3. Sale by Conduct

In Islamic Law, generally, the contract is concluded by an express offer and acceptance. Offer and acceptance are the modes and means whereby parties express their willingness to enter the contract. In commercial practice, however, the conduct of the parties is also accepted as a means of concluding contract. For example, A enters a shop where the goods are displayed with price tags. He pays the price and picks up the required commodity; the contract is concluded by this act of parties on the basis of its acceptability in commercial usage. The Muslim Jurists allow this form of concluding contract with certain conditions. These conditions are:

- Conduct must be from both sides. Delivery of counter values must be from both sides. Like a buyer asks the seller about the price of an item and the sellers mentions the price to the buyer, then buyer hands over the money and the seller delivers the item to him.
- The conduct should be based on consent of the parties to the extent that no presumptive evidence that exists negates the existence of consent.
- That the item must be of small value. The Muslim jurists are of the view that in order to form a contract through conduct, it is necessary that the subject matter of contract must be of small value like bread, meat etc. and not expensive like house, gold, land etc. However Mālikī jurists allow even in expensive items, the above condition, depending mostly on customs prevailing in the area.[30]

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[30] Ibn Qudāmā, *al-Sharḥ al-Kabīr*, vol. 3, p. 3.

- When the institution debits – by the order of the customer – a sum of money to the latter's account, and credits it to another account in a different currency, either in the same institution, or in another institution, for the benefit of the customer or any other payee. In following such a procedure, the institution shall adhere to the principles of Islamic law regarding currency exchange.[29]

A delay in making the transfer is allowed to the institution, consistent with the practice whereby a payee may obtain actual receipt, according to prevailing business practice in currency markets. However, the payee is not entitled to dispose off the currency, during the transfer period, unless and until the effect of the bank transfer has taken effect, so that the payee is able to make an actual delivery of the currency to a third party.

- Receipt of a cheque constitutes constructive possession, provided, the balance payable is available in the account of the issuer in the currency of the cheque and the institution has blocked such a balance for ensuring payment against the cheque, when it gets presented, or the institution has acknowledged it as 'good for payment'.

- The receipt of voucher by a merchant, signed by the credit card holder (buyer), is constructive possession of the amount of currency entered as payable on the coupon provided, the card issuing institution pays the amount without referring to the merchant accepting the card.

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[29] e.g. AAOIFI's Sharī'ah Standard No. 1 deals with trading in currencies

- Actual possession of moveable assets is through physical delivery. Constructive possession takes place by relinquishing any obstacles, to enable the right owner to take possession, without any problems though there may not be any actual transfer and delivery *per se*.
- Constructive possession may also be effected via registration of mortgage.
- Possession of documents e.g. bills of lading, warehouse receipts etc., in the name of possessor, or acknowledging his interest, tantamount to constructive possession, if the assets are ascertainable, and there is no hinderance i.e. the possessor is able to transact.
- Prior possession of tangible asset is deemed to be constructive possession, irrespective of trust or liability in character.[28]

In currency, following modes of constructive possession have been acknowledged by the scholars, as permissible modes, for the purpose of transfer of risk and liability to the transferee.

- ♦ To credit a sum of money to the account of the customer in the following situations:

- When the institution deposits to the credit of a customer's account a sum of money directly, or through bank transfer.
- When the customer enters into a spot contract of currency, against another currency already deposited in the account of the customer.

[28] Sharī'ah Standard No. 18 on possession, p. 318.

- If a person used house or building of a person without entering into any formal lease agreement, he will pay customary rent for this use to the owner.
- If a person hires services of a person without determining and fixing his wages, he will be entitled to the wages prevalent in the market.
- If a *Muḍārabah* contract becomes irregular due to any reason belonging to *rabb al-māl* (provider of capital), then the *muḍārib* (worker) will be entitled to customary remuneration for the period he has worked in *muḍārabah* partnership.

2. *Qabḍ* (possession) in modern commercial practice

Qabḍ means to possess something. The actual word is generally used for physical possession of a thing. The *Sharī'ah* has, however not prescribed any particular mode of taking possession. The jurists, therefore, have recourse to prevailing practice in business community while determining the mode of possession. In the modern commercial practice, *Qabḍ* is applied to both actual and constructive possession. The modern commercial practice ('urf) has determined a number of modes for taking possession, which have assumed the status of Law. A judge while settling any dispute on possession is obliged to take care of this new meaning and interpretation of possession. Following modes of possession have been acknowledged by the modern jurists, as valid modes of possession.

- Actual possession of land property is by relinquishing (any obstacles) and enabling the possessor to make any transaction on it.

- If the common practice in the lease of houses is that the rent is paid in advance in the beginning of month, then it will be treated as though it were a contractual stipulation.
- If a person has asked his attorney to rent out principal's house, the attorney would be expected to rent his house on terms and conditions customarily prevalent in the market.
- If the common practice regarding the payment of rent is that it is paid in advance in the beginning of month, then such practice would be treated as law, even if it is not mentioned in the contract.

Maxim:[26]

الثابت بالعرف كالثابت بالنص

التعين بالعرف كالتعين بالنص

What is proven by *'Urf* is like that which is proven by a *Sharī'ah* proof.[27] **Or,**

A matter established by custom is like a matter established by law

Applications:

Following are some applications of this Maxim:

1. Customary Use and Customary Remuneration

- If a person has hired a vehicle or beast of burden, he can use it only in normal course. However, if he wishes to use it for an abnormal purpose, he cannot do it unless the lessor allows him in express terms.

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[26] *Mawsū'at al-Qawā'id al-Fiqhiyyah*, op.cit. vol. 4, p. 537.
[27] Corresponds with Majallah, Article 44

Islamic *Fiqh* Academy, India which has a key role in providing *Sharī'ah* solutions to new problems facing Muslim community, has also discussed the issue of *pugree* in one of its seminars and gave verdict in its favour. Khalid Saifullah Rahmani, quoting the decision of the Academy writes: "In case a shop, or house, is rented out to a tenant and landlord receives a lump sum amount in addition to monthly rent, it will be presumed that the landlord forfeited his right of stay in favour of tenant against the consideration. This amount is *valid* for him as it is a substitute of his right of stay in the building. In future, if the landlord desires to get back his property, he can do it against the payment of *"pugree"* to the tenant. The amount of *"pugree"* may be decided by the parties by mutual agreement. The first tenant can also forfeit his right of longer stay in that premises in favour of another tenant with an agreed consideration."[24]

Maxim: المعروف عرفاً كالمشروط شرطاً[25]

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

Custom Determines Conditions

The maxim means that a matter recognized by custom, will be regarded as though it were a contractual obligation. It can be illustrated by the following examples:

- If it is a common practice that the seller of airconditioner is generally responsible for its installation, then it will be treated as a condition in the contract of sale, although it was not expressly mentioned in the contract.

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[24] *Nay Masā'il Awr 'Ulama-i-Hind key Faisaly*, op.cit. p. 114.
[25] *Sharh al-Qawā'id al-Fiqhiyyah*, op.cit. p. 183.

and thus, can not claim any right to the property, just as the original owner is debarred from doing so.

There is a difference of opinion among the *Sharī'ah* scholars regarding the validity of this practice. A majority of Muslim scholars is inclined towards its permissibility. The scholars in Egypt and subcontinent generally subscribe to this view.

Ibn Nujaym, a prominent Egyptian Ḥanafī scholar, holds it valid on the basis of *'urf*. He writes: "Such type of tenancy agreements should be recognized as *valid* custom because it has attained the status of *'urf al-'amm wa al-khāṣ* (general and specific custom) in Cairo."[20]

Mujāhid al-Islām Qāsmī also favours this view and suggests that "it should be recognized on the basis of commercial usage."[21] Mufti Habib-ur-Rahman Khayr Abadi, a contemporary scholar from India, has also supported this position. He admits that this custom is validly recognized in big cities of world.[22]

Dr. Wahba Zuḥaylī, an eminent contemporary scholar of *Fiqh*, also does not see any harm in *badal al-khuluww*. He says: "The amount which is taken these days in consideration of right to stay "*muqābil al-khuluww*" is not contradictory to the rulings of Sharī'ah. The tenant may further alienate the property to a third party by receipt of consideration, if the period of his lease has not expired."[23]

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[20] *Al-ashbāh wa al-nazā'ir* with its explanation *Ghamz 'uyūn al-baṣā'ir*, vol. 4, p. 360.
[21] *Jadīd fiqhī mabāḥith*, vol. 1, pp. 80-85.
[22] Ibid. vol. 1, p. 95.
[23] *Al-Fiqh al-Islāmī wa Adillatuhū*, op.cit. vol. 5, pp. 3824-3825.

increase in the rent after short periods of time. *Pugree* or *badal al-khuluww* is used in Egypt in tenancy contracts of houses also where the tenant, in consideration of *badal al-khuluww*, is entitled to stay in the house for a longer period exceeding sometimes 50 years. The tenant can also pass on the right of stay in the house to his children living with him in the same house.

The form in which it is practiced in Egypt is as follows. For Example, A, a landlord enters into agreement with B, a tenant, on the condition that the tenancy will be for thirty years with monthly rent of Rs. 5000/-. The total of rent for thirty years comes to 18, 00,000/-. Here, the parties may agree for an advance payment of 10,80,000 while remaining 7,20,000 may be paid by the tenant through a monthly reduced rent of Rs. 2000. The monthly rent of Rs. 3000 is deducted from the advance money paid by the tenant at the initiation of tenancy. This advance payment is called *badal al-khuluww*.

At the beginning of this century, such types of tenancy agreements became vogue in Egypt and got legal recognition as *'urf al-amm wa al-khāṣ* i.e. general and specific custom.

As a result of this agreement, the landlord cannot get his property back until the expiry of whole tenancy period. Further, if the landlord intends to get back the possession of his property, he has to repurchase the right of stay from the tenant at another price agreed upon between the parties at that moment of time. This type of right of tenancy may also be transferred to a third party by the mutual agreement of the three parties, whereby, the latter will step into the shoes of first tenant and will continue to execute the contract, as originally entered into by the first tenant. Here, the first tenant is no longer a party to the original tenancy agreement

fulfil their obligations. The security and stability of contracts also require that the parties should be made bound by the stipulations they have inserted in the contract. The Council is, however, of the view that the pecuniary penalty imposed on the defaulting party in enforcement of penalty clause, should not be unjust, unfair, or disproportionate with the size of loss caused to the party.[18]

4. Waqf of Immovable Property

The established rule in Islamic law about *waqf* is that it is affected on immovable property only. The reason is that movable property is liable to destruction and loss and consequently cannot be assigned in *waqf*. However, the Hanafī jurists, Imām Abū Yūsuf and Imām Muḥammad Ibn Ḥasan Shaybāni, have validated the *waqf* of goods such as books, tools, weapons because popular custom has accepted it. [19]

5. Right of Retaining Possession (*Pugree*) and its Sale

It is a recurring practice among the merchants in the Islamic world that in case of lease of shops the landlord, besides charging monthly rent, receives another lump sum amount in advance from the lessee, in lieu of which he forfeits his right to evict the lessee from the leased property. In the Sub-continent, it is called "*Pugree*" and in Arab world *badal al-khuluww*, i.e. "Consideration for right of Possession", which is may also be termed as the "Right of Non-Eviction" The lessee, through "*pugree*", in fact buys the right of possession, from the lessor. The *pugree* protects the lessee from a harm that may be caused to him because of his forced eviction at a time when his business is at full swing. It also safeguards him against arbitrary

[18] *Abḥāth Hay'ah Kibār al-'Ulamā*, pp. 213-214.
[19] *Principles of Islamic Jurisprudence*, op. cit. p. 56.

rendered many conditions valid which were previously treated invalid.[17]

3. Penalty Clause(s) in Contract(s)

It is a common current practice that in export, import contracts, or construction projects, the contract includes a clause that if the contractor or obligor does not fulfil his obligations within a specified period, he will be liable for compensating the loss caused to the obligee. Taking cognizance of this commercial usage, the modern Muslim scholars have allowed insertion of penalty clause in contracts to safeguard the client against possible harm that may be caused to him due to non-completion of project and non-fulfilment of obligation. Article 6/7 of the AAOIFI's Sharī'ah Standard on *Istiṣnā'* provides:

> "It is permissible for the contract of istiṣnā', to include a fair penalty clause stipulating agreed amount of money for compensating the purchaser adequately, if the manufacturer is late in delivering the asset.
>
> Such penalty is permissible only if the delay is not caused by intervening contingencies (force majeure). However, it is not permitted to stipulate a penalty clause against the purchaser for default on payment."

The Grand Council of the 'Ulama of Saudia Arabia has also expressed the same opinion. In one of its *Sharī'ah* verdicts, the Council held that the penalty clause in contracts is consistent with Islamic teachings that enjoin upon believers to

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[17] Muhammad bin Akmal al-Bābartī, *al-'Ināyah 'alā Sharḥ al-Hidāyah*, vol. 6, p. 76-77.

104 of the Syrian Civil Code State that *'urbūn* is an indication that both parties have the right to cancel the contract during agreed period.

It is worth mentioning that many modern Muslim scholars suggest *'urbūn* as an alternative to conventional options such as *call option* and *put option*. They assert that *'Urbūn* serves the same purpose as options i.e. a right to buy, or sell, an underlying commodity, at a specified price, within a specified period of time. They also treat it as a device for hedging against any rise, or fall, in prices.

2. Irregular Conditions

According to early Ḥanafī jurists, a condition that gives undue advantage to one party, is an irregular condition and subsequently renders the contract irregular (*fāsid*). The example of an irregular condition is to stipulate that the seller will stay in the house sold for some period before he hands it over to the purchaser or a condition by the buyer of piece of cloth that the seller will tailor it and make suit from it for the buyer. Such conditions were treated irregular by the early Ḥanafī jurists on the assumption that they would lead to dispute between the parties. But the later Ḥanafī jurists ruled that if an irregular condition becomes common and prevalent among the people, it will be treated as a valid condition, because due to *'urf* it has ceased to be a source of dispute. Thus, all the conditions which are recognized by the prevailing commercial usage such as a guarantee that the company will be responsible for the repair and maintenance of equipment such as computer, air-conditioner sold to a party, are valid conditions. This shows that the custom and usage has

The Majority relied on *ḥadīth* reported by Imām Mālik in *al-Muwaṭṭā*, Nasā'ī, Abū Dāwūd and Ibn Mājah that holy Prophet (s.a.w.s) forbade sale of *'urbūn*. However, the *ḥadīth* is considered to be weak.[14]

The Hanblī jurists on the other hand rely on a *ḥadīth* reported by Abdul Razzāq to the effect that Prophet (s.a.w.s) was asked about *'urbūn* sale and he permitted it.[15] The Modern Muslim scholars, such as Zarqā, Qarḍāwī, and Zuhaylī, favour the minority view of Ḥanblī jurists and allow retaining earnest money by the seller, in case the buyer does not pay the price within stipulated time. Muṣtafā al-Zarqā, an eminent contemporary Muslim jurist, is of the view that *'urbūn* provides a useful formula, which can be utilized to facilitate a credible commitment, or a surety, that the buyer will not change his mind after finalizing a sale. However, if he does so, the seller can be compensated for possible loss that has been caused as a result. The need for such assurance is more evident in modern times when large orders have to be entertained. The Islamic *Fiqh* Academy of Jeddah, in one of its *Fiqh* rulings, has held that 'urbūn is permissible. The reason given by the Academy was that security of the right of seller and stability of transactions required that.[16] This ruling is based on *'urf*. Transactions through earnest money are widely prevalent and operative in the modern world. As such, the Islamic *Fiqh* Academy has based its verdict on the custom. 'urbūn has been taken care of even in the legislations of Arab countries. The Article 103 of Egyptian civil code, Article 74 of the Kuwaiti civil code, Article 103 of the Jordanian civil code and Article

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[14] Al-Imām al-Bājī, *Al-Muntaqā Sharḥ al-Muwaṭṭa'*, vol. 4, p. 157.

[15] Ahmad Muhammad Shākir, ed. *Musnad Imām Aḥmad bin Hanbal*, vol. 2, p. 13; *Nayl al-Awṭār*, op.cit. vol. 5, p. 250.

[16] See, Resolution no. 72 (3/8), International Fiqh Academy. Jeddah. Cf. Sharī'ah Standards, AAOIFI, Bahrain, 2003, p. 129.

2. The custom should not be contradictory to the injunctions of *Sharī'ah*. It should not violate any definitive principle of Islamic law. As such, the practice of crop sharing on the basis of a fixed produce, raffle and prizes on bonds are unlawful, since such practices are against *Sharī'ah*.

3. Custom must not contravene a clear stipulation of an agreement. In such case, the agreement will prevail and not the custom. For example, the cost of formal registration in the sale of a real property is customarily payable by the buyer. But if there is stipulation in the contract requiring that the vendor should bear the cost, and then the buyer will not be required to pay the cost of registration.

Application of Maxim

The *'urf* as a basis of *Sharī'ah* ruling can be understood by a number of *fatwās* and Sharī'ah verdicts in the *Fiqh* literature. We have selected here some rulings from the contemporary *Fiqh* literature:

1. Permissibility of *'Urbūn* Sale.

Earnest money sale is a transaction in which a person buys an item and pays a certain amount of money in advance to the seller, on the condition that if the transaction is completed, the advance will be adjusted, and if the buyer does not pay the remaining amount, the seller will not return the advance.[13]

The Majority of Muslim jurists, except Imām Aḥmad, hold earnest money sale on the above pattern as invalid, because it implies taking of other's money without any just cause. Moreover, it involves an unknown option which amounts to *gharar*. The parties do not know at the time of contract whether the transaction will be completed or not.

[13] *Al-Mughnī*, op.cit. vol. 4, p. 232.

Conditions of Custom

A custom may be recognized as a source of law, and as an authority in judicial decisions, when it fulfills certain conditions. These are:

1. It should be most widely prevalent and common practice. The practice of few individuals can not be regarded authoritative. If, for example, a sale is concluded in a city where two or three currencies are commonly accepted and the contract in question does not specify any, the one which is the most dominant and common will be deemed to apply.[8] Similarly, if a buyer discovers a defect in the goods he has purchased, he can exercise option of defect, i.e. right to return object on account of defect only, when it is established that such defect is commonly recognized as a defect by the merchants. The *Majallah* has articulated this condition in the following two maxims:

Maxim: إنما تعتبر العادة إذا اضطردت أو غلبت[9]

(i) The custom which is most widely prevalent and operative is to be relied upon.[10] Or,

Predominant Custom Prevails

Maxim: العبرة للغالب الشائع لا للنادر[11]

(ii) Credence is to be given that which is publically and generally operative, and not to what is rare.[12] Or,

Establised Practice Predominates Rarity

[8] *Principles of Islamic Jurisprudence*, op.cit. p. 363.
[9] *Sharḥ al-Qawāʿid al-Fiqhiyyah*, op.cit. p. 179.
[10] *Al-Majallah*, op.cit. Art. 43.
[11] *Sharḥ al-Qawāʿid al-Fiqhiyyah*, op.cit. p. 181.
[12] Ibid. Art. 42.

Maxim: العادة محكمة[3]

Custom is an Arbiter

Maxim: المعروف عرفاً كالمشروط شرطاً[4]

A common practice has the same effect as an express condition.

Maxim: الثابت بالعرف كالثابت بالنص[5]

التعيين بالعرف كالتعيين بالنص

What is proven by *'Urf* is like that which is proven by a *Sharī'ah* proof.[6] Or,

A matter established by custom is like a matter established by law

Now we take up these maxims in some detail.

Maxim: العادة محكمة[7]

Custom is Arbiter

The maxim provides that a prevalent and recurring practice among the people acts as a *Sharī'ah* evidence. A judge may rely on custom and usage, besides other evidences in his judgements, provided the custom does not contravene any text of the *Qur'ān* and *Sunnah*. The jurists while issuing a verdict, or *fatwā*, also have recourse to the custom and usage prevailing in the society.

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[3] *Sharḥ al-Qawā'id al-Fiqhiyyah*, op.cit. p. 165.
[4] Ibid. p. 183.
[5] *Mawsū'at al-Qawā'id al-Fiqhiyyah*, op.cit. vol. 4, p. 537.
[6] Corresponds with Majallah, Article 44
[7] *Sharḥ al-Qawā'id al-Fiqhiyyah*, op.cit. p. 165.

fuqahā', when they found that the customs on which they were based, no longer existed.

In the past, for instance, wheat and barely were measured in terms of *mudd* and *ṣā'* (two measurements of capacity). But today, they are universally weighed. Thus, any calculations whether for trading or for purposes of payment of *'ushr* or *sadaqah* or atonement (*kaffārah*) are made in terms of the prevalent units of weight.[2]

'Urf has also a role in *ribā al-faḍl*. *Ribā al-faḍl* is an excess revealed through *Sharī'ah* criterion (i.e. measurement, or weight). In the classical Islamic law, if two parties exchanged one *mudd* of wheat with two mudd of wheat, they were said to have committed *ribā al-faḍl*. But today, wheat is calculated through weight, so *ribā al-faḍl* will take place only when, say, 5 kg is exchanged with 8 kg. As such, the Muslim jurists have interpreted "*Sharī'ah* criterion" in the above definition, in terms of measurement of capacity.

In the past, the trading in abstract rights and intangible property was not allowed by the Muslim jurists, but today the commercial usage has changed. Now, the abstract and unreal rights such as copy rights, goodwill, patents, royalty etc., are treated as a tradable commodity. The modern Muslim jurists have ruled that unreal rights can also be sold and purchased like any tangible property.

Appreciative of the significance of commercial usage, and its authority as a source of Islamic Law, the Muslim scholars have formulated a number of maxims, which highlight the status of custom and usage in the Islamic law. Some of such maxims are as follows:

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[2] *Economic Relevance of Sharī'ah Maxims*, op.cit. p. 51.

Status and Authority of Custom in Islamic Law

A recurring and common practice among the people (*'urf*) is considered as a source of law in the *Sharī'ah*. It also provides a basis for judicial decision, i.e evidence to which a judge may have recourse in his judgment. It also serves as an interpretative aid and guide which helps a jurist to interpret legal injunctions of the Qur'ān and *Sunnah*. It goes without saying that many *aḥkām* of the Qur'ān have been interpreted by the jurists with the help of *'urf* and *'ādah*. The Qur'ān, for example, makes maintenance obligatory on husband. Its amount, however, has been left unspecified, which is determined with reference to custom. The *ghabn fāḥish*, which is a radical discrepancy between the market price of a commodity and the actual price charged to the customer, is also determined with reference to *'urf*. To ascertain what margin of discrepancy in a particular transaction amounts to *ghabn i-fāḥish*, is determined with reference to the practice of tradesmen, and people, who are engaged in similar transactions.[1]

The early Muslim jurists framed a considerable amount of *aḥkām* on the basis of custom prevailing among the people in their time. Some of those *aḥkām* were changed by the later

[1] *Principles of Islamic Jurisprudence*, op.cit. p. 374.