

Territory of Properties and its Laws

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Abstract: The Territory of Properties is that part of the land, subterranean canal, etc. which is necessary for perfect profiting from the property. Nowadays, regarding that, lands are non-producible goods and due to the population growth, the need for land continuously grows. Since, an extent of surrounding areas of a property is considered as its territory and its dependent part, therefore the issue of the Territory of Properties has been widely discussed. Although, in the recent years, changes have been made in types of buildings and their schemes such as benefiting the height have been considered, but these issues also has created new problems like air territory. Many of the jurisprudents have specified the existence of territory and their documentations is the jurisprudence that has directly or indirectly referred to the issue as well as consensus. In addition, they considered territory as rational problems. Moreover, existence of a real estate and surrounding waste lands are the components of a property. Some of the jurisprudents have considered the basis of territory as the principle of no harm and believe that, the purpose of distinguishing the territory is preventing the loss of its owner. In order to ensure the perfect benefit of the land by its owner and preventing his/her loss, it is not necessary to absolutely prohibit the others from possessing it, but it is enough to prevent the possession which will incur loss to the owner, although the fulfillment of this viewpoint can cause the restrictions to the others. For example, cultivation of a waste land that is required to deplete soil around the well or place the wheel and engine is inconsistent with the existence of territory and prevents the full benefit of the well owner.

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1. Introduction

In all societies, people own have "real estates" and "rights" for their own and legal institutions or jurisprudence have legislated "provisions" for them. Each of societies has their own understandings from these three concepts (Rashidi, 2003). Nowadays, one of the most important issues is new laws and provision to meet the advances in science, communities, universities and Islamic system. With the emergence of these problems, some issues are forming that never been among the rudiments or minutiae of jurisprudence discussions and since that, science and religion never been separated and Shiite jurisprudence is dynamic, any issue that arises from scientific matters has previously expressed in religion (Adl, 1985). Therefore, religious scholars, based on the verses and hadith, establish the answers for each problem. One of these issues is territory and despite the fact that, recent religious books had not addressed this issue independently, but today, due to the population growth, development of the cities, and the advancement in technology, both religious jurisprudents and jurists have dealt with that as an independent problem. Concerning the above, territory leads many religious jurisprudence questions and consequently, legal problems that must be investigated. For example, whether the determined

boundaries in jurisprudence could be the basis for territory- then they can meet the needs of the today's society concerning the growing population and advancement in the technology- or according to hadiths, the territory is based on the incurred harm. In addition, one of the major issues here is that, whether territory is kind of rights or property (Katuzian, 2011). Because, if it is a property, it can be sold separately, and if it is a right, then it is a corollary right that cannot be transferred separately. There are many discussions on this topic from the jurisprudence and legal viewpoints. In this study, we have tried to investigate this issue from different perspectives. Given that the problem of territory is among the new problems and there is a lack of resources in this issue, therefore, in this study, we tried to establish a precise definition of territory based on the jurisprudence and legal resources to explain the problem.

Territory comes with many underlying questions that some which are as following:

- Whether territory is the property of owner or the right of owner?
- What is the basis of territory?
- Will the criteria specified in the jurisprudence are responsive to the needs of our society today?
- Does the territory is the same easement?

2. Material and Methods

2.1. Definition of territory from the view of jurists

In Iranian law, in compliance with civil code, jurists have complied with the territory and since the territory has been established based on the jurisprudence; definitions are somewhat close to the jurisprudence definitions. Civil code, in article 136, specified this as: the amount of surrounding area of the property, subterranean canals, streams, etc. that it is necessary to perfect benefit.

- As a legal term, territory is the amount of land which its owners or their representatives are legally allowed traffic to use their rights without harm to others.

- Territory is that amount of the land that, customarily and conventionally, is required to survival and reclamation of the wastelands and determination of its area is based on the convention or experts' comments (Katuzian, 2011).

- Harim (the Arabic word for Territory) is an Arabic word meaning prevention and is the amount of surrounding area of the lands like canals, streams that is required for perfect benefit and prevention of loss, and due to excepted respect of the others to its right and trespassing is called Territory (Rashidi, 2003).

- In most cases, the use of land is needs that, surrounding area will not be transferred to others or at least will not be trespassed in order to perfect benefit of the property. For example, if someone has to build a subterranean canal on a wasteland, in order to be able to take good advantage, he/she must always possess that amount of land that is required to dump the soil and the prevention of others to drill subterranean canals or wells in the adjacent area. Technically, this amount of the land and the rights of owner on this area are called "territory" and "territory right", respectively.

- Recognition of the right of territory for the owner of the adjacent land, is needed to avoid the loss of owner, since that, trespassing in the mentioned area could cause loss to the owner. Therefore, the article 139 of the civil code explains that, any occupation, in contrast with the purpose of territory is prohibited without the permission the owner (Barati, 2009).

- Literally, Harim (Territory) is the surrounding area of the property. From legal viewpoint, it is that amount of land that is required for perfect benefit.

- It is one of the objective rights that can be considered as an easement is the right of territory.

- It is the right of the owner the land that is required for perfect benefit and its recognition is required to prevent his/her loss.

- Property owner has priority over others in benefiting the territory of the real estate and since it is required for perfect benefit then it is considered as the belonging of the property and any trespassing is forcible act. Therefore, territory is the amount of the surrounding area of the property and the right of territory is the right of owner on the property to fulfill perfect benefit from the property.

- Territory is that part of the ground outside the cultivated area but required for perfect benefit and meets its needs. Therefore, this part, dependently, is considered as cultivated are and is dedicated to the owner of the land.

2.2. Components of territory

In order to better understanding territory, we need to recognize the consisting elements listed in below.

2.2.1. Existence of the real estate

The first constructive element of the territory is the real estate. This means that, there must be a property at first place to consider the surrounding area as territory. It indicates the subordinate feature of the territory so that, it comes with the existence of cultivated land and vice versa. Therefore, territory rights remains until it will be terminated through legal methods such as abrogation by the owner or transferring the land with the precondition of not transferring territory (Tafakoriyan, 2010).

2.2.2. Existence of adjacent wastelands around the real estate

One of the consisting elements of the territory is the existence of adjacent wastelands. This idea is common between majority of jurists and jurisprudents (Bashiri, et al., 2011). But the question is that, why there is not territory in neighboring properties and how they considered this precondition for? Answering to this question needs the discussion regarding the basis of territory.

2.2.3. Existence of a relationship between real estate and adjacent wasteland

In order to gain perfect benefit of mentioned property in first element, there must be of a relationship between real estate and adjacent wasteland. It is specified in article 136 in compliance with jurisprudence. Therefore, there must be such a relation in order to fulfill perfect benefit. The person who cultivates a wasteland must be able to gain perfect benefit and no one can prevent this by cultivating neighboring lands. Therefore, the territory is required to gain full benefit i.e. it meant to attract benefit not repel harm and the loss mentioned in article 136 of the civil code is an assumption (Safayi, 2010). This means that, if the territory will be trespassed, there will be a loss for the owner; otherwise, there will be no loss.

2.3. The boundaries of territory

Since that, the territory is considered to ensure the perfect benefit of the owner, thus, its boundaries are to the extent that is required for perfect benefit of land, in fact, in terms of the amount of space around the property that no loss will be incurred. Focusing on the definitions of jurists and jurisprudents, one can realize that, in some of the above definitions, the full utilization of the property through his/her domination on territory is the center of definition. Given that the legislature has not been followed the same approach in different rules, the amount of territory appears to be ambiguous (Safayi, 2010). Now, the question is that, on what criteria it can be identified and what is the proper authority that can determine the size of the required area to ensure the perfect benefit of owner.

2.3.1. The amount of territory in jurisprudence

In some cases, the territories had been specified in tradition. For example, Holy Prophet once said that: "if you encountered with a territory issue in the paths, consider it seven cubits" and Imam Sadiq (the sixth Imam in Islam) has said that, the territories of both a conventional well and a mosque are 40 cubits from each side (Mohaghegh Damad, 2002). However, according to the scholars, these are true if they are located in wastelands while, nowadays, real estates, especially houses and shops are very close together and thus, there is no territory and one can occupy only his/her property.

2.3.2. The amount of territory in law

Although territory has specific function in laws, but lawmakers did not follow the same approach in different laws and legal nature of territory is vague. For example, civil code, despite taking loss into account, emphasizes on well-known covenants and determined measures (Mohaghegh Damad, 2002). It is prescribed in article 137 of the civil code that, the territories of wells are 20 and 30 paces for drinking and agriculture, respectively. Moreover, article 138 specifies that, territories of kanats (subterranean canals) and fountains are 500 and 250 paces for soft and hard soils, respectively. However, if the mentioned measures in these articles will not be sufficient to prevent the loss, the required size to prevent loss will be added. In these articles, it seems that the lawmaker has followed the well-known covenants but if we look more accurately, we will find that, the civil code has set the loss as the basis of territory and this issue has created a conflict, because the 138 and 139 articles have not emphasized on the loss (Taghavi, 2009).

2.3.3. Territory and public law

Lands, real estates, and surrounding areas (territory) are essential for human life. Over the time and growth of the population and inability to produce farming lands, several problems have been emerged, especially in the last sixty years. However, in this

context, solutions such as utilizing the height or underground floors in the construction of buildings have been considered but generally, due to the limitations of farm lands the problem still remains. Due to the increasing needs of the community to farm lands, at first, some profiteers took advantage of wastelands at outskirts of big cities and under the articles of 140 and 142, while preparing the lands, cultivated them and consequently, owned them ((Sarmad, 1968).

Continuing this trend has resulted in exploitation of these lands by certain individuals and others has forced to buy these lands at higher prices. In order to fix the problem and establish justice, order, and security in society, it was arranged that government take control of waste lands.

3. Results

Harim (Territory) means the surrounding of a real estate and according to the experts of Shiite jurisprudence is the area required to gain perfect benefit of the land. Moreover, in this context, Sunni scholars believe that, territory is personal rights and benefits of the things around the land and therefore, benefitting the without permission, is prohibited (Haram). Concerning the definitions of jurisprudents, one can find that, the basis of their definitions is on the rights over the thing around the land and it is called Haram (territory) since it is prohibited to others to take advantage of territory without permission (Taghavi, 2009). However, the Shiite scholars only prohibited the trespassing that are harmful but, some Sunni scholars prohibited any kind of trespassing without permission of the owner. Legally speaking, territory is the amount of the land that owners or their representatives are authorized to benefit without causing harms to the others. There is no consistency between jurists in their definitions of territory (Jaffari, 1993). Some consider the prevention of harm and some consider the perfect benefit as its basis; however, some have intermediate comments. Jurisprudents, in explaining the rule of territory have been referred to Hadiths, rational discussions, and consensus and considered its basis as first, completion of benefit and second, prevention of loss. In addition, they benefitted two types of principle of no harm in territory issue: some explicitly recognize principle as the basis of territory and considered it as a norm in all cases and others have been used this principle in a case-oriented manner. The values listed in the tradition have topicality in terms of well-known covenants and has nothing to do with the presence or absence of loss, although far less than the determined distance no harm incur to the adjacent well, therefore, the lower amounts are not permitted (Kadkhodayi, 2009).

Another group of scholars have set the principle of territory as the basis of principle of no harm and believe that, the determined values usually prevent the loss of two wells or subterranean canals, but if it will found that, burrowing a new well have incurred harm to the previous one (in compliance with specified distance in the tradition), according to the principle of no harm, it can be said that, the second well is not allowed. However, the Sunni scholars usually have commitment to the values specified in tradition and have not considered the loss as the basis of territory. They pass the sentence of indemnity in a few cases if the loss will be large. Defined in article 138 of the civil code, territory is the surrounding area of wells, canals, streams, etc. that is required for perfect profit (Tafakoriyan, 2010). The territory is the area around the properties and trespassing into it can be the start of the loss to the owner. However, Civil Code expressed three provisions for territory. Article 137 stipulates that, "the territories of the wells are 20 paces for drinking water and 30 paces for agriculture. Article 138 stipules that, "the territories of fountain and subterranean canals from each side are 500 paces for soft soil and 250 paces for hard soil, but if earlier mentioned values in this article and the article before will not be enough to prevent the loss, the required extra distance will be added." Although, from the provisions of the above rules, it appears that, the legislator has determined values for territory and did not considered the loss, but from article 139, one can conclude that, the main basis of territory in civil code is the loss (Sarmad, 1968). Explaining the territory, article 139 of the civil code describes that, "territory is as the property of land owner trespassing in what is considered as territory is prohibited without permission and therefore, no one can burrow new well or canals in the vicinity, but harmless occupations are permitted.

4. Discussions

Due to the relatively detailed discussions about the nature of territory and its principles and documentations in the Islamic jurisprudence and Iranian laws, it seems that, following suggestions are effective in explanation of territory and compliance with it.

- Respecting the territories of properties with or without considering the loss is a rational and identified rule that respected in all legal systems and human societies for a long time. Therefore, it is suggested to leave the determination of the territories to the formal experts, since, nowadays, the values specified in tradition and Islamic jurisprudence have no topicality and can be changed according to the circumstances.

- Concerning the theoretical explanation of the nature of the territory, we must accept territory as a right, since, due to several reasons that mentioned in the study, territory is not the property of the owner. In this context, it seems that, the legislature, via passing the necessary legislations and concerning the nature of territory as right, must create the required ground for all members of society to take advantages of the benefits of territory in a legal manner. In addition, the population, in most countries, such as Iran, is centralized in the big cities that need development of well-defined rules about territory.

- Although, most of discussions of former jurists and jurisprudents were on the subterranean canals (Kanats) and wastelands, but concerning the new emerging paradigms, many of the modern properties and real estates, require their own specific types of properties. Therefore, it is suggested to develop the required legislations in accordant sections of the government and respective ministries of the executive branch and presenting them to the parliament to be approved. Benefiting the comments of qualified jurists and jurisprudents will prevent the future conflicts.

- Given that, according to the code, the minimum territory of rivers is one meter, it seems that it does not provide the perfect benefit and necessary protection. Since, one meter not only restricts the lands but also, it is not enough to protect the passage of the needed equipment. Therefore, it is suggested that, using the results of this study, concentration time, morphology, vegetation, and economic, social and environmental conditions, will be considered in determination of the extent of territory. Thus, the maximum use of the lands in the territory will be possible to fulfill perfect benefit of the passage and optimum protection. In addition, the damages of possible river flooding will be reduced.

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