

THE EXAMPLES OF THE UNFAIR COMPETITION IN THE FAMOUS ISLAMIC JURISPRUDENCE AND REMOVING THE FAULTS OF IRAN'S LAWS

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***Abstract:** Moral issues occur in the competition law through prohibiting the unfair competition. The unfair competition is a one against honor, trade principles and behaviors and good intention. In this article, it is tried to answer the question concerning the way examples of the famous religious jurisprudence of the unfair competition, as a complementary to the related principles in Iran's laws, are used. For this purpose, the principles related to the moral trade in the famous Islamic jurisprudence and its adjustment with the new unfair competition laws are investigated and it is concluded that there are clear examples and adjustable ones with the new unfair competition laws in the Islamic jurisprudence and can be used for completing the unfair competition system in Iran's law.*

***Keywords:** unfair competition, unfair trade acts, Najsh, Talaghiel Rokban, Alsum, Alel Sum*

STATEMENT OF THE PROBLEM

The unfair competition includes any kind of the competition which is against honor in the trade and industry field. Over the history, the unfair competition has been transferred from a simple and wide concept, as a part of the intellectual property principles, to the distinctive principle about which there is limited knowledge concerning its means and consideration. Concerning the incomplete legal sources written in Iran's law concerning the unfair competition, this issue should be searched

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in the authentic Islamic sources and the authentic judicial decrees and in the case there is not any principle in this respect, then it should be referred to the law expertise and jurisconsults' views. In Iran's law, jurisconsults' judgment decree is known as Iran's law sources in order to end hostility and they are prioritized to jurisconsults' views concerning "legal" issues. Article 2 of Iran's civil bylaw says that "judges are responsible for considering claims based on the laws, issuing the due decree and/or terminating hostility. If the related principles were incomplete, unclear or opposite or there is not any law concerning the presented issue, the decree for the issue would be issued through referring to the Islamic authentic sources or the authentic decree or the legal principles which are conforming with the legal principles. Also, the judges cannot avoid investigating the claims and issuing the decree on the ground of silence, fault, incompleteness and law violation. Otherwise, they are considered as a person who avoids adjudicating rights and will be sentenced. What are the similar examples used in the famous Islamic jurisprudence which are related to the unfair competition? And what kind of consideration is considered for them? This article does not investigate the issue of general like deliberate destruction, indirect harm and lack of harm in Islamic jurisprudence as general consideration and only concerned with the issues related to the unfair competition. In order to answer the above mentioned question, the concept of the unfair competition is explained (first discussion) and then different kinds of the unfair competition is determined (second discussion) and finally some of the related examples are explained in the third and fourth discussion.

FIRST DISCUSSION: SEMANTICS

Iran's law lacks law necessary to the conflict with the unfair competition and the only written adducible legal note concerning the concept of unfair competition is "Paris convention to protect the industrial ownership" accepted by Iran government. The article 10 repeatedly defines Paris convention to protect the industrial ownership of the unfair competition as "any competition against the usual honor in the industry and trade" and this definition with some changes is used in some of the domestic laws of the countries and the international legal deeds. For example, article 1, "the proposed paragraphs by the world intellectual property organs to protect the unfair competition" considers any act or procedure against honor in the industry and trade as an unfair competition (Wipo, 1996, 7). The Islamic Republic of Iran is considered as the member of the said organ based on "the appendant of Iran government to the convention established by the world intellectual property organ (WIPO)" passed by 2001/9/26 disagreement with honor or disagreement with honor procedure is the most knowingly used definition for the unfair competition which is used in laws applied in most countries. For instance, Jordan's 2000 illegal competition law and the trade secrets consider the unfair competition as any competition against honor in the field of industry and trade (2) and the China's law of unfair counter-competition necessitate the businessmen to respect the principles of keeping mutual discretion, fairness, equality, honor and respect the conventional trade behaviors and violation of these principles

in the competition is considered as the unfair competition (2). Based on Morocco's law 17/97 concerning the industrial ownership, any competition inconsistent with conventions and rubrics concerning industry and trade is considered as an unfair competition (18) and the third part of trade sign, expression and secrets and protection of the illegal trade competition in Oman is considered as the trade illegal competition and protection of trade secrets and article 33 of this law also prohibit any real and legal people from any act opposite to honor procedures in industry and trade Also, article 1 of Germany's unfair competition law 1994 considers the unfair competition as act in conflict with honor act (1) In Paris convention, the meaning of the expression is opposite to the honor procedure is considered as vague and it is defined by reference to the national laws. For this reason, Paris convention does not present any clear definition for the expression of unfair competition (Wipo, 1996, 18) and in order to make it understood, there are some examples of unfair competition for being clear for the honor act.

SECOND DISCUSSION: TYPOLOGY

It is clear that the analysis of legal lessons concerning unfair competition in the Islamic jurisprudence is closely related to reclassify these laws. The proposed paragraphs in the world intellectual property organ talk about "acts and procedures". In this research, besides acts and procedures, the unfair competition in the Islamic jurisprudence is investigated. The meaning of the word act is clear but the word "procedure" is referred here on the ground that it refers to the behaviors that cannot be called an act. For example, omission of act like when the competitor avoids giving the complete information concerning the faulty goods and strengthens the wrong impression to others concerning his product. However, the opposite party goes under damage due to giving true information and respecting professional honor principles (Wipo, 1996, 8). The difference between the proposed paragraphs and the specialized Paris convention is that Paris convention refers any kind of competition act, however, the proposed paragraphs in the world intellectual property organ refers both : "competition act" and "competition procedure". On the one hand, some of the related examples concerning the unfair competition law referred as the Islamic jurisprudence refer to the kind of the unfair competition that aims competition including *Alsum alal Sum* and *Albaye Elal Bay* which are investigated in this article at first. On the other hand, some of the principles are related to the trade unfair procedures including *Najsh*, *Talaghiel Rakban* and *Ahkam Boyuel Amanat* are discussed secondly.

THIRD DISCUSSION: THE EXAMPLES OF PROHIBITING THE UNFAIR COMPETITION IN THE FAMOUS ISLAMIC JURISPRUDENCE

Some of the principles related to the unfair competition laws directly refer to the competition per se among which the two titles *Alsum alal Sum* and *Albaye Elalare* investigated.

First Title: Alsum Alel Sum

The unfair and dishonor competition occurs when the competitor proposes better conditions and money after determining price and sellers and buyers' agreement on price and before concluding sale and prevents from concluding the contract. Third, it refers to the stage before concluding sale and after agreement on the trade. Sheikh Tousi knows this act unlawful (Tousi, *Almabsut*, 160/2) and other jurisconsults believe that it is repulsive (Bohrani, 1985, 44/18). The main source to refer in the Islamic jurisprudence is Hassan Ebn Zaeid narrating Imam Sadegh (AS) saying prophet Mohammad (PHU) prohibits interfering others' agreement (Hosseini Rouhani, *Feghhel Sadegh*, 171/15). Although the prohibition is on reverence, Shahid Sani's implication of repulsiveness is based on accuracy principle and unclear saying.

Second Title: Albaye Alal Baye

In the Islamic jurisprudence, it is prohibited sale by sale and purchase by purchase. This form of the unfair competition occurs when a person refers to the seller and buyer and suggests more or less money after the deal is done and while one of the parties has the right for it so that the previous sale is irrevocable and the new sale is established. This issue is not considered as the main issue in the famous Islamic jurisprudence but those juris consults who focus on this issue differ in reverence and repulsiveness. The juris consults believe the reverence of this act, for instance, Ebn Odris Helli considers it as reverence (Helli, *Sraer*, 252/2) and the writer of the book *Asbahel Shia* considers it as reverence but he knows the second sale right (Keydari, 243). In contrary, Mohaghegh Naraghi in his book titled *Mostanadel Shia* accepts it as repulsiveness (Naraghi, 31/14). Although Saheb Javaher considers this act as repulsiveness, he considers the second deal right (Najafi, 460/22).

This act is one of the clear cases of unfair competition mentioned in other countries' law. Based on Swiss' law of the unfair competition, one of the cases of the unfair competition is to stimulate others to break the contract and this act occurs in the following cases: 1: consumer is stimulated to break his deal with the opposite party and establish a new deal with him 2: in order to achieve personal interest or interest for others, it is suggested that competitive workingmen, agents or workers act against their determined responsibilities 3: the competitive workingmen, agents or workers are stimulated to betray or search the professional trade, industrial secrets and secrets related to staffs and managers 4: the sale by installment or the special conditions are entailed by revoking contract with the competitor (S.L.U.C.CHAP2.part1.4).

FOURTH DISCUSSION

In the second meaning of the unfair competition, the competitor achieves profits by dishonored, unmoral, ill-intentioned and unconventional acts among businessmen while the honored party does not achieve such profit. However, these acts are not done for the purpose of competition. For example:

Based on German's law, the competitor achieves a profit by misusing the physical situation and / or the consumer's disability while the honored competitor does not achieve such a profit because of avoiding doing such (GAAUC.2013, section, 4). The competitor achieves a profit by misusing the physical situation and / or the consumer's disability while the honored competitor does not achieve such a profit on the ground of avoiding doing such (Ibid).

The seller introduces his goods as in unreal reference and conclusively the goods are bought in away that if such an act is not done it is possible that the consumer bought the goods from his competitor (Paris convention through industrial ownership). Based on Swiss' unfair competition law, the unfair competition occurs when the clients' decisions are negatively influenced by the trade complementary acts and the competitor does not mention the probable fault in the goods and does not achieve the profit that his honored competitor does not achieve such a profit (S.L.U.C.cahpter2.part1.3h). In all mentioned cases, the act occurred does not aim on competition but since the result will be expressed in terms of competition in some countries it is considered as the unfair competition and in the Islamic jurisprudence, some of the laws are in line with this meaning of the unfair competition including "Najsh", Talaghel Rokban . The dishonored businessman who becomes rich in this way is in fact achieves a profit that is not probable for his competitor and in the Islamic jurisprudence in some cases there are some principles with the meaning of the unfair competition examples, for instance.

First Title: Najsh

Najsh, spelled as N-a-j-sh, is one of the examples of the unfair competition prohibited in the Islamic jurisprudence that is closely related to the trade unfair competition. In jurisprudent terms, Najsh is defined as a kind of the false trade marketing based on which the person who does not intend to buy the goods appears in the role of a client and proposes more money as buyer(s) and as the result of his wrong act, the buyers should pay more money for the goods (Helli, Montahel Matlab, 1004/2; Shahid Aval, Dorous, 187/3). Ayatollah khoei also considers another meaning besides this meaning for the word Njashand that is "to put in good words and advertise others' goods to sell them or revoke them to be sold cheaper" (Khoei, 660/1). Najsh absolutely does not only cause harm for the consumer and buyer and sometimes it causes harm for the seller as well since Najsh occurs in two manners :1-The assumption that Najsh causes harm to the buyer and/or consumer and this is the case when fake buyer increase the price while he does not intend to buy that but he plays the role of a buyer in order to increase the price and in this way Najsh occurs as a benefit to seller and this definition is accepted by most juris consults or in other words others' goods are appreciated and introduced to sell. 2-The assumption that Najsh causes harm to the seller and this is the case in which a person depreciates others'goods to sell it cheaper and Ayatolah Khoei knows Najsh occurs in all the following cases (Khoei, 660/1). There are also some different views concerning the meaning of the word Najsh in the case whether Najsh occurs when fake buyer and seller agree on it. In defining how Najsh occurs,

some juris consults know the collusion between fake buyer and seller necessary (Mohaghegh Korki, Jamel Masdegh, 39/4) and some juris consults know the occurrence of Najsh in both cases, collusion between fake buyer and seller and lack of it in order to occur this act (Rouhani, Seid Mohammad, Menhajel Sdeghin, 28/2). This kind of trade in the second meaning is considered as a kind of unfair competition since the use of this method causes the dishonored businessman achieves a profit whose competitor does not and it is considered as dishonored procedure prohibited in the Islamic jurisprudence. This unfair method causes the rejection of the honest businessman indirectly who uses the usual, conventional, ethical method for the trade and the new definition of the unfair competition is appeared in the 2007 Austria revised law under the title of "counter-unfair competition" and in the post-2013 German's law under the title of "counter-unfair competition". Najsh can be considering as an unfair competition. As it is mentioned before, the counter-unfair competition mainly claims to protect an honored businessman against unethical, dishonored, ill-intentioned and unconventionally unusual trade behaviors among businessmen and the acts with the similar entity can influence an honored businessman right both directly and indirectly and Najsh is a kind of act that can influence an honest businessman indirectly. Lack of Najsh can be measured in terms of protecting an honored businessman who respects the trade ethical principle and does not set the fake scene in the deal. For example: in the unfair competition laws, if a businessman increases the price in the auction or tender by making the fake scenes and achieve the profit which an honored businessman does not and achieve better financial position in comparison with his competitor, he is obliged to pay money to his competitor based on the unfair competition principles. According to the jurisconsults' view concerning prohibition of Najsh by prophet (PHU) to protect an ethical market but over times jurisconsults consider Najsh mostly as a subject related to the parties taking part into the contract.

In terms of the consideration for the unfair act of Najsh in the famous Islamic jurisprudence, there are some different ideas and as the jurisprudence becomes close to the contemporary time, the consideration is harder to imply. Some of great jurisconsults in the famous Islamic jurisprudence consider this wrong procedure as situational consideration while some other consider it as the commitment consideration. For the purpose of Najsh, their revocable situational consideration, compensation and option are mentioned. According to Ebn Janid, if Najsh is occurred by the seller causes irrevocableness of the sale but if it is occurred by another person, that person is responsible to compensate the buyer. Ebn Janid implies that Najsh is the same as concealment and tricking (Skofi, 169) and if Najsh occurs by a person except the seller and causes damage to the buyer, the fake buyer is responsible to compensate (Skofi, 169). In order to measure Najsh for the option of hypocrisy, fault and fraud need option: Ghazi Ebn Alboraj necessitates the option of hypocrisy enacted by hypocrisy (narrated by Shahid Aval, Dorous, 187/3) and Sheikh Tousi in his book "Khalaf" and by enacting hypocrisy and fault necessitates the option and then in continuing

discussion, he discusses that fault causes option for that fault which is sold in itself but here there is not such a fault (Tousi, Alkhalaf, 171/3, 172). But in the book, Mabsut distinguishes between the assumption that Najsh occurs as the result of collusion between seller and fake buyer and where such collusion does not occur and in the case of collusion, disagreement will be replaced by the option of hypocrisy and finally the theory per se strengthens lack of option (Tousi, Almabsut, 159/2). Also, some consider the right for option of fraud for the person under damage in the case there is fraud but in the case there is not any fraud, there would not be any option through Najsh (Helli, Mokhtalofolshia, 45/5). Based on the second theory, if Najsh presupposes fraud and does not cause any damage to the client, any situation principle cannot be considered for this deal but if Najsh causes fraud, not because of Najsh but also the option for fraud, the client can nullify the contract. Alameh Helli in his book "Mokhtalefo Shia" after referring to the various views of jurisconsults concerning Najsh, notes that if Najsh does not presuppose any damage to the client, it does not cause any option (Tousi, Almabsut, 159/2). Shahid Aval (178/3) and Mohaghegh Naraghi (43/14) consider Najsh as unlawful and Ayatollah Sistani also considers Najsh unlawful as well if Najsh does not cause deception and is not the collusion between fake buyer and the seller (Hosseni Sistani, 12/2). Some of the previous jurisconsults believe that Najsh has neither reverence nor the situational consideration and if it does not presuppose and necessitate unlawfulness like Moslems' lie or treachery is not considered as unlawful (Khoei, 662/1 and Hosseini Rouhani, Said Sadegh, 466/14).

Second Title: Talghel Rokban

One of the problems in the unfair competition prohibited in the famous Islamic jurisprudence is "to welcome to go the convoy". The prophet (PHU) prohibits welcoming the convoy and there is the right for option for the person who sells his goods out of the city (Nouri, 281/13). This narration is not mentioned in none of the known Shia book (Hossenin, Rouhani, Feghhel Sadegh, 288/2) but it is used by the previous jurisconsults (Tousi, Alkhalaf, 172/3) and the use of it is approved. Some consider the act of going to see the convoy reverent (Helli, Yahya Ebn Said, Aljamel Sharaei, 257) and some jurisconsults consider repulsive for it (Helli, Mohaghegh, 120/1). The famous jurisconsults consider the fraud for the owner can cause the fake of option (Helli, Tahirel Ahkam, 160/1; Tousi, Khalaf, 42/3; Maghrebi, 13/2; Mohaghegh Helli, Almokhtasarel Manafe, 120/1; Shahid Sani, Masalelel Afham, 203/3). Talghel Rokban is considered as an unfair trade competition since the basis for the use of this method is to misuse the unawareness of the members of convoy of the real price of the goods in the city. In this way, the dishonored businessman make a profit while the honored businessman does not and this cause can be implied clearly from some related narrations by some jurisconsults (Hosseini Rouhani, 175/15). The jurisconsults know fraud the reason for the fake option but in the related narration, there is no reason for option and the reason for option is considered fraud, an implied reason (Tousi, Alkhalaf,

42/3, Tabresi, 462/1) and even some of the great jurists, in terms of reason, the option principle mentioned in the saying "welcome to see the convoy" is referred as "lack of harm." (Shahid Sani, Masalekel Afham, 203/3). What can be understood from this narration is the fake option principle but nothing is mentioned concerning its reason in the related narration. For this reason, it is not possible to know fraud as the reason for the fake option principle and what should be noticed is that almost all jurists consider the current price as a criterion for fraud (Helli, Tazkeratel Foghaha, 523/1; Shahid Sani, Sharhe Lameh, 464/3; Khomeini, 523/1; Ebne Buraj, 361/1; Ebne Zohre Halabi, 224; Mohaghegh Korki, Rasael Korki, 11/3; Bohrani, 41/19; Hosseini Rouhani, Feghel Sadegh, 172/17) while in Talghel Rokban, as the above mentioned concept, fraud does not happen since the price agreed in the welcoming market is the same as the price in the market. On this base, the theory of fraud, knowing option in Islamic saying, is in conflict with the jurists' view concerning option for fraud, knowing the market price as the criterion for the fraud. The unfamiliarity of jurists with the possibility for establishing consideration in order to break the moral principles in the market causes the related narrations concerning the fake option of welcoming the convoy to be understood by the reasons related to the option for fraud by the jurists presently where as what is seemed more real and correct is that referring option to an unethical act equals to welcoming the convoy.

CONCLUSION

The Shia main approach concerning trade and competition is a moral perspective and Sharia in its law making has a great attention to the ethical principles in trade. In order to refer to two meanings of unfair competition in the Islamic jurisprudence, some principles can be found. The Islamic jurisprudence takes a look to the competition both in terms of an act against moral issues which occur for the competition and also an unethical conclusively which prohibits the competition. Regarding the fact that there is not any law in some cases, abbreviation and its fault in Iran's law to issue judicial decree, the jurist known views of jurists and the Islamic authentic sources are considered as one of the adducible basis and regarding the issues mentioned in the article, the judges consider the commitment of act and the unfair competition as a cause for guiltiness and they can vote the civil responsibility for the person who does such acts and approaches.

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