

## EXAMINING THE CONCEPT OF MAJLIS AL-‘AQD (CONTRACTUAL MEETING PLACE) AND ITS IMPLICATIONS IN ELECTRONIC TRANSACTIONS

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### ABSTRACT

The prophetic tradition that states that: “the contracting parties have the right to repudiate or affirm the contract as far as they have not separated” has been the basis for the concept of *majlis al-aqd* (contractual meeting place) applicable to Islamic commercial transactions. The concept has survived since the prophet lifetime and up till today. Modern Technology on the other hand has advanced the mode of communication, to wit, concluding contracts nowadays. These technological inventions have obviated the need to be physically present whether by oneself or through another human messenger before a contract could be negotiated and concluded. However, with the requirement of *majlis al-aqd* which offer and acceptance must bow to and abide, it becomes pertinent to examine the concept in the light of the recent models of concluding contract in Islamic Law. In undertaking this task, using doctrinal methodology, the traditional doctrine of *majlis al-aqd* is briefly brought forward as a parameter to weigh and measure its application on the modern methods of what can be termed as *majlis al-aqd*. For easy dissection of the discourse, the modern technological means of communication are categorised according to their forms of usage. Hence, instantaneous and non-instantaneous means of communication and pre-programmed website contract are considered in the light of the rules and principles of *majlis al-aqd*. This paper found that, where the technology used in concluding contract is one that can be categorized as instantaneous, the classical rule of *majlis al-aqd* applies. Where the contract is concluded inter-absentees, the rule of *majlis al-aqd* does not apply. It is however advisable that parties make adequate stipulations to obviate unnecessary uncertainty.

### INTRODUCTION

*Majlis al-aqd* is an essential cornerstone for the determination of the conclusiveness and validity of offer and acceptance (*al-ījab wa al-qabul*). Since offer and acceptance is a condition precedent before the

formation of any binding contract in Islamic Law, the existence of the *majlis* where offer and acceptance are communicated becomes sacrosanct and undoubtedly fundamental. *Majlis al-aqd* which simply means contractual meeting place is a terminology used for the place where the negotiation of contract and the pronouncement of offer and acceptance is made and concluded. The termination of the meeting or the conclusion of the at the *majlis* terminate the meeting place and validates the contract. Where the contract is not concluded and the meeting is terminated, the contract then is not formed.

Traditional literatures, explains the application of *majlis al-aqd* to be restricted to contract in which parties are physically present whether by themselves or through a messenger or an agent. An extension of the doctrine has also been made in respect of written messages like letter as offers and acceptance. The case is not the same nowadays with the invention and popular use of some technological devices. These devices made communication possible for individuals from far places as if they are physically present. This is achieved either by audio or audio-visual means from such distant place; or better still, by receiving written messages from far in a very short period of time. The mode of communication is relatively the same, as regards period at which such communication could happen in when parties are physical present. This is indicative of the significance of this discourse. One should be sure of the Shariah regulation as to the forms of concluding a contract before reliably venturing into same. Islam is a total way of life, no aspect of human endeavor is left out, without being accommodated under the regulation of shariah. Allah (SWT) categorically mentioned in the Qur'an that: We have neglected nothing in the Book (of Our decrees). Then unto their Lord they will be gathered.<sup>1</sup>

Modern technology has advanced the sphere of commercial relationship and transactions alike. Persons nowadays do not need to be physically available before negotiating and concluding contract. Contracts are now concluded virtually via phone calls, Messengers' application like WhatsApp, Facebook, Telegram, We-Chat, Instagram, Chat Room/Application, e-mail and Websites among others. It is then

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<sup>1</sup> Surat al-An'ām, Chapter 6 Verse 38.

imperative to examine whether the classical rules of *majlis al-aqd* can accommodate the modern means of concluding contract.

The manner of use of these modern technologies appear to showcase different circumstances and categorisation, depending on the facility available through the technology or application. For example, applications like WhatsApp, Facebook, We-Chat and Telegram have facility for both audio and video calls apart from the normal instant messaging facility. Phone calls may also be audio or video depending on the type of phone and the facility it contains. Instagram, Twitter and the likes only allows instant public messaging just like the facility in Facebook and groups created in WhatsApp, We-Chat and Telegram Applications. However, Telegraph, phone message and E-mail only allows relatively instantaneous messages but not like WhatsApp and the likes. Finally, in using websites for contract, it depends on whether such website is preprogrammed to attend to visitors or will need the intervention of the principal.

In this paper, the traditional concept of *majlis al-aqd* is expounded. The various virtual modes of communication which is being used for concluding contract is also adumbrated briefly. Using the various modes of virtual communication, this piece then considers the modern approach to the concept, majorly from two perspectives, vis: instantaneous and non-instantaneous means of communication. A separate discussion of the application of *majlis al-aqd* in pre-programmed websites contract is also examined.

This discourse is set to find out whether or not instantaneous communication devices are analogous to face-to-face dealing to which classical doctrine of *majlis al-aqd* could be said to apply. The appropriate application of the *majlis* to non-instantaneous means of communication and pre-programmed websites contract shall also be determined, and necessary suggestions and recommendations shall be made in this respect to avoid uncertainty.

### **CONCEPT OF MAJLIS AL- AQD**

*Majlis al-aqd* simply means contractual meeting place. It is a place where negotiation of contract took place and concluded. Essentially, it is the place or better still the unit of time within which offer and

acceptance comes to concurrence.<sup>2</sup> This will suggest that, *Majlis al-aqd* does not only connote the place of physical convergence of the contracting parties, but its meaning also extends to the unit of time spent for the formation of the contract. The latter definition seems more suitable in modern time where contract are concluded *inter-absentees*.<sup>3</sup>

It is pertinent to mention from onset that, the study of *Majlis al-aqd* is essential for many reasons. From one angle, it will determine when the parties are at concurrence and the contract is legally formed. From another angle, it determines whether the offeror can still withdraw his offer or whether the offeree still has the chance of accepting the offer (i.e. if the offer has not lapsed). It also serves to determine whether either of the parties still have option to set aside the contract for one stipulated condition or the other which is in technical terms referred to as *Khiyar al-Majlis*.<sup>4</sup>

*Majlis al-Aqd* is a concept borne out of prophetic traditions granting contracting parties right to either accept or reject the contract as long as they have not parted or separated. Some of the traditions goes thus:

*“It was narrated from Ibn ‘Umar that the prophet (salla Allahu alyhi wa-salam) said, “When two men enter into a transaction, each of them has the option (of canceling) so long as they have not parted and are still together. But if one of them gives the other the choice to decide, then they agree on a deal, then it becomes binding. If they part*

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<sup>2</sup> See Al-Shafiy, J., *Majlis al-Aqd fi al-Fiqh al-Islami’ wa al-Qonun al-Wadhi* (Alexandria, Dar al-Jamia al-Jedeedah, 2001), 90-92; Muhammad, S., *Al-Madkhal fi al-Ta'arif bi bil-Fiqh al-Islami wa Qawaid al-Malikia wa al-Uqud fih* (Dar al-Taleef Publisher, 1966), 408-409, and Ibrohim, M., *Hukum Ijara al-Uqud bewasa'il al-I'tisal al-Hadeetha* (Jordan, Dar al-Dhiya, 1986), 50.

<sup>3</sup> *Ibid*; see also Alzaagy, A., “The Islamic Concept of Meeting Place and its Application in E-Commerce” 1,1/2007 *Masaryk University Journal of Law and Technology*, 33.

<sup>4</sup> The detail discussion of *khiyar al-majlis* is not made here as it constitutes a separate topic that should be extensively discussed under *Al-Khiyaraat*. See El-Gamal, A. M., *Financial Transactions in Islamic Jurisprudence (Trans. Al-Zuhayli, W., Al-Fiah Al-Islamiy Wa-Adhillatuh)*, (Vol. 1, Damascus, Dar al-fikr, 2002), 165-166

*after that and neither of them canceled it, then the transaction becomes binding.”<sup>5</sup>*

*“Narrated Ibn ‘Umar (radiya Allahu anhu) Allah’s Messenger (salla Allahu alyhi wa-salam) said, “Both the buyer and the seller have the option of cancelling or confirming the bargain as long as they are still together; and unless they separate or one of them gives the other the option of keeping or returning the things and a decision is concluded then, in which case the bargain is considered as final. If they separate after the bargain and none of them has rejected it, then the bargain is rendered final.”<sup>6</sup> Reported by Al-Khamsa except Ibn Majah. Ad-Daraqutni, Ibn Khuzaima and Ibn Al-Jarud also reported it<sup>7</sup>*

The literal understanding of the above *ahadith* is that the contracting parties have the wider latitude to negotiate and re-negotiate their contract in so far as they are still together and have not parted from the place of their negotiation. In such circumstance, either of the parties have option to go ahead or cancel the transaction. If they agree to a concurrence before they parted, their agreement remains binding except where one of the parties give the other option or choice to think over it for certain time, the concurrence becomes binding subject to the condition given.

Although Muslim jurists agree on the essence of *majlis al-aqd*, they however are at divergence as to its import and usefulness. In essence, all Shariah schools of law agreed that it is a place (whether physical or constructive as in contract *inter absentees*) where contractual negotiation takes place and is concluded.<sup>8</sup> Whether contract will be formed and regarded as concluded during the *majlis* even before the

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<sup>5</sup> Ibn Al-Hajjaj, I.A.M., *Sahih Muslim* (Vol. 4, Riyadh, Maktaba Dar-us-Salam, 2007) Trans. Al-Khattab, N., Hadith 3855 p. 232. The Hadith is based Sahih. See: Al-Asqalani, H., *Bulug Maram min Adillatu al-Ahkam* (Saudi Arabia, Dar-us-Salam Publication, 1996) Hadith 692, pp. 266-267

<sup>6</sup> Al-Bukhari, M.I., *Sahih Bukhari* (Vol. 3, Riyadh, Maktaba Dar-us-Salam, 1997) Trans. Khan, M.M., Hadith 2112 p. 189.

<sup>7</sup> Al-Asqalani, H., *Bulug Maram min Adillatu al-Ahkam*. Op. Cit. Hadith 693, p. 267

<sup>8</sup> See Nyazee, I. A. K., *The Distinguished Jurist’s Primer*, English Translation of Ibn Rushd’s *Bidayat al-Mujtahid Wa. Nihayat al-Muqtasid* (Vol. II, Garnet Publishing Ltd., n.d.) 208

departure of the parties or whether it is the parties disperse at the meeting place that will constitute the conclusion of the contract and its bindingness is a point of divergence among the Muslims jurists.<sup>9</sup>

One group of Jurists<sup>10</sup> held that the contract becomes binding through unequivocal acceptance of the offer from the offeree in the *majlis* and it is not necessary that the contracting parties disperses from the *majlis* before the contract is formed.<sup>11</sup> This suggests that immediately there is an unequivocal acceptance by the offeree to the offer, the contract becomes binding and none of the parties can resile from it thereafter. This group relied on the provision of the *Qur'an* that encourages Muslims to fulfill their obligations<sup>12</sup> and the *hadith* that held Muslim bounds by their stipulations.<sup>13</sup>

While declining to apply the *hadith* of *majlis al-aqd*, this group of jurists gave preference to the provision of the *Quran* and the *Hadith* mentioned hereinbefore, adding that, it corresponds with practice of people of Medinah. The jurists also opined that the separation used in the *hadith* is figurative by the use of parting word as regard the conclusion of negotiation that indicates their concurrence on the contract, which does not correspond with physical parting.<sup>14</sup>

The other group of jurists validate the *hadith* of *majlis al-aqd* and interpreted same to mean that parties have ample time and opportunity to ruminate on the offer and acceptance and decide finally before the *majlis* is ended. Where there is agreement on the transaction before the conclusion of the *majlis*, the contract becomes possible but not binding. The conclusion of the *majlis* by the physical parting of the parties concludes the formation of the contract. This in essence suggests that

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* The group consist of Imam Malik, Imam Abu Hanifa and their disciples including some jurist from Medina. See also Alzaagy, A., "The Islamic Concept of Meeting Place and its Application in E-Commerce", Op.Cit. 33

<sup>11</sup> Al-Kasani, A. A., *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (Beirut, Dar-al-Kitab al-Arabi, 1982) 137; Al-Marghinani, A.A., *Al-Hidayah: Sharh Bidayat al-Mubtadi* (Trans. By Hamilton, C.) (Vol. 1, Lehore, Premire Book House, 1957) 241-242; Al-Hattab, A. A. M. *Mawahib al-Jalil li Sharh Mukhtasar Khalil*. (Vol. 6, Beirut, Dar al-Kutub al-Ilmiyyah, 1995) 29

<sup>12</sup> Surat al-mâeda, Chapter 5 Verse 1

<sup>13</sup> "...al muslimuna inda shuritihim...." See Al-Asqalani, H., *Bulug al-Maram min Adillat al-Ahkam* (1<sup>st</sup> Ed., Riyadh, Dar-us-Salam, 1996) 306, Hadith 735

<sup>14</sup> Al-Marghinani, A.A., *Al-Hidayah: Sharh Bidayat al-Mubtadi*, Op. Cit.

offer and acceptance will remain open between the parties and can be withdrawn or restated during the meeting. It will then become sealed up when the *majlis* is ended.<sup>15</sup> Where the parties are at concurrence with their respective offer and acceptance at the conclusion of *majlis*, the contract is formed and same remain binding. If however they could not come together with their negotiations, the contract is then not in existence. In this respect also, *Qur'an* chapter 4:130 was referred in aid.<sup>16</sup>

Another jurisprudential concept deduced from the above mentioned *ahadith* relating to the current discussion is *Khiyar al-majlis* which means 'option of session' or 'option of meeting place'.<sup>17</sup> This option is actually the *fons et origo* of the *majlis al-aqd* as it determines the unity of offers and acceptance within the confines of the negotiation session. In this regard, Imam Abu Hanifa, Maliki and some jurist of Medinah who held contract as binding and enforceable the moment there is correspondence of offer and acceptance even if the *majlis* has not ended, interpret *khiyar al-majlis* to mean option of acceptance or rejection in the sense that, the only option available at the time of *majlis* is for the offeree to either accept the offer or reject the offer.<sup>18</sup>

From the other side of the coin are the jurist who upheld the *ahadith* of *majlis al-aqd*<sup>19</sup> and opined that parties have the ample time to ruminate on the negotiation as long as they have not parted. They interpreted this period of ruminating as the option available to the contracting parties during the contract session. Following the linguistic meaning of the *ahadith* and its support of the reality of contractual and negotiation situation, holding that the parting used in the *ahadith* is only figurative

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<sup>15</sup> This opinion is attributed to Imam Shafi'i [see Awrangzeb, A., *Al-Fatawa al-Almagirriya* (Vol. 3, Calcutta, 1828) 9-10], Ahmad Ibn Hanbali [Al-Bahuti, M., *Kashshaf al-Qina* (Vol. 3, Beirut, Dar al-Fikr, 1982) 147-148]; Is'haq, Abu Thawr, Dawud, Ibn Umar; a companion of the prophet (*Salla llahu alahi wasalam*) and Abu Dhi'b a jurist of Medinah. It was also reported that a group from the successors of the companion also support this opinion. See Nyazee, I. A. K., "The Distinguished Jurist's Primer" Op. Cit. 205; El-Gamal, A. M., *Financial Transactions in Islamic Jurisprudence*. Op. Cit. p. 11

<sup>16</sup> Nyazee, I. A. K., "The Distinguished Jurist's Primer" Op. Cit. 204

<sup>17</sup> El-Gamal, A. M., *Financial Transactions in Islamic Jurisprudence*. Op. Cit. 10

<sup>18</sup> *Ibid.* p. 166

<sup>19</sup> See note 10 and 11 *supra*

will make the actual meaning of the *ahadith* vacuous according to this group of jurists.<sup>20</sup>

It is pertinent here to comment that, the stand of the second group appears sound for many reasons. Apart from the fact that their stand and interpretation coincide with the reality of negotiation style in contractual realm; their interpretation of the *ahadith* also follows the direct or express meaning of the authority.<sup>21</sup> There is again allegation against Imam Malik for preferring analogy in interpreting the *ahadith* in the face of textual authority, which allegation is noticeably positive. The Jurist also prefers in this regard the practice of *ahl al-Medina* and an *hadith* that is regarded as *munqatih*.<sup>22</sup> The response of Imam Malik seems not overwhelming and convincing in this regard.

### **DETERMINING MAJLIS AL-AQD IN MODERN MEANS OF COMMUNICATION**

The take off for the adoption of *majlis al-aqd* in modern days stem up from the discovery that physical dealings is not only the mode of concluding contract, technology has made it more easier for distant parties to communicate within the preferred and available geographical reach.<sup>23</sup> The definition of *majlis al-aqd* in this sense became constructive and the physical meeting is defined to represent the unit and length of time within which offer and acceptance is communicated.<sup>24</sup>

In the wordings of Al-Zaaagy, he said:

*“The idea of the unity of meeting place is an essential condition in contracting with the present parties. However, an actual application of the unity of the meeting place, as said above, is not conceivable in*

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<sup>20</sup> El-Gamal, A. M., *Financial Transactions in Islamic Jurisprudence*. Op. Cit., 10-11; 166

<sup>21</sup> See Khallaf, A., *Ilm Usul al-fiqh* (Cairo, Maktabah al-Safâ lilmashri wal-Tawzi', 2016) 154-155

<sup>22</sup> Nyazee, I. A. K., “The Distinguished Jurist’s Primer” Op. Cit., 205

<sup>23</sup> Alzaagy, A., “Contracting Concept of ‘Meeting Place’ in Islamic Law: Is There a Room for Possible Implementation in Internet Transaction” 5, 2/2011) *Masaryk University Journal of Law and Technology*. 146-147

<sup>24</sup> Qurehdaghi, A., *Mabda' al-ridhoha fi al-Uqud* (Dar al-Basha'ir al-Islamiyyah, 2002) 1093

*contracting between absentees. Hence, a constructive unity was established for such contracting. 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. In other words, it was provided that the unity of meeting place denotes that the acceptance must be issued before the receiver physically departs from the place where the offer came to his knowledge”<sup>25</sup>*

If one considers the above assertion, it appears to be more applicable for contract between parties who are absent but using a messenger as an intermediary. The offeree in this circumstance need some time to ruminate on the offer before he can accept same. It may then be impossible to give acceptance at the spot where the offer meets the offeree. Therefore, it would be apt to say that the acceptance in contract 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 the trading customs. If the acceptance is not issued within a reasonable time, then the offer will be terminated; and thus, there is no possible valid conclusion of contract, except if the parties stipulate otherwise.<sup>26</sup>

Example could be given as follows; if Ahmad send Mohammad Jamiu (who both reside in Offa) to offer his car for sale to Ismail in Ilorin, Ismail has to accept or reject the offer as soon as Mohammad Jamiu delivers Ahmad’s offer to him. If the offer meets him within the NBA House at Lajorin, Ilorin, he has to give his acceptance there and then or within reasonable time, except there is a stipulation by Ahmad that suggest otherwise. (Such as where Ahmad allows Ismail some days to think over it before responding to the offer).

To this end however, technology in recent time has moved transactions beyond sending intermediaries. For examples, negotiation can be made via telephone conversation, WhatsApp and other available instant chat application/forum like Facebook, Telegram, Instagram, imo, chat on, badoo, We Chat etc. other available means to conclude contract

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<sup>25</sup> Alzaagy, A., “The Islamic Concept of Meeting Place and its Application in E-Commerce” Op. Cit. 37

<sup>26</sup> *Ibid*

includes websites programmers, blog pages and website market application like Jumia, Jiji, Ali Express etc. It will not be out of place to examine the concept of *majlis al-aqd* in all this modern for a to decipher the appropriate rule applicable while negotiating or concluding a contract through any of such platform.

It is observed that, in all the above-mentioned platform, while some accommodate instantaneous delivery of messages, message in others take time before same is delivered. Some websites are also preprogrammed to conclude transactions without human interference at the other end. On this note, phone message, chat on Facebook, WhatsApp, telegram, Instagram, imo, chat on, badoo, We Chat and the likes accommodate instantaneous delivery of message provided the network of the service provider is good. Again, most of these applications also allow both audio and video calls which will place the situation on the same footing with parties negotiating face to face except where internet connection poor. The discussion of the concept of *majlis al-aqd* in modern time will be properly placed in the above-mentioned division.

Before delving into the proper discussion however, it is important to briefly highlight how some of these forum or applications/devices are used, to infuse a proper background for the adoption of the rules of *majlis al-aqd*. In so doing, this discourse shall only consider and briefly give a highlight of the operation of WhatsApp Application, Facebook and Jumia. Few comments shall be made on e-mail message and “pop up ads” on internet pages like independent websites or blog pages.

### **Overview of Some Modern Communication Platforms:**

- **Facebook**

Facebook is an application that allows individual or corporate body to open a profile on its application which is accessible on the internet and allow such person to connect to friends and allies who also subscribe to and have similar profile registered with Facebook.<sup>27</sup> It has several facilities which includes Facebook home, timeline and Page where one can post images and or video together with or without write up which

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<sup>27</sup> See Ruby M. Sosson, Facebook Basics for Individual (Ruby M. Sosson Memorial Library, Upper Sanjoa, n.d.) available at <https://pagosalibrary.org/wp-content/uploads/2014/07/Facebook-handout.pdf>, p. 2. Accessed last on 30/11/2021

are accessible and readable by friends, friends of friend or the public depending on the privacy settings of subscriber.<sup>28</sup>

After registering a profile with Facebook, one is allowed to post a public comment (be it written, photo or video). This post will be accessible to users who can also make a counter comment to the post. Access to individual post sense is determines by private settings subscribed to. One may allow on friends, friends of friend or the general public to view and make comment on such post. People may also have access to share the video on Facebook and even adopt it on one Facebook page which is termed as timeline. Post may equally be shared across other social medial through shared link. The post may be liked, loved etc. Several emoji can also be used to react as comment and response to comment.<sup>29</sup>

Complementing this application is Facebook Messenger which is both available within Facebook and can equally be downloaded as a separate application using the details and profile of the user existing on Facebook. It is under this Messenger that private messages among users can be sent and received, settings can be made for group of persons to be placed either under a particular group or Room for private messages within the member of the group. Under this application also, both voice and video calls can be made to other subscribers who are friends on Facebook.<sup>30</sup>

The implication of all the above is that, contract negotiation can be made using any of the means available to reaching out to another person on the platform. That is, private message can be sent to make offer and acceptance. Where a group or room is created, offer can be made by any member of the group or room and depending on the term of the offer, the directed offeree can simply accept or reject the offer within the room or group. It is equally available for the Facebook user

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<sup>28</sup> *Ibid.* pp. 7, 10

<sup>29</sup> *Ibid.*; My Community Life, *Facebook User Guide* (City of Kingston 2015) available at <http://www.mycommunitylife.com.au/files/67388f2b-9eee-4293-a117-a4c60105dbc6/My-Community-Life-User-Guide-Facebook-June-2015.pdf>. pp. 7,15,19 and 22 Accessed last on 30/11/2021

<sup>30</sup> Whakapiki, H. M., How to use Facebook Messenger to make Phone and Video Calls. <https://static1.squarespace.com/static/588697b246c3c43743c821d0/t/5e79c48982364638deb84240/1585038482580/Messenger+resource+.pdf> accessed last on 30/11/2021

to post relevant offer on his or her homepage or timeline while negotiation can flow under the comment column.<sup>31</sup>

It is important however to mention that, a subscriber can get instant message on Facebook Messenger where the message is sent individually to another subscriber. There is also no difference if the message is sent to a Facebook group chat or a Facebook chat room even if the user has not launched the application. This is because, there is usually a notification shown at the edge of the application indicating that new message is awaiting to be read. Although, this depends on the notification settings of individual. In the case of Facebook home, pages and timeline, notification of comment may also be given on phone depending on the chosen settings. Such notification is however not instantaneous and is not accessible until the application is launched. Audio and video call is only usable when both parties are available and stable on the application. There is an indication of green light button attached to the name and/ or picture of individual present on the Facebook Messenger which is not available on the Facebook application itself.

If the above exposition is examined, one would be able to decipher that both Facebook audio and video call will qualify as instantaneous message delivery techniques. This can be likened to contracting face to face by persons present in the same location. The above cannot conveniently be said of other facilities on Facebook. This is because, the use of other facilities on Facebook is unlike voice and video call that requires both the caller and the receiver to be online at the same time. In other Facebook facilities, sender of the message may send any message regardless of whether other subscribers are online or not. The only exception to this is private messages on Messenger which will show that the receiver is online and has received the message instantly. Based on the above, private messages on Facebook Messenger also qualify as instantaneous messages where it can be proved sufficiently that, the recipient is online and has received the message. All other forms of communication via Facebook and its Messenger are not instantaneous because neither party can be sure of the exact time the other party is online nor went offline during negotiation.

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<sup>31</sup> My Community Life, *Facebook User Guide*, Op. Cit.

- **WhatsApp**

WhatsApp is a mobile application that allows individual who own an Android telephone to connect with his/her line or phone number and be able to have connection with other WhatsApp subscribers. The mobile phone to be used for this application must be WhatsApp enabled. To have connection to each other, every subscriber must have numbers of others saved on his/her phone or sim card contact. The application works in such a way that once it is downloaded and set up, access is granted directly to other subscriber. Such access includes; viewing profile, sending text and voice messages and viewing uploaded status. Video and photos can also be sent to each other.<sup>32</sup>

Other important features of the application include making audio and video calls, sharing any form of message, be it audio, video, text or photo to other subscribers and various other social media platform. Group can be created to harbour intended members who only will be privy to the messages sent therein. There is also Status Feature wherein individual can post public message in form of text, audio, video, photo or internet link which is accessible to all subscribers who have the senders contact saved on his phone or sim card contact list.<sup>33</sup>

At the grasp of the above prevalent features of WhatsApp, it becomes simpler to denote how contract can be initiated and negotiated through the application. Just like Facebook, the video and audio call is only usable when both subscribers are online at the material time to be able to connect with each other and make conversation. Other messaging facilities may not need the availability of the other subscribers, in that, such message can be sent at any time, only that, the receiver will only receive same when he is connected to internet or launch the application as the case may be.<sup>34</sup>

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<sup>32</sup> See graphical description on how to download, subscribe and use WhatsApp in Fernandez, N., How to use WhatsApp: A step-by-step beginner's guide <https://www.androidauthority.com/how-to-use-whatsapp-1097088/> accessed last on 30/11/2021

<sup>33</sup>Bassetti, S., Bukhari, S., Chhatwel, K., et. al., How to WhatsApp? A Guide for Beginners (West London, Clinical Communication Group) <https://www.peoplefirstinfo.org.uk/media/10460/how-to-use-whatsapp.pdf> accessed last on 30/11/2021

<sup>34</sup> *Ibid.*

In the case of private message sent to another subscriber, once the message is sent, it gives a sign by marking the message at the foot once, where the receiver is connected to internet and the WhatsApp is enabled, the message goes straight to him and the marking at the foot is doubled to notify the sender that the message is delivered. At the point the receiver read the message, the double mark that appears on the sender link then carries colour indicating that the message has been read. The same process applies when the receiver replies the message of the sender.<sup>35</sup>

In group messaging however, once the admin or any member of the group send messages, the message is placed in the forum and a single mark appears at the foot of the message indicating that it is sent on the sender screen. To know whether the message has been read, delivered or yet to be delivered, the sender has to highlight the message, click the three dots that appear at the top right side of the application, then select “info”. Information regarding the message as to the individual members of the group that has been delivered to; numbers of member remaining and those that have read the message will be shown. It also shows the time such message was read and delivered. It is equally imperative to mention that, this also applies to individual messages, and that, it is only the sender of such message whether privately or in a group that can have access to such information.<sup>36</sup>

Examining the above description, it is apparent that contract negotiation can easily be made through almost all the above mentioned messaging facilities on WhatsApp. In the case of audio and video call, the message is instantaneous and is likened to face to face discussion. Whereas, where the message is sent to an individual or group, pegging it as instantaneous or non-instantaneous depends on whether the other subscriber is online and has read the message. Where parties are online and are receiving messages and replying same simultaneously, the discussion is instantaneous and the facility is so termed. Where the receiver of the message is not online or has not read the message or

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<sup>35</sup> Expert Reviews, WhatsApp Messenger Explained: Group Chat, Voice Call, WhatsApp Web and What those Blue Tricks actual means <https://belviderepark.co.za/wp-content/uploads/sites/121/2017/08/EBook-whatsapp.pdf> accessed last on 30/11/2021

<sup>36</sup> *Ibid.*

where he even ignores the message after same is read, it then becomes non-instantaneous in that circumstance.

- **Jumia Application**

Jumia is an online market application where items are displayed with their pictures and features indicated together with the price. It is accessible to all internet users depending on whether the website one visit allows ads to which Jumia can pop up and be accessed. It is more efficient when the market application is downloaded and the user's profile is saved therein for personal use. In this wise, the facility becomes more personalised that, one will login to the application at convenience and select item of choice among the ones displayed for sale. The specification of the item selected is identified alongside the quantity of item intended to buy and the delivery method.<sup>37</sup>

Upon selection of an item, one can either choose the 'buy now' option or the 'add to cart' option. Where the former is selected, the browser then technically takes the page to where payment is to be made. In the case of the latter option, one will have to toggle back to cart and confirm all the items placed therein and review the modes of delivery selected before proceeding to payment page. At this point, the item selected is collated and the prices is summed up together with other charges like shipping etc. Making payment will conclude the transaction as the payment will be acknowledged while the expected delivery period and the item or order number will be made available in the invoice that will be generated for the buyer.<sup>38</sup>

There is no doubt that, this kind of application has been pre-programmed to function without the aid of the programmer or any other person at the moment of transaction. There is however a link where complainant or question can be laid through message and call. The

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<sup>37</sup> Nkwo, M., Orji, R., Nwokeji, J., *et. al.* E-Commerce Personalisation in Africa: A Comparative Analysis of Jumia and Konga [http://ceur-ws.org/Vol-2089/7\\_Nkwo.pdf](http://ceur-ws.org/Vol-2089/7_Nkwo.pdf) p. 68 accessed last on 30/11/2021; Antwi, S., Assessment of Jumia's E-Marketing Plan [https://www.researchgate.net/profile/Samuel-Antwi-3/publication/343655159\\_Assessment\\_of\\_Jumia%27s\\_E-Marketing\\_Plan/links/5f369067458515b7291f3992/Assessment-of-Jumias-E-Marketing-Plan.pdf?origin=publication\\_detail](https://www.researchgate.net/profile/Samuel-Antwi-3/publication/343655159_Assessment_of_Jumia%27s_E-Marketing_Plan/links/5f369067458515b7291f3992/Assessment-of-Jumias-E-Marketing-Plan.pdf?origin=publication_detail) p. 3 Accessed last on 30/11/2021

<sup>38</sup> How to Buy or Place Oder on Jumia <https://www.techmobile.com.ng/how-to-order-on-jumia/> accessed last on 30/11/2021

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application is programmed in such a way that, it will function and respond to request immediately the command is imputed. The conclusion of the contract is therefore left at the discretion of the customer. The seller then takes up the responsibility of the result of such conclusion and supply the materials selected upon confirmation of payment.<sup>39</sup>

This kind of facility and others like it is a bit different and unique. It doesn't require the active involvement of the other party before contract is concluded. However, negotiation is not done in this kind of transaction. What is available is that, the customer has the liberty of selecting any item and pay for same if he is pleased with the price, feature and the description. Payment is the ultimate factor in determining final consent. Can this be described as instantaneous or non-instantaneous modes of communication? On the face value of it, it appears to be instantaneous. This is because the transaction can be concluded immediately as the buyer select and pays for the item selected. There is however more to this arrangement, the non-involvement of the other party before conclusion which is evidenced by payment makes it a distinct specie and modes of communication.

Flowing from all the above, it is important to mention that the above is not exhaustive of the modern means of communication. However, it is the view of this paper that, the means of communication enumerated here can adequately be used as a litmus paper with which other applications can be examined. For example, Twitter and Instagram can take cue from Facebook while Imo, we-chat, Chat on etc is almost a replica of WhatsApp. In the same vein, Ali Express Application, Jiji etc operates in almost the same manner Jumia also operates. It must be stated boldly and reiterated that each of the above mentioned has its unique features and modes of application that differs from each other in their own manner.

### **The Application of *Majlis al-Aqd* Using Instantaneous Electronic Communication.**

In instantaneous communication devices, just like face to face transactions, there is no time lag between the communication of offer

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<sup>39</sup> Nkwo, M., Orji, R., Nwokeji, J., *et. al.* E-Commerce Personalisation in Africa: A Comparative Analysis of Jumia and Konga. *Op. Cit.*

and acceptance. It may be difficult to restrictively suggest specific types of instantaneous electronic devices.<sup>40</sup> It may be sufficient, however, to indicate that when both the offer and the acceptance are instantly communicated via cyberspace, the method that is used there to convey the parties' is classified as instantaneous. Sometimes this type of instant electronic communication may be in the form of a voice, such as by telephone, or voice and picture such as with video conversation via the Internet (e.g. msn messenger), or instant writing such as with chat-rooms on the Internet.<sup>41</sup>

However, it is clear that the major difference of this kind of negotiation from where the parties are present is that, contracting parties are located in different places using a form of communication that makes it look as if they are together in the same place, when in reality they are not physically together.<sup>42</sup>

By analogy therefore, it has been suggested that instantaneous means of communication be regarded as forming part of face to face transaction. Thus, all the rules applicable to face to face transaction should also apply to such form of communication. The meeting place is the period during which both parties are involved in negotiating among themselves without any of them being busy with something outside the scope of their discussion. Hence, so long as both parties continue their discussion on the transaction through such methods, the meeting place is deemed to be existing and current. It is deemed terminated as soon as their conversation is ended or when they switched to another unrelated topic.<sup>43</sup>

The option of meeting place is also applied in the same way. The option of meeting place comes to an end when the instant communication between the offering party and the receiver is interrupted. For example, in the case of the telephone being used to conclude the contract, the option of meeting place is terminated at the time that the phone is hung up. In the msn messenger example, the option of meeting place is

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<sup>40</sup> It is more appropriate to examine the particular electronic device/application in question before one takes the decision whether it is instantaneous or not.

<sup>41</sup> Alzaagy, A., "The Islamic Concept of Meeting Place and its Application in E-Commerce", Op.Cit., 39

<sup>42</sup> Ibrohim, M., *Hukum Ijara al-Uqud bewasa'il al-I'tisal al-Hadeetha*, Op. Cit., 105

<sup>43</sup> Alzaagy, A., "The Islamic Concept of Meeting Place and its Application in E-Commerce", Op.Cit., 40

deemed to be over when the contracting parties, or one of them, sign out or leave the room where their instant conversation was held.<sup>44</sup>

### **The Application of *Majlis al-Aqd* Using Non-Instantaneous Electronic Communication.**

Here, there is no instant communication of offer and acceptance. This is because, parties are at different place and there exist a considerable time or interval between the communication of the offer and acceptance. In the past, the messenger and the letter were the most famous non-instant means to carry parties' commercial will. 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, to name but a few. In such devices, there is no direct link between the contracting parties, and the offer and the acceptance are not instantly connected. Hence, such contract is deemed in the law as contracting between absentees and it is regulated accordingly.<sup>45</sup>

Determining when contract becomes binding and embedded with legal effect in contract between parties inter absentees is a matter of juristic discussion. Some parameters were used to determine same which are hereafter discussed.

According to Al-Sanhuri, a contract between absent parties is formed when the acceptance to an offer is expressed, regardless of whether the acceptance is brought to the notice of the offeror or not.<sup>46</sup> This simply suggest that upon the declaration of acceptance which complete the process of correspondence between the parties, the contract is formed without unreasonable delay.<sup>47</sup> This is regarded as Declaration theory.<sup>48</sup>

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<sup>44</sup> *Ibid.*; See also Abdullah, A., *Khiyar al- Majlis Wa al-Ayb fi al-Fiqh al-Islamiy* (Saudi Arabia, Dar al-Maseer, 1997) 136

<sup>45</sup> Alzaagy, A., "The Islamic Concept of Meeting Place and its Application in E-Commerce", Op.Cit. 41

<sup>46</sup> Al-Sanhuri, A., *Masadir al-haqq fi al-fiqh al-islami* (Vol. 2, Egypt, Dar al-hana', 1953) 56

<sup>47</sup> Al-Oboodi, A., *Al-Ta'aqud 'an Tariq Wasa'il al-Ittisal al-Fawri* (Jordan, Dar al-Thaqafa, 1997) 157.

<sup>48</sup> Al-Zaagy, A., "The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective" 6, 2/2012 *Online Journal of the Virtual East*, 58 available at <https://cyberorient.net/wp->

A number of jurists had been held to accept this declaration theory. It is confirmed as reported by Al-Zaagy<sup>49</sup> that it appears in the writing of Al-Kasani<sup>50</sup> and Al-Buhooti.<sup>51</sup> In this regard, Al-Zaagy stated as follows:

*"when a seller sends a letter or correspondence through a messenger to a prospective buyer, who is absent from the 'meeting place,' one offering to sell a certain article with certain value, then when the offer reaches the buyer, he unequivocally accepts that, at this time, the contract is considered to be validly formed."*<sup>52</sup>

There are however challenges to this theory. It is rigged with confusion and uncertainty. It places the formation of the contract solely at the whims and caprices of the offeree. It is only the offeree that can state whether or not an acceptance has been made, which also, may be denied by him as he wishes.<sup>53</sup> It was then suggested that the contract remain nonbinding until, the acceptance is communicated to the offeror.<sup>54</sup> Accordingly, the offeror can withdraw the offer at any time before the expressed acceptance by the other party (offeree) comes to his knowledge.<sup>55</sup> This principle is referred to as Information rule.

This theory also appears contradictory as it accommodates uncertainty and establish bias against the offeree. It also protects the offeror more, as it will also be difficult to know when the acceptance comes to the notice of the offeror.<sup>56</sup> It will then be difficult to determine the actual time *majlis al-aqd* is ended, hence the length of time to which the *khiyar al-majlis* is available remain doubtful.

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[content/uploads/sites/3/2012/09/CyberOrient\\_Vol\\_6\\_Iss\\_2\\_Alzaagy.pdf](content/uploads/sites/3/2012/09/CyberOrient_Vol_6_Iss_2_Alzaagy.pdf) accessed on 10/07/2021

<sup>49</sup> ibid

<sup>50</sup> Al-Kasani, A. A., *Bada'i' al-Sana'i' fi Tartib al-Shara'i*, Op. Cit.

<sup>51</sup> Al-Bahuti, M., *Kashshaf al-Qina' 'an Matn al-Iqna'*, Op. Cit.

<sup>52</sup> Al-Zaagy, A., "The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective" Op. Cit.

<sup>53</sup> Marqass, S., *Nadhariyat al-'Aqd*. (Egypt, Dar al-Nashir li al-Jami'at al-Misriya, 1956), 133

<sup>54</sup> Al-Sanhoori, A., *Masadir al-Haqq fi al-Fiqh al-Islami*, Op. Cit. 242

<sup>55</sup> Al-Zaagy, A., "The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective" Op. Cit. 59

<sup>56</sup> ibid

As it appears that there is no concurrence as to the determination of *majlis al-aqd* in contract inter-absentees, it is suggested that parties make stipulation as to the length of time that will be available for the communication of offer and acceptance. That is, the offeror must stipulate that the offer will be available within certain time for the offeree to communicate his acceptance, that will obviate the negotiation from being clogged with uncertainty and delay.

### ***Majlis al-Aqd* in Websites Contract**

It is matter of intellectual debate as to whether transactions formed by electronic websites are analogous to face-to-face transactions, and therefore, validate the rule of 'meeting place' or whether they should be considered as contracting inter absentees.<sup>57</sup> Some views suggest that websites contract should be regarded as face to face transaction, in that, parties may though be geographically apart, their communication are instantaneous like other forms of communication (telephone, chat room etc.). Accordingly, the rule of *majlis al-aqd* as applicable to contract between present parties should be applicable.<sup>58</sup>

In contrast to this position, it was argued that drawing parallels between transactions conducted over the telephone or the likes and transactions undertaken over the web does present some problems. In telephone communication, both parties discussed as they would, face-to-face without any intermediary. They negotiate, restate their term, amend same instantaneously and reach an agreement as they wish.<sup>59</sup> Website programmers however does not give room for negotiation aside the pre-programmed terms and conditions for the traders. As a result, it is not safe to conclude that web transaction is analogous to that of face-to-face transaction. It is then suggested that it be regarded as contract between parties *inter absentees*.<sup>60</sup>

If this conclusion is made, does it follow that the concept of *majlis al-aqd* as applicable in contract inter absentees, applied to web contract?

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<sup>57</sup> Alzaagy, A., "Contracting Concept of 'Meeting Place' in Islamic Law: Is There a Room for Possible Implementation in Internet Transaction" Op. Cit. 153

<sup>58</sup> Al-Fadhel, M., *Al-Nadaryyah al-A'mmalat* (Vol. 1, Jordan, Dar al-Thaqafa, 1992) 136-137

<sup>59</sup> Alzaagy, A., "Contracting Concept of 'Meeting Place' in Islamic Law: Is There a Room for Possible Implementation in Internet Transaction" Op. Cit. 153

<sup>60</sup> *Ibid.*

That apparently cannot be the position as it is clear that preprogrammed web present clearer position of the conclusion of contract, which places the burden on the person transacting through the web to take his decision before clicking the final bottom to conclude the transaction.

### **Conclusion**

The concept of *majlis al-aqd* is discussed both from classical aspect and its application to modern time, where technology has expanded the modes and means of communication. This exposition found that, instantaneous communication devices are analogous to face to face dealing and as such classical doctrine of *majlis al-aqd* applies. The application of *majlis al-aqd* to non-instantaneous means of communication except websites contract, is to be done with great caution and perseverance. Although, it has been suggested that parties make stipulations as to the length of time available for the acceptance to avoid uncertainty and undue delay, negotiations which are devoid of this kind of stipulations shall be construed using the prevailing practices among the parties and the evidence available to juxtapose the best principles that will appeal to the justice of the situation. With regards to pre-programmed websites or applications, it is most equitable to align it with instantaneous means of communication and adopt the classical rule of *majlis al-aqd*. Above all, clear stipulations as to how and when the acceptance should be made to still meet the offer, is most rational, simple, straightforward and equitable.

*Wa-Allahu Âlam.*