

Juridical and legal study of the right to borders of properties in Iran

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Abstract: Necessity of forging the law and enforcing it in all societies is a clear issue, since if a society faces legal gap and shortcoming, chaos and anarchy would be dominated on the society. If statute is relied on will of the legislator and its executors are righteous people, the domain for annoyance and conflicts would be destroyed totally or would be minimized. Necessity of considering relevant issues can't be denied. One of the overtaken issues in human life is the borders of properties. Shiite and Sunni jurisprudence has encompassed valuable discussions on all overtaken subjects. Scholars and jurists in two mentioned religions have tried to gain sentences for different subjects from verses and narratives. The present study is attempting to investigate the borders of properties in juridical and legal terms in Shiite and Sunni religions. A lot of questions are existed in regard with the borders of properties like nature of the borders, rate, elements and perspectives of juridical religions, which have been investigated in this study.

Key words: Right to borders of properties; Law forging; Statutes

1. Introduction

One of the main challenges in domain of authorities and ownerships of entities is possibility and rate of effect of their will on right to borders of properties. In fact, border (border) refers to surrounding area of something, which is needed for the owner of the object for perfect benefiting. The subject of borders has been presented in juridical books following the subject of cultivation of waste lands and in words means prohibited or banned. However, jurists and lawyers have defined the borders as follows: border of everything refers to the value that is required for taking benefit of the object. In Civil Code of Islamic Republic of Iran, articles 136-139 have considered the borders and have discussed in this regard. Subject of borders is one of the sentences that have been confirmed with the emergence of Islam and the sentences have been signed by holly legislator of Islam with slight changes. However, scholars have documented some principles to confirm its legitimacy including narratives on borders, principle of No harm, consensus and manner of reason (Taheri, 1996).

However, current conditions of life have intensified necessity of the borders, since economic, social and political activities in different domains have intensified conflicts and annoyance of benefits in competition domains. Under such conditions, the legislator attempts to approve just and pervasive rules, so that enforcing them can prevent such disputes and conflicts or minimize them. All legislators around the world attempt to forge laws adjusted with needs of the society and achieve logical solution. Hence, currently different countries

are trying to issue just laws to provide the domain for activity in different fields and to minimize the disputes (Katuzian, 1995).

On the other hand, exploration in long-standing juridical subjects that have achieved to the current age after passing many centuries of social life can be considered a necessity for dynamic jurisprudence. Without a review, jurisprudence would be stopped and times would pass over it. The secret for considering jurisprudence (Ijtihad) in Islam is preventing underdevelopment of Sharia orders. Accordingly, changed subjects in the jurisprudence and especially in part of properties have been related to borders subject, which has long-lasting background and wide application. Previously, borders used to be applied only for borders of properties and some examples and measures used to be presented for it in jurisprudence (Fadayi and Amini, 2006).

Therefore, evolutions of human life have indicated that traditional borders of properties and certain quantities should not be applied so much. Regulations, canons and different rules in different executive sectors of the country, except for Civil Code, have exceeded limit of traditional borders of properties. Civil Code has been also accused to inefficiency and defect by many jurists, since it has been loyal to the traditional borders of properties. Hence, one can consider borders of properties from different dimensions; although the most important issue is basis and nature of borders. This is because; through gaining basis and nature of borders, one can easily make decision in regard with the mentioned issue. Hence, the present study has investigated right to borders of properties in Iran in juridical and legal terms.

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2. Concept of borders in view of jurists

The main objective by forging and canonization of borders for owner of the property is preventing damage of the owner. If a property is created, but its owner has not right to use surrounding area, the principle of ownership would be destroyed. In order to prevent violation of right of owner, the Almighty God has canonized right to use surrounding area to the extent needed. Here the question raised is that whether the border is itself property or has only right to use it? Hence, concept of borders has been investigated in this study in view of jurists, Shiite jurisprudence, scientists and Civil Code (Toosi, 1996).

- Border means in fact limiting a quantity of lands around the property, water channel and creek, which are essential for taking absolute benefit and avoiding damage. In terms of the respect that people should consider for right of borders that should not be violated, the term has been known as privacy (Imami, 1989).
- If a person constructs a garden, house, farm or well through cultivating waste lands, certain part of the waste lands near the structure that is required for perfect benefiting would become its border.
- Border refers to a quantity of surrounding areas, which is required for survival of cultivated space in waste lands. Determining the area and its borders can be done by exerts or based on common recognition.
- A quantity of area around the well and spring, which other one can't build well or water channel in it
- Border refers to the quantity of land that owner of well or owner of a house can stand there and extract water from the wells
- One of the objective rights that can be considered as a kind of right of easement is right of borders of properties

3. Borders in Iran Civil Code

Legislator determines some laws for purpose of regulating social relations and determining limits and rights of legal and real entities and for purpose of preventing violation of others' rights; observing public interests; and also public health issues and in general preventing loss resulted from illegal possessions of people. People don't live lonely and far from others and the societies of people are based on common life and every society has specified regulations. In regard with right of borders, legislator has determined border through studying relevant subjects of surrounding areas of houses, roads, streets and alleys. Border refers to acceptance of a banned zone that is a part of a property and is under ownership of the owner (Imam Khomeini).

Observing conditions of the banned zone, which is known as border, means lack of violating the regulations of the banned zone by other entities. Codifying relevant regulations of borders of

properties is naturally mandatory due to technical, social, economic, interests, corruptions and losses and other necessities. The concept of mandatory nature of borders is that the regulations are obligatory and required.

In this regard, one of the scientists of law has stated that mandatory laws are some regulations, in which will of individuals would be ineffective, if it is contrary to the regulations. Content of the regulations is public order and the society or good behavior or protecting entities that are unable to dispose imposed losses on them because of low age, dementia or because of their gender or disability.

One of the legal authors has defined right of borders as follows: certain quantity of a land, which its owners are legally permitted to use the area for purpose of using their rights without causing damage for others.

Authors of the Civil Code have also defined the term borders as follows: border is a part of surrounding lands of water channel and spring, which are mandatory for perfect benefiting.

Hence, one can found from concept of the mentioned article that the principle is existed for perfect benefiting from properties; and that the banned area refers to same lands around the properties and water channels, which are in terms known as "Borders".

There is no doubt that every person, who enters borders of properties of another person to take benefit from properties, water channels and other things, in fact has violated their privacy and such violence can be regarded as a start for imposing damage on the owner of the border of properties.

As it is obvious in study of historical codification of water, it could be found that emergence of agriculture in the ancient civilized societies could cause creation of discussions on borders of well, rivers and canals. Even in Majma Al-Ghavanin of Hammurabi that has been the first comprehensive legal collection, specific regulation on intangible properties can be observed. Importance of agriculture in Iran has made legislators determining specific rules for borders of wells because of presence of water channels and wells since last times (Safaei).

4. Legal nature of borders

Article 136 of Civil Code has defined the border of properties and then has considered existence of the border as a principle for probability of perfect benefiting and other mentioned articles have also considered it as the property for the owner of border. Clearly, under such conditions, all relevant effects of ownership would be accrued. It means that the owner of border has the right to influence the border through two methods of avoiding or proving. In the proving mode, the owner has the right to do anything in his own property and in avoiding mode, he can avoid other people to influence the property and can enforce his absolute right and use also

support of relevant authorities in regard with the mentioned modes (Al-Eyni, 1990).

However, benefiting rate of owner of borders should be to an extent that it can't cause loss for others and article 139 of Civil Code has referred to this issue. This issue is one of the certain principles, in which every owner has the right to use his ownership to an extent that no damage can be imposed on fixed rights of others. Concept of the holly Hadith "No harm in Islam" that is based on denying harming can be a basis for performance of the owner of borders. Hence, the subject of borders is an easement right based on definitions of Civil Code.

However, it could be specified that there is basic difference between right of easement and right of ownership, since ownership is an exclusive, absolute and accomplished right. However, right of borders is a kind of right that has been predicted for perfect benefiting of owner from his properties. The discussion that the border can be created for what kind of lands is the point of disagreement among different legal and juridical scholars. However, jurists and lawyers believe that the right of borders can be created only for waste and uncultivated lands and there is no right of borders for lands of others. The reason for this statement is apparently this issue that the mentioned right is contrary to right of ownership. Naturally, the owner has right to have any kind of influence in his properties. Hence, the owner has the right to influence in adjacent areas of well or spring, provided that the influences are in common level and if the influences cause loss for neighbors, the owner would have no responsibility in this regard. When article 139 of the Civil Code states that the border can be considered as the property of the owner of borders, it has assumed that the border has the capability of ownership and has no ownership and only waste lands have no owner. Same idea has been presented in article 1 of Water channel Act approval of Aug 28 of 1930 as follows:

If a person is owner of a well or water channel in properties of other one or in permissible lands, occupation of the owner of well or the canal is only permitted for relevant operations of the water channel and the owner of the properties can have any kind of occupation and influence in surrounding areas of the well or lands between two wells to borders of well, provided that the occupations cause no harm and damage for the owner of the water channel and the executor.

In this said article, special right of easement has been considered for the owner of well or water canal and the mentioned border in Civil Code has been considered as a barrier against extra occupations of the owner of lands.

5. Reasons for presence of the borders

With the emergence of property and ownership, a subject has been created under the title of border. The subject has been firstly in simple form; although

it has become so important after the development of civil code. Border has an old background, so that different kinds of border have been described in Ancient Greece. In Early Islam and while codifying Islamic Regulations in age of Prophet Mohammad and Imams, the subject of border has been common, so that narrative books have quoted different narratives from Imams about the border. Today, border is being considered among important legal institutions. On the other hand, some reasons have been also mentioned for existence of border in books of jurists, which are described as follows.

Respecting border and this issue that others can't recover it is apparently agreed by contemporary jurists. Most juridical books that have considered recovery as the reason for ownership believe that a condition is not being in the borders. Meftah Ul-kerameh has named some books that believe that the border is a barrier against recovery as follows:

Sharaye, Mokhtasar Al-Nafe, Tazkareh, Tahrir, Ershad, Lamaeh, Dorus and other juridical books of recent jurists, among which Mabsut, Mahzab, Al-jame and Jame Al-Maghased have claimed consensus on it. Masalek, Mafatih and also Riath have claimed disagreement. This issue has been also mentioned in Tazkareh.

Jame Al-Maghased has also claimed consensus with the difference that its author has considered consensus as a basis for border and has considered it after composing the narrative. Masalek has also denied the disagreement without referring to common narratives on legitimacy of border.

Moreover, Allameh has stated in Tazkareh that there is no opponent.

It seems that the mentioned consensus can't be selected as an independent reason for reference, since it is documentary consensus. According to the claim of "no disagreement", considering some jurists like Allameh and Shahid Sani, who have acted mostly based on content of narratives on border, and due to the agreement on acting based on content of narratives, consensus can be realized. Such consensus can't be an independent reason in view of fundamentalists; although it can be confirmed. Hence, reliability of consensus is rooted in reliability of common narratives.

6. Principle of no harm

Some jurists state based on narratives that the basis of border and the reason for its prohibition is preventing imposition of damage on the owner of a property that need surrounding lands for purpose of using his own property. If such right is not recognized for the owner, he can't take perfect benefit and if a person occupies a property in a manner that limits use of owner of the property, in fact the person has wasted interests of the owner's property. Based on consensus of all juridical religions, interest is same property. However, only Hanifis disagree with this issue to consider the interest as same property. This is apparently a consensus among Imami jurists and hence, can be

included in the principle of no harm. Accepting the process of the mentioned principle in regard with border, which is accepted by many jurists, can cause deep change in traditional nature of the border. However, the traditional examples of border can be reviewed based on no harm and due to time and space needs. Also, examples of narratives of border can be also investigated on this basis.

Jurists have applied two types of principle of no harm in regard with subject of border as follows:

- A group has considered the principle clearly a basis for the border and believes that it is existed in all examples and cases of the border.
- Another group has applied the principle on case basis.

According to created changes in regard with border, if the basis of border is principle of no harm, many problems would be resolved. This is because; time pass and also social changes have made it hardly possible to adjust numbers and values determined in narratives in some cases; although if the basis for border is the principle of no harm and the determined values have been considered as an example, the principle would be able to be adjusted with the early life and the modern life of today. This is because; here the principle of no harm is dominant, which can be implemented in any time and space.

In regard with the subject of border, some cases that use principle of no harm are related to borders of well and spring, which have been followed by careful and serious discussions. Deployment of fans of the principle following famous jurists, Ibn Joneid Eskafi and his followers, against opponents is one of the most important discussions in field of border.

7. Discussion and conclusion

According to obtained results from the study, it could be mentioned that necessity of preserving civil establishments of the country and taking perfect benefit of them and preventing probable damages have made the legislator to take action in regard with making some regulations in regard with border of the establishments. However, the legislator has canonized the regulations in frame of border, which is a traditional and juridical establishment. In this regard, the legislator has applied traditional rules of the border and has prohibited some occupations of the adjacent owner in border of the properties; although the border can be created only in waste lands in jurisprudence.

Using the term "border" in regulations made for purpose of protecting civil properties in regard with adjacent properties is a virtual use of the word and right of easement is naturally resulted from the order of law. Hence, in every case one should act based on specific order on same case and the mentioned order can't be applied for other cases. According to right of easement, the owner of adjacent properties is not permitted to occupy his own properties. In fact, the border has been considered among those borders that influence of

others in it is prohibited and the article has been derived from Quran and Islamic Jurisprudence. Legislator can make some regulations in order to regulate social relations and determine limits and rights of legal and real entities; to prevent violating others' rights and observe public interests, health and technical issues and to prevent damage resulted from illegal occupations of individuals. From concept of legal articles in regard with border, it could be found that the principle is existed for perfect benefiting that the banned and prohibited region is same surrounding area of properties and water channels, which is known as border. Authorities that legislator has granted in regard with border of properties is to an extent that has considered the border as property of the owner of order and possessing it without permission of the owner is not legal action. Hence, one can't construct another spring or water channel in these lands; although those occupations that cause no harm for the owner of border are permitted. Accordingly, it could be found that the border is applied for purpose of completing the benefit and gaining interest and removing losses, whether the loss is actual or potential.

Border of properties is one of the most important issues in the current life of human. Border can be imagined when a property is existed and there are some uncultivated lands around it and also there is a link between them.

Social life is related to relations and considerations among individuals, who need making rules and regulations. In addition, interest of the society is depended on observing these regulations, since this can avoid making mistake and making chaos and using personal power by individuals.

Moreover, through considering commonalities of different juristic subjects and reservations on coordinates can result in peaceful coexistence of followers of both religions. Two perspectives have been existed in regard with border since last times. Some people consider it as property and others consider it as a right.

Accordingly, right of easement is one of the effects of ownership, in which consequential ownership and fruits of the property are resulted from an action or the owner is considered as owner of borders as a result of same property. Also, the view and the resulted products from the land should also follow the mentioned provisions and regulations.

According to article 139 of Civil Code: "Borders are governed by the provisions applicable to the property of the owner of the borders and any occupation or use of them which is contrary to the purpose of the borders is invalid without permission from the owner; and therefore nobody can dig a well or water channel (qanat) within the borders of another spring or channel. But activities which do not cause loss are permissible." This is because; this can cause violation of previous fixed rights.

For this purpose, it could be mentioned that the right of borders is a kind of easement with the

difference that it can be created for waste and permitted lands. However, because of recovery of lands in European properties, the border has been predicted only in adjacent properties; although it has been considered also for cultivated lands as an exception in Iran Water Channel Act approval of 1930.

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