

# A BRIEF STUDY OF ETHICS OF ADVERSITY IN SAUDI SHARIA LAW

**Ahmad Saleh Al-Barrak, Prince Sattam Bin Abdulaziz University**

## ABSTRACT

*Issue of adversity has been extensively examined in Islamic sharia law; however, the code of ethics which have to be followed by the opponents due to conflict have not been discussed nor formulated from a legal perspective in Saudi Sharia law. Therefore, the present study aims to constitute specific rules and principles—ethics of adversity—to be followed by the Saudi judges in settling the cases of adversity. In addition, the present study also addresses the code of ethics that should be followed the opponents who decided on taking legal actions and those who decide on settling their conflicts without resorting to courts. The study has used descriptive–quantitative approach for examining the problem of the study. The study has presented the ethics of adversity with precision and clarity, taking into consideration the small parts relating the adversity like its concept, the situation of adversity cessation. The study also combined both the jurisprudential and legal origins of the case in the Saudi legal system.*

**Keywords:** Adversity, Islamic Sharia Law, Ethics of Adversity, Jurisprudence

## INTRODUCTION

The present paper aims to address the issue of adversity in Islamic Sharia law and how Islamic sharia law could organize the adversities and conflicts arising between opponents. Adversities have recently dominated societies to the extent the resonance of terms like complainant versus complaine, and aggressor versus the victim of aggression has become common phenomena. People's reactions to adversities vary; Some people may take legal actions filing cases; others settle their conflicts without resorting to courts; third category remain helpless for their oppression because their feeling of poverty, and fear or social pressure may prevent them from taking any legal action to restore their rights. Therefore, the significance of the present study is to address the code of ethics for the conflicted parties who decided on taking legal actions and those who decide on settling their conflicts without resorting to courts.

## REVIEW OF LITERATURE

The number of the studies addressing the code of ethics for opponents from a legal perspective is scare despite the availability of the bylaws and regulations which have been recently enacted for organizing these conflicts. In addition, the Fiqhi literature-jurisprudential literature (*i.e.*, Al-dam, 1984; Al-surji, 1997; Ibn Farhun, 1983)—did not address the issue of code of ethics for opponents from a purely legal perspective ; these code of ethics, however, were overlapped with different judicial and jurisprudential issues and they were not drafted in a legal style, but they follow the norms of narrative style. Accordingly, the present study addresses the code of ethics necessary for settling conflicts from a legal perspective which not only guides the arbitrators and

judges' decision and opponents but also regulates the workflow of disputes settlement council and reduces the arbitration period for settling the adversity lawsuits.

## **THEORETICAL FRAMEWORK AND DEFINITIONS**

Ibn Faris (1979) writes that the etymological study of khism, shows that adversary, is derived from two origins; however, he then reconsidered his own previous view concluding that “khism” and its derivations belong to one origin, which is al-jānib, Adversity. Its most salient connotations in Arabic language are “controversy, conflict, difference, enmity, argumentation and antagonism” (Ibn Faris, 1979; Alsfahani, 1412 H; Ibn Manzur, 1414H). Its nominal derivation is al'alim bi-al-khūsūma- the knowledgeable of Adversity even if he is not an adversary (Ibrahaim, 2004). Terminologically, the traditional jurists did not define the term Al-khūsūma, Adversity; however, it is has recently been defined as “a kind of relation existing between two persons or more based on a conflict” (Ibrahaim, 2004).

Adversity cannot be legally enforceable unless it takes the form of a lawsuit to be considered by court. Therefore, the legislators defined it within the litigation context. Saif (1967) defines it “as a legal case arising out of the right of an opponent to sue the other party that entails rights and obligations for and against opponents ” (133). Fahmi (1954) defined it as “ a legal bond or a legal case arousing out of suing a case before a court requiring the both opponents and the court to proceed with the procedures necessary for adjudicating upon the dispute”(58).

### **ADVERSITY (AL-KHŪSUMA) (VERSUS DISAGREEMENT (MŪNZA'H)**

Al-asfahani (1412H) argued that Arabic language does not distinguish between Al-khūsūma Adversity and disagreement Mūnza'h (798). However, Qala'ji & Qinibi (1988) argued that understanding jurists' use of the two terms made us conclude that the two words are different as adversity (Al-khūsūma) is a claim based on evidence or semi proof ; however, disagreement Mūnza'h is not necessarily to be relied on an evidence (196-198). In the same vein, each difference between two persons or more in which any one of them can withdraw without being inflicted by damage out of that is known as disagreement. By contrast, each difference between two persons or more in a legal case, in which none of them can withdraw without being inflicted by damage out of that, is called adversity, whether it be intellectual or not-- conflict in property, in contract or in any other types of conflict, and whether it be in litigation or not.

#### **Who is the Adversary?**

Al-asfahni defined adversary as “one of the parties involved in Adversity or all parties involved” (284).

#### **Ethics of Adversity**

There are a set of ethics relating to adversity whether it is in litigation or not and these codes of ethics, as per many law systems, can be summed up in the following:

- Practicing patience
- Acting wisely
- Clarity and the gradual strategy in introducing the case, which is the subject of litigation.

- Abstaining from insulting or attacking the adversary
- Introducing the subject of litigation with fairness and justice.
- Stopping adversity if it is proven that one is wrong and the opponent is right.
- Maintaining the right of the opponent in adversity and in exposing his justifications.
- The adversary has to be confident that he is the holder of the right in case of litigation.
- Introducing evidence and proofs proving his right.
- Fulfilling obligations immediately without waiting the verdict of the court because delaying the rights is a kind of oppression and resorting to courts entails a kind of difficulty and suffering (Ibn Farhun, 1986).
- If it is proven to one of the opponents that his adversary is the holder of the right and he cannot fulfill his obligations immediately, firstly, he has to admit the right and then ask his adversary in person or through a satisfactory mediator to grant him a grace for a specific period.
- If the adversity requires the litigation, Muslim has to resort to only Islamic courts; non-Muslim, however, has the right to resort either to the Islamic courts, or to his religious or legal authority (Al-girgani, 1979).
- One should not base his adversity on a false accusation; that is to say, he shows adversity though he knows that he is a liar. (Ibn-farhun, p.51)
- The adversary may not use deception and tricky means to take something which does not belong to him as Prophet Muhammad Peace be upon him Said: "I am only a human being, and you bring your disputes to me, some perhaps being more eloquent in their plea than others, so that I give judgement on their behalf according to what I hear from them. Therefore, whatever I decide for anyone who by right belongs to his brother, he must not take anything, for I am granting him only a portion of Hell (Al-bukhari, 1422, No. 2680). From this previous hadith, one can conclude that the judgment of the judge does not approve foul nor disapprove fair.
- If reconciliation does not result into damage or a violation in the legal rules, and adversity is based on crystal-clear issues, the conflicted parties should resort to reconciliation and settle the adversity (Ibn Abd Al-bar, 1387)
- Reconciliation is deemed necessary when adversity falls between relatives (uterine relatives), Umar Ibn Alkhattab said: "Stop litigation between relatives until they reconcile because adjunction inherits hatred"(Al-tarblsi, p.20), or adjunction between two group of people or two sects may worsen the adversity or stir conflict.
- If the adversary becomes insolvent and he is not known for stalling nor denying people's right, he should be given a grace period.
- The adversary should not insist on bringing his opponent to court particularly if he is an elderly and his attendance inflicts harm upon him or if he is a woman whose attendance may constitute danger to her, and in these two cases, the presence of attorney is allowed (Al-tarblsi, p.22).
- The two opponents should abstain completely from presenting gifts to the judge or his representative like reconciliatory or arbitrator regardless of any motives.

- The judge or his representative should abstain from accepting any gift from any of the opponents. (Ibn Abi Al-dam, 1984).
- The judge should treat the two opponents equally and does not favor one of them over the other (Al-tarblsi, p.22).
- The judge should not listen to one of the two opponents at the absence of the second party wherever there is a possibility to attend, as he may have a counter-argument that refutes the claims of his adversary (Al-Baghawi, 1983). Prophet Peace upon him said : “ if the two the opponents sit before you, do not judge unless you hear the second party, as you listened to the first party, as it helps him give sound judgment” (Abu Dawood, No. 3582).
- If one of the opponents is absent due to his stay in a different place, or his refusal to attend, the judge should hear from the present party so as to absence is not to be considered a pretext to nullify the rights of others and the following statement should be added to the case: the absent has the right to say his argument when attending (Abaghawi, 563).
- Every opponent should articulate his argument as clear as possible indicating his intended meaning.
- If one of the opponents fails to articulate his intended meaning, the judge has to entitle another person assuming the responsibility for clarifying the intended meaning.
- The two opponents shall not use insulting or slurs against each other or against the judge (Altrablisi, p.49).
- The two opponents shall comply with the etiquette of dialogue and with the instruction of the reconciliator during the reconciliation session (The regulations of reconciliation and its procedures, article No. 16).
- The complaint presented by the opponent may not be written in a vague style that distracts and confuses the judge or the second party because this may lead to a wrong judgment; subsequently, it leads to the loss of the rights.
- The two opponents shall be committed to not insulting or inflicting any harm upon the witnesses regardless of its degree; however, they have to tell what they know in as per the requests of the court(Al-tarbalsi, p.55)
- The proxy in the case under consideration shall be disclosed to the reconciliator or the judge.
- The proxy may not be accepted if it was revealed that the legal client is oppressive (Al-maradwi, 1995)
- The judge has the right to cancel the lawsuit if it is proven that one of the opponents is a trouble maker and intends to inflict damage upon the second opponent and he does not want to prove the rights of the others (Ibn Farhun, 1414 AH)

### **When Adversity should be Stopped?**

This issue has to be considered from two perspectives:

Firstly, from the perspective of the legal texts: the legal texts have indicated that issues being addressed to the ruler or to the judge have two major features: first, adversity that may entail Hudud offences and punishments and etc., If these issues reach to the judge, they may not be ceased absolutely; however, a judgment shall be issued and the executive authorities shall enforce the issuing judgment and this is based on the saying of the Prophet Muhammad Peace be upon him: Forgive the infliction of prescribed penalties among yourselves, for any prescribed penalty of which I hear must be carried out (Abu Dawood, 1414 H, Hadith No. 4376).

The second is the adversity which does not incur Hadd punishment; however, it is related to the personal rights like conflict between husband and wife or what is related to the inheritance and the opponents have no evidence proving their rights. In such a case, the judge may direct the opponents toward reconciliation and this opinion is derived from the Hadith Umm Salamah said: Two men came to the Messenger of Allah (ﷺ) who was disputing over their inheritance. They had no evidence except their claim. The Prophet (ﷺ) then said in a similar way. Thereupon both the men wept and each of them said: This right of mine goes to you. The Prophet (ﷺ) then said: Now you have done whatever you have done ; do divide it up, aiming at what is right, then drew lots, and let each of you consider the other to have what is legitimately his "(Ahamd ibn Hanbl, 2001, Hadith No. 26717).

Second: the legal aspect is concerned with adversities which have taken the form of lawsuit; however, something emerged leading to cessation of the litigation. Article no. (1/88) from Procedural Law issued pursuant to the Royal decree No. 1 dated on 22/1/1435 Ah has stipulated the conditions of the cessation of the litigation as follows:

A-If the lawsuit has not become ready for judgment in its subject, the litigation will be ceased.

B-the death of any of the opponents because adversity is held only for people who are still alive; however, the inheritors have the right to sue a new case for the same subject.

C-One of the opponents has suffered from disqualification of litigation, *i.e.*, as he becomes insane.

C-The end of the representation for the attorney who followed up the litigation, *i.e.*, the termination of his proxy for any considered reason. In this case, the lawsuit will not be ceased as the court has the right to provide the legal client with a suitable grace if he starts appointing a new attorney within fifteen days from the expiry date of the first proxy.

As shown in the provision of the article (89), “the lawsuit will be ready for judgment in its subject if the opponents submitted conclusive requests and statements in the litigation session before the availability of cassation reason.

2-Leaving Adversity: The article (92) stipulated that the claimant has the right to leave the adversity when one of the following conditions is fulfilled; notifying the opponent of leaving the adversity; sending a report to the court clerk; writing a clear statement in a memo signed by him or by his attorney to be shared with his opponent; or submitting the request verbally during the court session and to be kept in its records and the leaving of the adversity shall be accepted if any of these above conditions is realized.

3-Reconciliation: in the legal system, the regulation 56/3/B stipulated that reconciliation shall be exposed to all parties.” This regulation entails that the opponents shall be referred to the

reconciliation judge in the preliminary lawsuits in order to get a chance for settling their adversity and to make the reconciliation enforceable instead of proceeding in the litigation process.

The most salient code of ethics for reconciliation as mentioned in (the codes of work in reconciliation bureau and its procedures) are as follows:

- a) The reconciliator may not force any of the opponents or some of them to accept reconciliation ( the codes of work in reconciliation bureau and its procedures, article No. 16 )
- b) The judge shall be committed to the confidentiality of the reconciliation session, and may not be allowed to disclose data, documents and its subsequent results including minutes unless one of the following conditions is realized:
  - Disclosure which is for the best interest of reconciliation.
  - Disclosure endorsed by the parties of the adversity.
  - Disclosure required by the Saudi litigation system.
  - Disclosure preventing the occurrence of the crime.

D) The reconciliation judge shall stop the procedures of the reconciliation if it is proven to him that the sessions of the reconciliation are futile or the parties of the adversity violate recurrently the ethics of reconciliation and its procedure.

### **When does the Judge Reject the Reconciliation Offer?**

If the aspects of right were completely disclosed to the judge; however, he thinks that if he refers the opponents to the reconciliation, this will incur bigger benefits like stopping conflict or preventing a more serious evil and so on (The codes of work in reconciliation bureau and its procedures, article No. 17, the confidentiality of reconciliation session).

If the judge has made sure that the reconciliation inflicted harm upon any of the parties involved in adversity and the evidence has proven that one of the parties is forced to accept reconciliation or he was subject to deception and so on (the codes of work in reconciliation bureau and its procedures, article No. 16, the end of the reconciliation).

### **CONCLUSION**

The study has presented the ethics of adversity with precision and clarity, taking into consideration the small parts relating the adversity like its concept, the situation of adversity cessation. The study also combined both the jurisprudential and legal origins of the case in the Saudi legal system. In brief, the study is a legal document in the ethics of adversity simplifying the subject and making it readable for researchers. The study recommended the researchers in jurisprudence and law to conduct studies in this area of knowledge through rewriting the jurisprudential issues in a legal style based upon the existing legal systems and legalizations.

### **ACKNOWLEDGMENT**

The researcher acknowledged the support of Prince Sattam Bin Abdulaziz University, Deanship of Scientific Research for this paper.

## REFERENCES

- Abu Dawood. (2000). *Sunan Abu-Dawood (Edition)*. Al-maktaba Al-asryiha.
- Ahamd Ibn Hanbl. (2001). *Almusand (Edition)*. Shua'ib Al-ara'ut. Ed. Mua'sast Al-risalah.
- Al-asfhani, H. (1412 AH). *The Sciences of Qur'an*. Dar Al-Qalm.
- Al-bukhari, M. (1422 AH). *Sahih Al-bukhari, (Edition)*. Muhammad Al-naser. Touq Al-nagat.
- Al-baghawi, A. (1983). *The Interpretation of Sunnah, (Edition)*. Shua'ib Al-ara'ut. Al-maqtab Al-islami.
- Al-zubaidi, M. (2015). Tag Al-arous. Dar. Al-hadya.
- Saif, R. (1967). *Alwasset in interperiting and explaing the commercial civil law*. Dar Al-nahda Al-arbyiah.
- Al-tarablsi, A. (2010). *The guide for judges in issues relating to opponents*. Dar Al-fiqr.
- Al-Jerjani, A. (1979). *The method in the branches of faith*. Dar Al-fiqr wa Al-Qanoun.
- Ibn Abi Aldam, A. (1984). *Ethics of Judiciary (Edition)*. Mohi Al-sarhan, Matbat Al-irshad.
- Ibn Abd Albar,, Y. (1387). *Preliminary (Edition)*. Mustfa Al-alwi & Muhammad Bakr. Ministry of Awaqaf.,
- Fahmi, H. (1945). *Commercial Civil Litigations*. Abdullah Wahbi Bookstore
- Ibn Faris, A. (1797). *Criteria of Language, (Edition)*. Abdelsalam Haroun. Dar Elfkr.
- Ibn Farhoun, I. (1986). *Raising ruler awareness in the origins of judiciary systems and the methods of rulers*. Library of Al-azhar colleges.
- Ibn Kathair, I. (1991). *Beginning and End*. Dar Alwaffa.
- Ibn Manzur, M. (1414 AH). *The Tung of Arab dictionary*. Dar Sadr.
- Khatir, T. (2014). *The end of adversity by judicial reconciliation*. Dar Alfikr.
- Mustfa, I. (2004). *Arabic language dictionary*. Al-shorouk bookstore.
- Qal'aji, M., & Qinibi, S. (1988). *Dictionary of Jurists' language*. Dar Al-nafais.
- Rene Japiot: Cirile and commercial depression procedure, *Be (edition)*, 1935, 59.