sup>, Al Hassanul Basri<sup>16</sup> and Sayyid bn Musayyib<sup>17</sup>.

The contractual meeting place is to determine the possible distance between offer and acceptance without putting the interests of the contracting parties into jeopardy. It is therefore presumed that the offer remains open so far as the contracting meeting place remains intact. If the acceptance is declared before the extinction of the contractual meeting place or its disparity, it supposed to have met a standing offer in law. Thus the connection between the offer and acceptance is established and a contract is duly made.

If the acceptance is made after the termination of the contractual meeting, it meets no offer, neither in fact nor in law and as result, there is no connection between the offer and the acceptance and no contract is formed<sup>18</sup>

Where an offer is made, the offeree has an option of acceptance. It is held that the offeree has to accept in the meeting place. But the question is, should this option of acceptance be immediately or at any time before the meeting breaks up<sup>19</sup>. The jurists are having different opinions on this as follows:

- a. Shafi'i school is of the view that the option of acceptance has to be exercised immediately after the offer is made. The offer will not survive any delay in exercising the option of acceptance.<sup>20</sup>
- b. Hanafi school is of the view that the offeree must be allowed time to contemplate and consider the offer. The option of acceptance may be exercised at any time before the meeting breaks up.
- c. Maliki and Hambali schools are of the view that the offeree should not be made to exercise the option of acceptance immediately<sup>21</sup>.

From the actions of the companions of the Prophet SAW, the principles of *Khiyar al majlis* exercised and applied in a contract is what makes the contract valid.

#### **1.4 Termination of Khiyar Al Maj Lis/Majlisul Aqd**

The disappearance of Majlisul Aqd is possible both in fact and in law. When either of the two present contracting parties leaves the place where the offer is declared,

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<sup>14</sup> San'ani op cit Vol VIII, p53

<sup>15</sup> Al-Tabari, Jami al-Bayan at Ta'wil Ayatul Qur'an p23

<sup>16</sup> Al-Shafi'i, Kitab al-Umm, op cit vol. XI p277.

<sup>17</sup> Ibn Hazm op cit p354.

<sup>18</sup> Al Khafif A., Al Ahkam al Muamalat al shariyya, Ansar al-sunah, al Muhamadiyya Press. Cairo p220

<sup>19</sup> Bambale, Y.Y Op cit P 28

<sup>20</sup> Al-Ramli, Shamsuddin, Muhammad, Nihayat al Muhtaj, Matba'ah al-Bahiya Cairo, 1967, Vol III P 370

<sup>21</sup> Al-Bahuti, Mansur Ibn Yunus, Kahshaf al-Qina an maln al-qina, Riyadh, 1968, Vol III PP 147-148

the Majlisul Aqd is said to have been terminated in fact but where either of the contracting parties initiates what indicates rejection or revocation of the offer, even though they are present in the place where the offer is made, the Majlisul Aqd supposedly terminates in law. It is therefore asserted that for the attainment of the connection between the offer and the acceptance, the offer and the acceptance must be declared in a contractual meeting place without any interruption, revocation or rejection. This is in the case of the present contracting parties<sup>22</sup>.

In the case of the inter-distant contracting parties who contract through means of communication, letter, telegraph, etc, the Majlisul Aqd is when the message is delivered to the offeree. It is incumbent for the offeree to respond to the offer within a reasonable time from that instance. If he delays his response beyond the contractual meeting place of this instance, the contract is not constituted.<sup>23</sup>

### **1.5 Introduction to the Principles of E-Transaction (E-Commerce)**

Internet Transaction or e-commerce is the exchange of goods and services by means of the Internet or other computer networks. E-commerce follows the same basic principles as traditional commerce—that is, buyers and sellers come together to exchange goods for money. But rather than conducting business in the traditional way—in stores and other "brick and mortar" buildings or through mail order catalogs and telephone operators— in e-commerce buyers and sellers transact business over networked computers<sup>24</sup>.

E-commerce offers buyers convenience. They can visit the World Wide Websites of multiple vendors 24 hours a day and seven days a week to compare prices and make purchases, without having to leave their homes or offices. In some cases, consumers can immediately obtain a product or service, such as an electronic book, a music file, or computer software, by downloading it over the Internet<sup>25</sup>.

For sellers, e-commerce offers a way to cut costs and expand their markets. They do not need to build, staff, or maintain a store or print and distribute mail order catalogs. Automated order tracking and billing systems cut additional labor costs, and if the product or service can be downloaded, e-commerce firms have no distribution costs. Because they sell over the global Internet, sellers have the potential to market their products or services globally and are not limited by the physical location of a store. Internet technologies also permit sellers to track the interests and preferences of their customers with the customer's permission and

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<sup>22</sup> Ibn Abidin, Rad al-Muhtar ala al-darr al-Mukhtar, Uthmaniyyah Press, Cairo, 1324, 1906H, Vol IV. P29.

<sup>23</sup> Al-Sanhuri, Masadir al-haq fi al fiqh al Islami, Dar al Ma'arif Press, Cairo, 1968.

<sup>24</sup> Microsoft ® Encarta ® 2009. © 1993- 2008 Microsoft corporation, last visited on 3<sup>rd</sup> April 2010

<sup>25</sup> Microsoft ® Encarta ® 2009. © 1993- 2008 Microsoft corporation, last visited on 3<sup>rd</sup> April 2010

then use this information to build an ongoing relationship with the customer by customizing products and services to meet the customer's needs<sup>26</sup>.

E-commerce also has some disadvantages, however. Consumers are reluctant to buy some products online. Online furniture businesses, for example, have failed for the most part because customers want to test the comfort of an expensive item such as a sofa before they purchase it. Many people also consider shopping a social experience. For instance, they may enjoy going to a store or a shopping mall with friends or family, an experience that they cannot duplicate online. Consumers also need to be reassured that credit card transactions are secure and that their privacy is respected.<sup>27</sup>

### **1.6 Elements of E-Transactions/E-Commerce**

“Internet Transaction or e-commerce is the exchange of goods and services by means of the Internet or other computer networks. E-commerce follows the same basic principles as traditional commerce— that is, buyers and sellers come together to exchange goods for money. But rather than conducting business in the traditional way in stores and other "brick and mortar" buildings or through mail order catalogs and telephone operators—in e-commerce buyers and sellers transact business over networked computers.”<sup>28</sup>

The above definition best captures the principle involved in internet transactions and as such, the following points can be rightly deduced from it

- a. The offer and acceptance take place online.
- b. No physical meeting of the buyer and seller is required.
- c. Inspection of goods is done online.
- d. Payment for goods and services are done online.
- e. Arrangements for goods and services delivery are also done online.

### **1.7 Effort of Modern Scholars to Determine Khiyar Al Majlis/Majlisul Aqd in E-Transactions.**

Ordinarily, Khiyar al Majlis or Majlisul Aqd does not exist in Internet Transaction/e-Commerce as the contracting parties are not gathered in the place of bargaining. Though there is practical absence of meeting place, by extension the theory is still applicable.<sup>29</sup> The Majlisul Aqd in e-Commerce (as in contract between absentees) is the place where the receiving party becomes fully aware of the content of the sent offer via messenger, or a letter or other means of communications.<sup>30</sup>

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<sup>26</sup> ibid

<sup>27</sup> ibid

<sup>28</sup> ibid

<sup>29</sup> Muawiya, D.M., "Islamic Law and e-Commerce Contracts" 2009, p 236, Contemporary Issues in Islamic jurisprudence commerce.

<sup>30</sup> Muhammed M, al amwal wa Nathorya al-aqd fil al aiqh as islami, dar al- firq, Cairo, 1960

"Thus in this regard, acceptance is required to be issued before the receiver of the offer physically departs from the place where the offer comes to his knowledge.<sup>31</sup> However considering the difficulty in ascertaining when and where an e-Commerce offer is received, it would be apt to apply the test of reasonableness.<sup>32</sup> Therefore, if the acceptance is not issued within a reasonable time, then the offer will be considered terminated.

Kabiru Garba Muhammad in his Article *Electronic transactions and the theory of Majlisul Aqd (Contractual Meeting Place)* categorized MajlisulAqd under three headings namely:

- i. Meeting Place in face-to-face Transactions
- ii. Meeting Place in Transactions between Absentees
- iii. Meeting Place in Electronic Transactions.

Of concern and particular interest here is the 3<sup>rd</sup> above and he explains quoting a scholar,

“Generally speaking, it is believed that this new kind of trading known as e-transaction is absolutely conformable with general principles and rules of Islamic law. Accordingly, it is permissible to carry out all types of trading activities through cyberspace so long as it does not contradict some key aspects of Shariah”<sup>33</sup>

Contemporary Muslim jurists have declared that buying and selling through the internet is not impermissible in itself. However all the basic conditions for a valid sale must be present. If you have purchased some shares or any commodity through the internet, you cannot sell it unless you have taken its delivery in a manner that its risk has been transferred to you. After you have taken delivery, you can sell it at any price you agree with your purchaser even though it is through the internet.<sup>34</sup>

A pertinent question will be, could constructive delivery through electronic notification procedures constitute delivery under Islamic law of contract? Based on the above postulation of contemporary Muslim jurists, the answer may be in the affirmative, so far as, by constructive delivery, the risk has been transferred to the other party.<sup>35</sup>

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<sup>31</sup>A-Zaagy,A., The Islamic Concept of Meeting Place Application in e-Commerce, Masaryk, University.

<sup>32</sup> Ibid.

<sup>33</sup>A-. AI-Ahkam al-fiqhiyya le taamollat al-Electroniyya, Dar al-Wrrak, Riyadh. 2004 p167

<sup>34</sup><http://www.central-mosque.com/fiqh/internet/purchase.htm>.last visited27/07/2010

<sup>35</sup>Muhammad.K-G., "Elecronic Transaction and the Theory of *Majlisul Aqd(contractual MeetingPlace)*" 2009, p 227, Contemporary Issues in Islamic Jurisprudence journal.

In discussing meeting place in the electronic sphere, Kabiru Garba (supra) made the two following classifications: they are, Meeting place in electronic transaction using instantaneous devices of communication and using non-instantaneous method of communication.

**a. Meeting place in Electronic Transaction Using Instantaneous Devices**

In face-to-face transaction, there is no timing interval in communicating both offer and acceptance. As can be observed, there is no timing break in contracting via electronic instantaneous forms of communication. When both the offer and the acceptance are instantly communicate via cyberspace, the method that is used there to convey the parties' will is classified as instantaneous. This instant electronic communication may be in the form of a voice such as telephone or voice and picture such as video via the internet (e.g. MSN Messenger), or instant writing such as chat rooms on the internet. It has been said that such new kind of transactions using instantaneous method of communication should be regarded as similar to the transaction where both parties in reality face each other even though they are not physically together.<sup>36</sup> The reason for such conclusion is that the communication of the offer and acceptance in both types of transaction is done immediately without any delay. Hence electronic transaction using instantaneous tools should be regulated with the same rules as to face-to-face transaction. Thus, the meeting place is the period during which both parties are involved in negotiating business dealing without any of them being busy with something outside the scope of their transaction. The meeting place is terminated as soon as their conversation is ended, switching to unrelated topics or interrupted e.g where phone is hung up or network fails or where both or either of the parties signs out of the conversation. The option can be practiced so long as both parties are still bargaining via the electronic sphere.<sup>37</sup>

**b. Meeting Place in Electronic Transactions Via Non-Instantaneous Communication**

Where there is no instant communication between the offer and the acceptance, it is regarded as contracting between absentees. Contracting between absentees is a situation where the two contracting parties are not located in one place of bargaining. Here the theory has been extended to the Islamic doctrine of construction. Due to the natural difference of contracting with an absent party from the contract who parties are present. It was put forward that the meeting place in contracting between absentees

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<sup>36</sup> Al-Ebraheem, M., *Hokom Ejra'a al-Oquud be wasa'el al-ctesalat al-hadeetha*, Dar al Dhiya, Jordan, 1986, p.50.

<sup>37</sup> Al-Tayyar, A., *Khiyara al-Majles wa al-aeab fi al fiqh al-islami*, Dar al-Maseer, Saudi Arabia, 1997, p136



is the place where the receiving party becomes fully aware of the content of the sent offer.<sup>38</sup>

The concept of a constructive unity of meeting place means that the acceptance has to be made in the very place where the offer came to the knowledge of the receiver.<sup>39</sup> Therefore it would be apt to say that the acceptance in contracting in the absence of one party must be made within a reasonable time taking into account the nature of the contract and surrounding circumstances and trading customs. If the acceptance is not issued within, then the offer becomes terminated and will not be a valid conclusion of contract.<sup>40</sup>

In the above instance, parties are located in different places at the time of the transaction and there is a considerable timing interval between the issuance of the offer and acceptance and the knowledge of the offer and acceptance by the contracting parties respectively.

It is believed that such a gap between the connection of the offer and the acceptances also exist in electronic transaction using non-instantaneous tools of communication. Hence, this type of transaction should be treated in every respect under Islamic law of contract in the same way as contracting between absentees.

In times past, messengers and letters were the most famous non-instant means to carry parties commercial wills. However, many other diverse means have been emerging with the advent of technology in our modern life, such as fax, telegram, interactive websites E-mails and so on. With such devices there is no direct link between the contracting parties. The offer and the acceptance are not instantly connected. Thus, such transactions are deemed as contracting between absentees and are regulated accordingly under Islamic law of contract.<sup>41</sup> The Majlisul Aqd in this circumstance can safely be said to be the *session of the bargain till the conclusion of the contracting arrangements*. This is the position while transacting online irrespective of the location of both parties according to the scholars opinions above. They may be far apart anywhere on the globe, for example, one party in Nigeria and the other in the United States of America.

### **1.8 Some Juristic Opinions on Issues Suggesting Applicability of Khiyar al Majlis/Majlisul Aqd in E-Transactions using Ijtihad.**

The sources of Shari'ah could be divided into two major classes: that is the primary source and the secondary source. The primary source of Shariah is al-wahyi which includes (Wahyil Jaliyy) obvious and evident relation i.e Al-Qur'an and (Wahyul Khafiyy) Hidden revelation i.e As- Sunnah. Both are primary sources because they

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<sup>38</sup> Musa, M, Al-Amwal wa Nathriyya al-Aqd wa al-Khiyarat fi a-fiqh al-Islamiy al-Moqaram, Dar al-Kotob al-Wataniyya. Libya, 2003.p34

<sup>39</sup> Al-Qarehdagy. A., Mabda' ai-Ridha fi al-Uquud. Dar al-Bashaier al-Islamiyya, Beirut, 2002.p693

<sup>40</sup> Al-Zaagy A., Op cit p37.

<sup>41</sup> Muhammed K.G., op cit p230

contain the laws for many cases and also serve as the basis for extension the extension of the law. Consensus of legal opinion (Al-Ijma) also contains the law, and its provisions can be used for extending the law further, though some could be preferred to have recourse to the basis or the sanad of Ijma for the new case. That means we have to turn to the Qur'an and Sunnah again. It is on this basis that some jurists maintain that primary sources are Qur'an and Sunnah alone and that Ijma is a kind of secondary source. They argue that human reasoning for whatsoever does not give any additional value to Ijma to warrant it's enjoying the level of primary source. In fact they further argue that it is human element that renders it secondary since there is the possibility of it being perceived by other humans differently.<sup>42</sup>

However, we have in this work, associated Ijma with primary sources on the basis that its (Ijma) is a situation where different independent jurists reach a common understanding and interpretation of a given text from the Qur'an and Sunnah after scholarly debates. Viewed on this basis, Ijma therefore combines both primary and secondary sources. The primary source is the Qur'an or Sunnah while the secondary source is the scholarly efforts and understanding of jurists. This gives Ijma additional grade. It is on this ground that Imam Qarafi (D 684 AH) Imam Al Baydawi (D 730 AH), As- Shanqiti (D 1393 AH) among others opined that the primary sources of the Shari'ah should be arranged in chronological order thus, Al-ijma'u Khatfiyy (Explicit Ijma) Qur'an and Sunnah.<sup>43</sup>

The secondary sources therefore include Al-Qiyas, Almasalihul Mursala, Alurf, AListihsan, Al-istishab, Saddudh Dhari'ah Amalul ahlul Madina, Qaulussahabah.

Authority to the above classification could be sought in the history of Mu'azu bin Jabal R.A when the Messenger of Allah SAW delegated him as a governor and judge to Yaman. He declared that the Qur'an will be the primary source of judgment while Sunnah comes second. However, in the absence of precise evidence from both, Mu'az said he will exercise juristic power of reasoning (Ijtihad) to derive Islamic injunctions. It was reported that the Messenger of Allah SAW certified Mu'az's verdict. Many scholars including Ibn Al-Jawziy and Albaniy had validated the content of the narration ('athar).<sup>44</sup>

Ijtihad literally means an effort or an exercise to arrive at one's judgment.<sup>45</sup> In its widest sense, it means the use of human reason in the elaboration and explanation of the Shariah law. It covers a variety of mental processes, ranging from the interpretation of text of the Qur'an and the assessment of the authenticity of Ahadith. Qiyas or analogical reasoning, then, is a particular form of Ijtihad, the method by

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<sup>42</sup> Hassan, S.L, Jamiu, E.A.M, Introduction to Basic Principles of Shari'ah, A.B.U Press Zaria, 2019, PP 27.

<sup>43</sup> Hassan S.L Op cit P 27-28

<sup>44</sup> Albaniy, Muhammad bin Nasiruddeen, 1412 AH/1992 AD Silsilatul Hadithud Da'ifa wal Maudu'a wa Atharuha Al Sahih fil Umma, Kingdom of Saudi Arabia, Riyadh, Darul Ma'arif. 1<sup>st</sup> Edition Vol. II PP 285-286.

<sup>45</sup> Dot, A.I., Shariah the Islamic Law, London, Taha publishers, 1984, pp78-80

which the principles established by the Qur'an, Sunnah, and Ijma are to be extended and applied to the solution of new problems not expressly regulated before.<sup>46</sup>

Al-Ijtihad, therefore, is an exercise of one's reasoning to arrive at a logical conclusion on a legal issue done by the jurists to deduce conclusion as to the effectiveness of a legal precept in Islam. Imam Muhammad Idrees AL-Shafi'ee has supported the idea of ijtiḥād by quoting a verse of the Qur'an to substantiate his conviction over the issue. Al Mighty Allah has said:

“Wherever you go, face the mosque of Haram, and wherever you are, turn your face towards it”<sup>47</sup>

Imam Shafi'ee maintains that if one does not exercise his intellect, he will not be able to know where Masjid al-Haram is. Therefore, Allah Himself indirectly encourages us to exercise our faculty of reasoning, a great gift to mankind, to derive a logical conclusion on certain matters.<sup>48</sup>

The jurists have laid down certain conditions under which al Ijtihad must not be exercised:

- a. Ijtihad must not be exercised as to the existence of Allah. It is certain that Allah does exist and any attempt to think in His existence or not will lead to disbelief.
- b. Ijtihad must not be exercised as to the truism of the prophets of Allah who were sent by Allah Himself and any attempt to ponder over the idea of their Prophethood is tantamount to disbelief.
- c. Ijtihad must not be exercised on the authenticity of the Holy Qur'an.<sup>49</sup>

### **1.9 Qualities of a Mujtahid (One who exercises his reasoning to arrive at decisions on matters of the Shariah)**

#### **Academic Qualities**

- a. He must be so very well versed in the study of Qur'an. That he must know the reason why the verses and chapters of the Qur'an were revealed and when each one of them was revealed (asbaab al nuzul)
- b. He must be well versed in the study of the traditions of the Prophet Muhammad SAW. That is, he must know the distinction between authentic hadith from the science of Hadith; he must know hadith al Hassan (Good Hadith) hadith al Da'if (weak hadith) and so on.
- c. He must know the principles of ijma very well.
- d. He must know the injunctions of Qiyas and the conditions that surround it.<sup>50</sup>

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<sup>46</sup>Ibid p78

<sup>47</sup>Qur'an 2 v 150

<sup>48</sup>Doi, A.I., P79

<sup>49</sup>Ibid, 79

<sup>50</sup>Doi, A.I., op cit P79

### 1.9.1 Moral Qualities of a Mujtahid

The Mujtahid in other words must possess good character apart from academic excellence. Among the moral qualities he must possess are:

- i. He must be a good Muslim. That is he must not be a nominal Muslim; rather, he must be a practicing one.
- ii. He must be very pious and law abiding to all the injunctions of the Holy Qur'an.
- iii. He must not be influenced by any heretical influence
- iv. He must be just, reliable, trustworthy and pure from iniquitous practices.<sup>51</sup>

### 1.9.2 Classification of Mujtahid

- A. Al Mujtahid fil Shariah: these were those who did ijtiḥad in the matter of Shariah. They were the Companions of the prophet SAW till the third century of Islam.
- B. Al Mujtahid fil Madh hab: these were those who did ijtiḥad and later founded schools of jurisprudence. These are the Mujtahid that followed them.
- C. Al Mujtahid fil Masa 'il: these are the present day Mujtahid who give fatawa or juristic opinions on religious matters.<sup>52</sup>

Any form of Ijtiḥad must have its starting point in a principle of the Qur'an, Sunnah, or Ijma and cannot be used to achieve a result which contradicts a rule established by any of these three fundamental sources; whenever a new case of issue presents itself, reasoning by qiyas with an original case covered by the Qur'an, the Sunnah or Ijma is possible provided the effective cause (Illah) is common to both cases.<sup>53</sup>

Islamic scholarship is not silent over this issue. Bearing in mind the methods and practices involved in e-commerce contract, it could be concluded that the Hambali School has in the spirit of recognition of transactional reality accepted it.<sup>54</sup> The school places reliance on the principle of public interest of the people in the field of Mua'amalat transaction (Al-Maslaha al Mursala). This view tallies with that of Ibn Taymiyyah—a creative and liberalizing Islamic thinker. He validates any method employed in contract so long it is suitable to Shariah and does not contradict it. What Shariah disagrees with is not the physical absence of parties or the physical non-existence of the subject matter of the transaction but uncertainty.<sup>55</sup> It is in this

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<sup>51</sup> Ibid p79

<sup>52</sup> Dot, A.I., p 79

<sup>53</sup> Ibid p80

<sup>54</sup> Hisham, M, Understanding Islamic Law: from classical to contemporary, Rewman Alcomim publishers, 2006 p104

<sup>55</sup> Ibn Qayyim al-Jawaud. 1970 pp.357-361.

respect that contracts on future goods are deemed valid provided that they do not include a material of uncertainty, risk and speculation.<sup>56</sup>

Maliki school considers valid any instrument that reflects the will of the parties provided it is customarily accepted. So if we consider that nowadays e-Commerce contracts are of practical importance in the conduct of business according to Abdul Enein, this will not stop the Maliki school from accepting it as a medium of trade and business.<sup>57</sup>

The Hanafi School allows the conclusion of a commercial contract by any means that reflects the consent of the parties, including any sign that is understood by both parties.<sup>58</sup>

It should be noted here that the views of jurists as mentioned are not exhaustive on the point. It is also possible for these juristic opinions to continually change as new developments in e-Commerce evolve. The juristic opinions given here are merely representative of the underlining Islamic position.

### 1.10 Summary

It is seen from the foregoing that *Khiyar al Majlis* or *Majlisul Aqd* plays an important role in contractual arrangements under the Shariah and as such, jurists propounded measures guarded with several rules ranging from its constitution to vitiation to regulate contracts. Some of the measures are adopted from existing rules using analogical deduction i.e. *Ijtihad*. The coming or invention of the internet and transactions via it is seen to be something we like and appreciate and must continue to live with due to the globalization and civilization taking place as we are witnessing today. The task remains as it has always been, checking anything that is new with the sole aim of observing areas of compatibility or otherwise so as to keep within the confines of the Shariah in its ground rules contained in the sources of the Shariah and not to derail. With the position of the Internet transactions viewed through the spectacles of *Khiyar al majlis* or *Majlisul Aqd* with the aim of discovering whether any problem exists, it is discovered from the foregoing that the contemporary jurists and scholars have rightly averted their minds to the e-Commerce issue and have applied rules of the Shariah making the use of *Ijtihad*.

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<sup>56</sup> Ibid

<sup>57</sup> Abdul Enein, M.I.M, E-commerce through the lense of the Shariah Law, International Bureau of Permanent Court of Arbitration (ed), the PCA/ peace palace papers, http view. Last visited on 05/11/2008.

<sup>58</sup> Marsne, S., Consumer Protection in Economic Transaction: First comparison between European Law and Islamic Law, Journal of International Commercial Law and Technology, 2005, v2 issue 1 p6 <http://www.JKK.com> Last visited on 05/11/2008.

### 1.11 Conclusion

Science and technology is one of the greatest areas of knowledge that Allah has bestowed as blessings for mankind. Electronic transaction saves time, cost and energy. The Muslim world is carefully and gradually realigning itself with this great opportunity endowed to mankind. It is in view of this, that this paper has made attempt to discuss the concept of Khayar Al Majlis or *Majlisul Aqd* under Islamic law of contract within the context of modern electronic transactions. This is to be an eye-opener for contemporary Muslim jurists willing to further develop the area for the benefit of the entire Ummah across the world.

Like most issues of Ijtihad, investigating the legality of e-Commerce contract in Islam is not foreclosed. E-commerce is just a viable business platform which can greatly benefit the expansion of trade and commerce. Islam takes a very favorable disposition to efficient commercial transactions.<sup>59</sup> The Prophet (SAW) was a businessman and so were his companions (RA.) It is true that Islam is in complete harmony with science and technology provided they do not contradict Islamic ethics and morality and do not also cause hardship to the community.<sup>60</sup> A significant number of inventions were developed in the medieval Islamic world.<sup>61</sup> These developments lay down the foundation of science and technology. Islam encourages the acquisition of advance knowledge for the benefit and prosperity of people of their communities.

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<sup>59</sup>Trade and Commerce in Islam <http://www.walki250684.blog.spot.com/200711>. Last visited 05/11-2008

<sup>60</sup>Islam and Technoogy. <http://www.arriyadh.com/En/Islam/leftbar/welcomisl/islam-and-technology.doc-cvtasp>. Last visited 07/11/2008.

<sup>61</sup>Wikipedia. *The free encyclopedia* <http://en-wikeida.org/wiki/islamic> inventions. Last visited 25/10/2008