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# AN OVERVIEW OF THE PRECEDENCE RULE (SABAQ) IN IRANIAN LAW

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## *ABSTRACT*

*The axiom has been introduced in jurisprudence as a means of superiority in taking advantage of things and public and permissible places. The axiom conveys the idea that should anyone preempt others in taking advantage of primarily or commonly permitted rights s/he would be more deserving in respect to the others who cannot interfere with his use of them. A glance at the jurisprudential documents of the axiom with the consideration of the general conducts and narratives makes it clear that the legal nature of preemptive right is a unilateral legal act based on intention that is so-called as unilateral act of valid consequences. The Shiite and Sunni jurisprudents grant this right to a precedent person and it is apparently not amongst the canonical installations rather it is something more of an intellectual nature that has even existed before canonization that has not only rejected and denied it but it has also endorsed it. So, it can be stated that of jurisprudents claim that they have reached consensus over this idea, it should not be considered as canonical rules rather it is a general agreement reached by them by virtue of intellect. A person who sits in a bazar with no intention for earning money has no preemptive right. The court acts based on the appearance of the things in regard of the disputes and disagreements on the existence of the enjoyment right. The evidences and judicial circumstances are here intended by appearance. For example, an individual's sitting in a public bazar while having certain objects in the hand apparently implies the enjoyment intention for earning money and sitting in the mosque apparently signifies the enjoyment intention for the prayers.*

***Keywords***: *Preemptive Right, Partnership in Preemption, Primary Permitted Rights, General Commonalities*

## INTRODUCTION

The axiom is amongst the verified regulations that have been posited in the tradition and the jurisprudents have narrated it using various terms. Although the axiom has been used by Imamiyyeh jurisprudents from long ago, it has been the base of various arguments in jurisprudence, including acquisition of permitted rights, mosque verdicts and business rules as well as in books on waste land reclamation and its belongings such as laying hedgerows. But, it is not independently discussed. His Highness Ayatollah Makarem Shirazi can be said to possibly be the first person who has dealt with it. The present article tries substantiating the preemptive right following which the subject is delimited and answers to the raised questions will be found and, finally, some examples will be provided thereof. In summary, the axiom bears the idea that should anyone overtake others in using primary permitted rights or public places such as roads, mosques and general endowments, s/he would have a superior right over them as long as s/he has not withdrawn from the right or in case that s/he has not abandon them for a long period of time and nobody can interfere with his taking advantage of them.

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Preemption axiom features a subject and a verdict. By subject of the axiom, the entire things that should be existent for the verdict of preemptive right to be actualized are intended. The very preemptive right is meant by verdict and predicate. Preemption means being more superior in enjoying a thing. In sum, preemption axiom is a source for a legal order in regard of enjoying the public utilities.

### 1. Conceptualization of the Axiom:

Preemption literally means precedence and overtaking. In jurisprudential terms, it means justifying the enjoyment of a right via surpassing with no intention of ownership and/or excelling others in taking advantage of public utilities such as roads, mosques and public endowments in which case the precedent person is deemed more superior in exploiting the thing or place and the others are not allowed to make any interference in his using of the thing because the precedent individual's preemption causes the creation of a certain right to him or her and the others have no right to prevent him from taking advantage thereof. Of course, such an act of preemption should be with no ownership intention (Mohaqqeq Damad, 2006, 286, 1).

### 2. Documents and Proofs of the Axiom's Justification:

Reference will be made to the Holy Quran, tradition and consensus and the intellectual ways of conduct for proving the axiom.

#### 2.1. Holy Quran:

As it is ordered in the Holy Quran addressing His Highness Ebrahim (PBUH): meaning that "shout out amongst the people for the fulfilment of Haj so that the pilgrims come to you from any distant places on foot or riding on the back of any thin camel". The term "ضَامِرٍ" in the AYA means any weak and thin animal that can be ridden. Therefore, the expression should be interpreted as meaning that the limited days of life are rehearsal and training days for the otherworld's match and pioneering in reaching the ranks of divine mercy (dictionary of holy Quran, 2004, 223, 3, 220).

"Al-Sabaq"

"wa Qadan Al-Sabaq"

The first possible interpretation that is more robust is that:

Morphological structure: singular and male, infinitive and concrete, infinitive in standard form of "Mofa'eleh" and rhyming with "Fa'aal" (Sabaqa, Yosabaqa, Mosabeqa/Sabaq) meaning racing, overtaking and preemption

#### 2.2. Tradition:

##### 1) Narration of Talhat Ibn Zaid:

Muhammad Ibn Yahya quotes Ahmad Ibn Muhammad Ibn Isa narrating Muhammad Ibn Yahya quoting Yahya and Talhat Ibn Zaid who has heard Abi Abdullah that Amir Al-Mo'menin has ordered that "Muslims' bazar is like their mosque and he who preempts others in a place of the bazar is envisioned more superior than the others to that place and that nobody can occupy the houses in bazar with renting intention.

The narrative's implication in the justification of the right of a precedent individual is well-clear. Firstly, we deal with documentary discussion. Some individuals have doubted the authenticity of Talhat Ibn Zaid because he was an

uneducated person and an explicit authentication of him does not exist but there are ways mentioned for his authentication:

1- Mohaqqeq Khou'ei orders that Talheh's name has been mentioned in substantiated Kamel Al-Ziarat so he is to be considered as generally authenticated. Criticism: Mohaqqeq Kho'ei, as known to everyone, withdrew from the general solution of Kamel Al-Ziarat during the ending years of his life.
2- Mohaqqeq Khou'ei has ordered that it is stated in Rijal books and the issue has also been customarily confirmed; however, the author of the book is reliable and a book can be trusted by the reliability of the author or in other ways which are not so much common such as when a book is presented to an Imam (PBUH) or his assistors and they have confirmed it. So, the customary appearance of the expression lies in the idea that the owner of the book is reliable.
3- However, he is quoted in the following words: Safvan, Othman Ibn Isa and Abdullah Ibn Moqaireh are all fellows of consensus and the first is also a reliable sheikh.
4- It can be stated that it is the narration is highly likely to be the same narrative mentioned in the book and trusted by the assistors. Of course, it has to be considered as a supportive not substantiating narration because Talheh might have had another book.
5- Mr. Sobhani has also ordered that Talhat Ibn Zaid has also been mentioned in the book "interpretation scholars" by Ali Ibn Ebrahim (Kolaini, 1986, 662, 8).

### *Implicative Discussions:*

The narrative's implication has been criticized from several aspects.

The narrative is specific in two respects: firstly, it is only about bazar and mosque and, secondly, if the characteristics of bazar and mosque can be generalized to other things, the narrative is still specific to certain places.

"En Qolt": It is true that the narrative is about bazar and mosque but it is clearly evident that it is not specific because Imam (PBUH) orders beneath the narrative in general that "should anyone preempt others in using a place, s/he is more deserving than the others. Hence, it can be stated that the case is unspecific where the expression of the narrative is a general "Fa'a" major premise that is presented to provide proofs. But, in "Ma Nahno Fih", because the expression has been accessorily pinned to the subject "Man Sabaq Ela Makan Fa Howa Ahaq Beh", it has to be seen as a sentence not substantiation for the subject it introduces in which case the narrative means "the Muslims' bazar is like their mosque so if someone takes a position before the other, s/he will be more superior to making use thereof" (Khou'ei, 1989, 26, 2).

Muslims' bazar is like their mosque because or and the second expression (if one is not ordered) cannot play a substantiation role and the major premise (preempting others, one is more superior to the use of a place) is incomparable.

That is because there is made use of an ancillary word, i.e. Fa'a, in lieu of "because" and "and" (Sabzevari, 2015, 235, 7).

**2) *Narration by Asmar Ibn Mozres:***

The general issues have been narrated in Baihaghi's traditions as follows: Asmar Ibn Mozres said that he has referred to the great apostle and expressed allegiance to him and his highness said that should anyone reach something that has not been reached before that by any Muslim s/he can possess that thing.

Document Investigation:

Although the narrative has been mentioned by general ways, it has been exercised by the assistors hence the document weakness is compensated.

Examining the Narrative's Implication:

In terms of generality, the narrative is well-inclusive and it incorporates both spatial and other things but someone may say that the narrative bears possessory enjoyment of a thing and it does not proves the right to temporarily enjoy a thing but the fellows of decree have not given the possessory pronoun "Lah" a specific apparent meaning thus the narrative cannot be specific to the assistors unless it is said that preemption in possessing a thing is intended in which case acquisition of something is discerned from the narrative and this is not anymore specific to the assistors (Kolaini, 1986, 155, 8).

**3) *Narration by Ibn Abi Jomhour:***

"Should anyone get to something that has not been reached before that by any Muslim, s/he is more deserving thereof". Ibn Abi Jomhour directly quotes the prophet that: "the prophet ordered that some have said that a great many of our jurisprudents like Sheikh, in Mabsout, and Ibn Borraj, in Mohzab, and Allameh, in Montaha and Tazkarah, and Fakhr Al-Mohaqqeqin, in Izah, have based their reasoning on this narrative thus a narrative's being well-known makes up for its inherent weakness. But, the fame cannot be concluded solely for the narrative's being used by four of the scholars. In terms of its implication, the narration is total (Sabzevari, 2014, 208, 6).

**4) *Narration by Ibn Abi 'Amir:***

Ali Ibn Ebrahim quotes his father who has heard Ibn Abi 'Amir narrating some of our assistors quoting Abi Abdullah (PBUH) that "Muslims' bazar is like their mosque". It means that should anyone preempt others in taking a position therein, that place is like a mosque for him.

The narrative is also free of flaw in terms of document because the narrations mentioned by Ibn Abi 'Amir are all considered as substantiated but if this Rijali axiom is to be rejected, the Rijali axioms proposed by reliable sheikhs and fellows of consensus can be used.

It is the word of the narrator quoting Imam (PBUH) … "meaning" flaw: it is apparently not the expression and it causes the invalidation of its following expression "meaning that" it cannot be stated that the expression always holds true because Tarta might be the same narrator who directly quotes Imam (PBUH) or another person such as the author of Wasa'el. It means that he might have narrated the word. It can be stated that he has had certain evidence

"meaning that" if he is a direct narrator he has had such a perception of the expression meaning that his conjecturing of the narrative is closer to what he has felt and this can be a proof for us. But, the problem is that we do not know if the expression is presented by a direct or indirect narrator (Baihaghi, 1998, 151, 6).

5) *Narration by Asbaq Ibn Nabateh:*

It has been generally narrated from Asbaq Ibnn Nabateh that "his highness Ali (PBUH) went to the bazar one day and saw that they have built stores in there. His highness ordered to destroy and level them to the ground and said this is Muslims' bazar so his highness ordered to destroy the stores. Then, his highness ordered that should anyone preempt overtake others in using a place, it belongs to him or her and said that this was the way we did business. A person would transact one day here and another day there".

It is clear that the narration is flawed in terms of document and it is also specific in terms of the claim's implication because it is only pertinent to bazar (Makarem Shirazi, 1991, 141, 2).

6) *The Narration by Abu Harireh:*

Abu Saleh narrates Abi Harireh who has heard the great apostle (may Allah bestow him and his sacred progeny the best of His regards) ordering that if a person rise up from his place and return thereto later on, he will be more deserving thereof. Then, a man got up and returned thereto, Abu Saleh asked me to vacate that place.

The narration is flawed in its substantiation. It is also a specific narration in terms of claim implication and it is specific to place (Baihaghi, 1998, 150, 6).

7) *Narration by Ibn Amr:*

A man should not ask the other man to change his place so as to take his place.

Nafe'e quotes Ibn Amr who has heard the great apostle (may Allah bestow him and his sacred progeny the best of His regards) ordering that "one should not ask the other to change his place so as to sit there because the precedent person has a preemptive right thereto". First of all, the narration is flawed in substantiation because the document series are rather vague and, secondly, it is specific to place (Makarem Shirazi, 1991, 142, 12).

## *2.3. Consensus:*

Some contemporary scholars have stated that we do not have a jurisprudent who has reached a consensus over "the entire thing one has preempted others in using them" rather reaching a consensus has been claimed over the idea that "should anyone preempt others in using a place in a mosque, s/he is more deserving thereof" and "there is no fault in preempting others in using a place". Saheb Jawaher has ordered that "the person sitting in the mosque is more deserving thereof. So, there is a possibility of consensus actualization and discussing the necessity of it".

Of course, the jurisprudents' consensus does not provide for a specific aspect of the issue meaning that one cannot say that reaching a consensus indicates a special aspect of the issue that has been clear to the precedents and has not been conveyed

to us. The consensus or the narrations are substantiated based on the customs or the intellectuals' ways of conduct.

Note: some say that in case there is a weak proof for proving a problem and there is reached a consensus along with it, the consensus is flawed because it is either perceived or thought to be perceived. So, consensus does not work in such cases. But, no jurisprudent disagrees to consensus over such cases and if a jurisprudent is found disagreeing with a compendium of a sort, he has either envisioned it as a minor premise or totally annulled by ordering that consensus cannot be objectified in that case and not that there is a possibility of summarization and we decree against it rather major premise and/or consensus are criticized in the science of principles and nobody dares to disagree with them in practice.

The other witness to the idea is that Sheikh Ansari accepts consensus as a component of the cause. He states that if there are two weak narrations along with consensus, they can be fruitfully summed up though each of them alone does not fit the canonical verdict and there is still the likelihood of a consensus being reached based on those two weak proofs (Sabzevari, 2014, 212, 6).

Thus, if there are two weak narrations along with consensus, they all grant reliability to a canonical verdict and this is the very probability account posited by Shahid Sadr (may Allah sanctify the honorable soil of his tomb).

### 2.4. Intellectuals' Ways of Conduct:

There is no doubt that the intellectuals hold that should anyone preempt others in using a primarily or commonly permitted thing, s/he is more deserving thereof and, of course, if s/he does not intend owning the thing rather s/he has to only intend making use of it such as taking advantage of mosque and deserts and waterless and waste deserts and mountains and waters and caravansaries and this way of conduct has also been taken for granted by the canonical ruler and it has not been refuted (Baihaghi, 1998, 150, 6).

The point worthy of being noted here is that is this conduct intellectual or canonical? Someone might say what difference does it make? It can be answered by saying that the intellectuals' way of conduct needs endorsement but the canonical conducts need not to be approved.

Question: we know that there is an intellectual way of conduct, now, is it possible to have a canonical way of conduct by what they have canonized? It is quite possible that the intellectuals have founded something that is also founded by the canonical rulers by what they have canonized in such a way that they perform it as a religious teaching not as a customary thing. So, the mere intellectuals' accompaniment of the canonical rulers does not lead to the statement that the canonical way of conduct is the very intellectuals' way of conduct by what they have canonized.

Another noteworthy point is that even if it is the intellectuals' way of conduct, it is to be enumerated amongst the decisive conducts. It can be stated in explanation that each conduct is composed of two predicates: firstly, the foundation has existed at the time of the canonical ruler and, secondly, it has not been rejected by the canonical ruler. Now, the second predicate is sometimes decisive and it can be sometimes relied. If the conduct is frequently applied and it has not been rejected in

any single case, it has to be considered definite. Mohaqqeq Khou'ei interprets it as "Low Kan Laban" but if the conduct is found not so much widely practiced, there would come about an intellectual confidence on its unlikelihood of its rejection and not that it is to be definitely not rejected and such an intellectual confidence is envisioned as a proof. Now, one can say that the conduct is surely useful in the preemptive right thus such a right should not be seen as forged but as a decisive axiom (Jawaher Al-Kalam, 1983, 88, 38).

### 3. *Determination of the Realm of Preemption Axiom in Terms of the Event's Case:*

The relationship between the axioms in terms of case:

Preemption axiom encompasses the reclamation axiom because they both share waste lands and differ in mosque. The preemption axiom also embraces the acquisition axiom because they both share the primarily permitted things and differ in such an item as mosque.

Acquisition axiom and reclamation axiom are aspects of the preemption axiom because they all share unpossessed camels and differ in the acquisition of birds and reclamation of waste lands (Sabzevari, 2014, 6: 119).

Note: Mr. Makarem Shirazi posits two aspects to also make possession axiom include wasteland reclamation:

1) Reclamation is an example of acquisition and the latter means domination and both domination and acquisition of anything is case-specific in which stance the land acquisition depends on its reclamation.
2) Reclamation is not an example of acquisition but it is a precondition thereto meaning that the canonical ruler has conditioned the land ownership, besides on domination and acquisition, on reclamation, as well, and this is well exemplified in jurisprudence. For instance, the canonical ruler considers a sale as possessory if it is not detrimental or usurious. In this second case, the intellectuals' way of conduct has also been limited.

These statements by Mr. Makarem Shirazi are concrete considering the intellectuals' way of conduct constrained by such a condition as reclamation because the intellectuals know the acquisition of a thing is case-specific. Thus, reclamation should be considered as a sub-axiom of acquisition in this case.

The difference between the axiom of fencing with stone and preemption axiom lies in the subject not in the predicate meaning that they both prove priority not possession. However, in the former the subject is fencing the wastelands with stone walls and in the latter overtaking others in using primarily and commonly permitted and public things is the subject (Makarem Shirazi, 1991, 2: 124).

### 4. *Determination of the Axiom's Realm in Terms of Intention:*

There are various statements put forth in regard of the idea that what intention is required for the actualization of preemption right:

1) The actualization of superiority depends on the enjoyment intention.
2) Mr. Sabzevari: there is no reason indicating that the superiority actualization depends on the enjoyment intention (should anyone preempt others in using a thing s/he has dominated over) rather it suffices an individual to have dominated a permitted thing by preemption as a result of which s/he is to be granted superiority

right that is only to be revoked by the individual's refrainment, transgression or abandonment or by intending to take a permanent possession thereof.

"Man Sabaqa" should be expanded to "Man Sabaqa Ela Makan". Someone might say that the expression should be considered as saying "should anyone preempt others in using a place" but this is also incomplete because the exclusions stem from the multiplicity of preemptors not the multiplicity of the uses thus a manifesting exclusion does not hold true. It seems that Mr. Sabzevari is right because his idea conforms to the narratives and conducts and the intention to enjoy has also been stated by jurisprudents but a question may arise as to where is this term rooted? The term is rooted in the idea that the jurisprudents, in distinguishing acquisition of a property a person owns from acquisition of a property the person does not own, hold that a person intending to enjoy a thing cannot possess it but if the person intends to take possession thereof s/he is the possessor thereof. So, the interpretation "intention to enjoy", as used by jurisprudents, serves indicating the opposition to possession intention and it is not that they know the acquisition intention itself as a precondition in possession and the proof to this statement is what has been mentioned by Shahid in Rawzeh:

"A person who does not intend to possess or enjoy, s/he has to be included by the rules and regulations governing the statuses of a precedent person hence lack of possession and justification of superiority is deemed expedient in this case such as the case of an actor.

In this statement, Shahid uses the possession and enjoyment intentions in opposite to not having such intentions and such a contrast shows that he means assignment intention, as well, by enjoyment intention (Sabzevari, 2014, 6: 224).

The question that is raised here is that if we doubt that an individual has had an intention or not, we should pay attention to the appearance of the person and if s/he claimed that s/he has intended so s/he will be accepted because there is no other way for understanding it except by what s/he expresses.

### 5. Should the Superiority Right be Considered Included by Situational or Obligatory Verdicts?

There are three possibilities in regard of the idea that what superiority is preemption followed by:

1) Such a superiority cannot be included by either situational or obligatory verdicts rather it is a mere ethical courtesy meaning that the proofs put forth intend expressing a moral rite and it can be explained as it is good and polite not to interfere a precedent person in his enjoyment of certain interests.

   Criticism: the statement is in opposition to the intellectual conducts, texts and decrees because the proof apparently demonstrates that a jurisprudential verdict follows the preemption.

2) Preemption is accompanied by situational superiority meaning that the effect of preemption is the occurrence of assignment right for a precedent person in such a way that the others' occupation of the preempted place becomes prohibited thus it takes the form of property transaction meaning that the same way that unauthorized occupying of a property is not permitted, residing in the preempted

place without the permission of the owner of preemption right is not allowed such as invalidation of Namaz; however, such a right can be transferred hence it is to be considered as having situational outcomes such as the invalidation of saying prayers (Namaz) in a preempted place or suretyship of a person that provides for the wastage of the enjoyment of this well-known statement (Sabzevari, 2014, 6: 216).

Criticism: surely, the noninterference in one's preemptive right of using a place is intended by these foresaid verbal and oral verdicts. The explanation can be the presumption that the thing is surely a sort of primarily or commonly permitted thing the enjoyment of which is not specific to any person so the assignment of a primary permitted utility to a person entails additional evidence and this is missing from the proofs so the sure idea in regard of the superiority as mentioned in the proofs is the very obligatory not situational impermissibility of interfering with an individual's use of his or her preemptive right (Sabzevari, 2014, 6: 217).

6. *Does Preemption Assist a Condition:*

Partnership does not hold as a condition in preemption rather only the preemption title holds whether the precedent person has preempted by assistance or by means of another person such as when a person sends his servant or when an individual hires another as his vice or lawyer. But, if the preemption occurs not by a person, the preemptive right is no longer justified because the title of preemption does not hold such as when an individual reserves a place for another in the mosque while the other one is not aware thereof (Sabzevari, 2014, 6: 226).

7. *The Period of Superiority-Oriented Preemption: its Occurrence and Persistence*

A person is superior as long as s/he is precedent and his or her superiority is wasted solely by the wastage of his preemptive right whether the person intends returning or not or whether it is wasted by force or voluntarily. Due to the same reason, if the intellectuals and fellows of canon move to a place wherein another person has resided before and left it for good, they will not wait to see if the person intends to return or not. It is stated in some narrations that the God causes the assignment of things by chance unlike the acquisition that has to take place in real terms following which the ownership persists even if the acquisition is wasted and this is commonly exercised. For example, it is termed preemption based on mores. Of course, one should note that the precedence is the reference in determining the verity in case of a person's having gone and reserved a place in the mosque as long as his lectern (Rahl) is left there even if the person is not present there and the wastage of preemptive right is suspended over picking up of the Rahl and leaving the place (Sabzevari, 2014, 6: 247).

8. *The Axiom's Case in Mosques and Honorable Shrines:*

Mosques and holy places are public places. Such types of places have been dedicated to worshipping as specified by the endowers as well as ruled by the undoubted religious teachings practiced by Muslims or, in general, by all of the followers of the religions and all the Muslims are equal in enjoying them unless a prohibited case arises such as when a person is wet, menstruated and during early childbirth period (Makarem Shirazi, 1991, 2: 155).

Based on abovementioned cases, when an individual takes position in a mosque for saying prayer, nobody can interfere with him or her as ruled by preemptive right. The

jurisprudents have generalized this verdict about saying prayers to the other worships based on consensus and credible and frequently practices ways of conduct. Therefore, making use of the mosque for reading the holy Quran, entreaty to God, teaching, preaching and religious lectures, instructing canonical verdicts and other things of the like are all envisaged as legitimate and aligned with the mosque interests. Of course, they are not all of the same rank meaning that saying prayers is the primary purpose and precedes any other use. It seems that there is no difference between saying prayers individually or in group and nobody can prohibit a person from individually saying prayers (Kolaini, 1986, 4: 493).

## 9. Cases and Examples of Preemption Axiom in the Statutory Provisions:

### 9.1. Public Properties and Public Utilities: Tributes

The collective properties of a nation are of two types: some are the properties that are directly and immediately devoted to the use by the general public such as the connective roads, parks and green spaces that are called public utilities. There are some other properties that are more of a private nature and similar to the properties of private individuals. The distinction between these two sets of properties dates back to the Roman laws. In this legal system, the second set of the properties belonged to the emperor (Ja'afari Langaroudi, 2009, 3: 57). In old French laws, as well, there was a group of properties that belonged under the same title to the royal position. The most important of these properties were jungles and rangelands that were transferred after the Great Revolution by the law enacted in 1790 to the general public and they became the properties commonly shared by the entire people. However, the blending of the public utilities and public properties in Iran's civil law has caused the offering of certain scales and criteria for distinguishing these groups of properties: one of these criteria is that whether they can be possessed privately or not.

Nowadays, it can be stated considering the popularization of the country's legal personality that the public properties incorporate the set the belonging of which to the nongovernmental legal persons (government here means country) is not verified and these properties are generally used as described in the following words: the country members assign the government, as the executive representative of the country, to the administration and exploitation of them so that the money earned from these properties can be summed up as a general budget to be used for public services. Secondly, the law texts know these properties belonging to the country's legal personality (Emami, 1997, 1: 132).

With the expansion of the state's governance and the legalization of all the social life areas, ownership as the legal origin of a proprietor's rights and duties indicating the fulfilment and veneration by the others should be documented and laid on a legal foundation. Additionally, based on general expediencies and interests as the sources of the enactment of a great many of the regulations, the legislator can cancel and render ineffective the ownership of individuals over the properties based on some lately approved rules.

Therefore, the general ownership of the country over the forests and pastures (national lands) is both intellectually and legally sourced and it can be stated that

one case that has been explicitly stipulated in the laws pertains to these same jungles and rangelands (Emami, 1997, 1: 135).

Article 1 of the law on nationalization of the jungles, passed in 01/27/1962 is well-expressive in this regard: "since the date this enactment has been made, the sub- and superstructure of all the jungles and rangelands and natural parks and country's forest lands are to be considered as public properties and belonging to the government albeit occupied and before this date by some individuals who might even have acquired ownership deed for them. In the article, the term government necessarily points to the country and the government, meaning the executive branch, cannot be only intended. In more illustrative terms, government is the very legal manifestation of the country (Ansari, 1995, 1: 166).

### *9.2. Various Regulations Regarding Tributes and Public Utilities:*

The executive regulations stipulated after the revolution in enforcing the act 45 of the constitution regarding the national lands are:

1) The law on transferring and reclamation of lands in the Islamic Republic of Iran's system, passed in 1980, by Revolution Council; in paragraph A of article 1 thereof, pastures have been mentioned amongst the intended lands.
2) The aforesaid law's procedure deals with the definition of the natural resources and prescribes the transferring of pastures in certain cases as ruled in articles 31 and 32.
3) The reference law on the identification of wastelands passed in 1986 by the Islamic Consultative Assembly
4) The law on the determination of the status of disputed lands as introduced in the subject of article 56 of the law on protection and exploitation of the jungles and pastures, passed in 09/29/1988 by the Islamic Consultative Assembly
5) The law on appending two notes to article 32 regarding the procedures of a reformatory bill on the law of transferring and reclamation of lands in Islamic Republic of Iran, passed in 11/11/1989
6) The law on separation of the responsibilities of agriculture and agricultural jihad ministries passed on 12/09/1990 by Islamic Consultative Assembly. Based thereon, the entire affairs pertaining to reclamation, expansion and exploitation of natural resources (jungles, pastures, fisheries and watershed management) are assigned to agricultural jihad. This way, the organization of country's jungles and pastures is isolated from ministry of agriculture and joined the agricultural jihad ministry.
7) The law on the formation of a national committee for the mitigation of the effects of natural disasters passed in 1991. This single article emphasizes on the role of agricultural jihad in reclamation of rangelands for fighting the drought. The responsibility of the ancillary committee of rangeland reclamation has also been assigned to this ministry in the specified procedures.
8) The law on the preservation and support of the natural resources and forest reservoirs passed in 10/12/1992 by the Islamic Consultative assembly. Article 2 of the law has replaced article 56 of the law on protection and exploitation of

the jungles and pastures in regard of the position and formalities of national resources identification.

9) The law on the interpretation of the classification and separation of the duties of the agriculture and agricultural jihad ministries passed in 09/11/1993.

10) The amendment of the article 34 of the law on protection and exploitation enacted in 1994 by the national exigency council that has predicted and prescribed the final transferring of the national lands under certain conditions.

### 9.3. Reclamation of Waste Lands:

Wastelands are the areas of land that are not usable due to being abandoned or being turned into canebrake. These lands are owned by anyone who can reclaim them (Shahid-e-Avval, 1996, 5: 167).

Reclamation means revitalization. It commonly means reconstruction. The term Mavat is an infinitive in Arabic and it means spiritless and dead. It commonly refers to the lands that have no owner (Emami, 1997, 1: 130).

In this regard, the civil law expresses the method of taking possession of the wastelands as stated in the following words: the wastelands are the areas of lands that have no specific owner and they are not used for any reason whether be it caused by their being waterless or be it surrounded by water or, in another case, if they are found turned into canebrake, grassland and jungle. In this regard, it makes no difference if these lands have been previously prosperous or not. The wastelands can be owned by reclamation. As it is stipulated in article 141 of the civil law: by land reclamation, the operationalization of the wastelands and permitted lands through performing actions common in land reclamation such as planting trees, construction of buildings and so forth is intended.

### 9.4. Fencing with Stone in Civil Law:

There is no definition offered for fencing with stone in Iran's civil law. It is stipulated in article 142 of civil law that: reclamation begins with fencing with stone, digging wells and so on but these actions do not provide for ownership rather the person doing the fencing of the land is to be given a priority in reclamation. Article 160 of the civil law states that: should anyone dig an aqueduct or a well in his own land or in permitted lands with the intention of taking possession and reaches water extraction stage or find a spring of water, s/he can own the land; in case of the permitted lands, the person's fencing of the land gives him or her priority over the others as long as s/he has not found any water. Some interpreters of the civil law infer the following from the aforementioned articles: the civil law intends that an action should have been done in fencing with stone that is commonly done for commencing land reclamation such as laying foundation of a building or excavating the land for planting trees (Moqniyeh, 2016, 1: 166).

### 9.5. The Position of Enjoyment in Iran's Jurisprudence and Law:

The enjoyment right has been defined in article 40 of civil law as follows: it is the right by way of which an individual can take advantage of a definite land that belongs to another person or has no specific owner.

Thus, as opined by some, the enjoyment right is an objective right and its subject is a definite material object, including movable or immovable. The subject of enjoyment is also a property belonging to another person or no one (Safa'ei, 2007, 240).

"The enjoyment right is a branch and rank of ownership that is transferred to an individual by a contract. In some jurists' ideas, there are two owners of right in regard of the property subject of enjoyment:

- The beneficiary to whom the right to use and enjoy the definite property has been transferred.
- The landlord who owns a land and transfers a large share of his rights to a beneficiary through a contract. The enjoyment right is an objective right and its subject should be something of a material type (Katouziyan, 2005, 208).

According to the definition that is given in article 40 for enjoyment right, it was made clear that the enjoyment right, meanwhile being considered a rank of ownership in respect to the possessor of the right, is limited in proprietary occupation of a certain property in regard of the landlord of a definite property for which an enjoyment right has been specified. The subject of enjoyment right is the property the use of which does not cause the immediate depreciation or destruction of a definite property and the later enjoyment of the property or its persistence are possible.

The definition given in article 40 of civil law for enjoyment right cannot distinguish the contract that causes enjoyment right from the contract of rents because the tenant right can also be included by this definition and it is well clear that the tenant right is not at all equal to the enjoyment right. The tenant possesses the benefits of a property and s/he cannot be given the enjoyment right.

### *9.6. Conditions and Elements of Acquisition of Permitted Lands:*

It was pointed out that the permitted properties can be possessed by acquisition unless it is prohibited by law. Article 146 of civil law expresses that acquisition means occupation and having hands over something via preparing the means of occupation and domination. Therefore, acquisition of the permitted lands differs proportionately with their types. For instance, the acquisition of permitted lands is preconditioned on reclamation and the land should be rendered usable by operations that are commonly exercised by people in reconstruction such as farming, planting trees or constructing buildings. But, the acquisition of the water in the rivers and fish is pendent on the material occupation of them. Or, the acquisition of buried items depends on their discovery and the acquisition of the wild animals depends on hunting them. So, each type of permitted objects is to be acquired by a specific way of occupation and having hands reached thereto (Katouziyan, 2005, 1: 193).

Corresponding to article 147 of the civil law, should any one acquire a permitted property in adherence to the related regulations, s/he will be the possessor thereof. The acquisition of permitted properties like the reclamation of wasteland is a unilateral act of valid consequences and it does not need the expression of will and satisfaction of the acquirer and acquisition is the precondition to the actualization thereof.

### 9.7. Pillars of Acquiring Permitted Properties:

According to the perspective presented in the beginning of the discussion on acquisition and considering the examples and conditions of acquisition of permitted properties mentioned above, two material and spiritual pillars can be presumed for acquisition:

A) Occupation and placing of hands or domination over the property with the possibility of occupation and enjoyment
B) Preparation of the means of occupation and domination

The spiritual pillar of the acquisition is actualized with the possession intention whether be it willed by the occupier or by any other person commissioned to occupation and reclamation (Katouziyan, 2005, 1: 195).

Therefore, besides domination of permitted property, its possession comes about with the intention and attention of the acquirer.

Thus, the following elements should exist for the acquisition of the permitted properties to take place:

1) The external presence of a movable or immovable property (of course, descriptions of reclamation, instead of acquisition, hold for the immovable properties.
2) The property should not be owned. The following objects are considered without owner:
   A) The things that have never been owned like wild animals.
   B) The things that have been abandoned like domestic animals or animals that are kept in cage if they escape and abandoned by the owner.
   C) The property whose ownership right has been repudiated in the course of time hence incorporated by the permitted properties.
   D) Things the acquisition of which has been rendered permissible by the owner such as the coins that are poured on the bride's head in wedding ceremony.
3) Creation of domination over properties or setting the ground for domination and occupation.
4) There is a need for acquisition intention to be existed so the intending to do alone is not enough. Therefore, intending the occupation of a permitted property without the result, i.e. occupation or acquisition, does not suffice (Ja'afari Langarudi, 2009, 5: 162).

### 9.8. Seas, Lakes and Large Rivers:

Seas, lakes and large rivers like Tigris and Euphrates and Oxus are enumerated amongst the public properties and nobody has the right to claim ownership over them. All of the individuals have been allowed to exploit them and no one can prevent them from doing so. Sheikh Tusi has accepted absence of opposing claim in this regard.

Ibn Abbas quotes the great apostle (may Allah bestow him and his sacred progeny the best of His regards) ordering that "people share three things: fire (burnable materials), water and pastures" (Bojnourdi, 1998, 1: 189).

If the water floods and pours in a person's land, s/he cannot own the land. The jurisprudents have decreed that if rain and snow fall into one's land and water piles up therein, or a bird or a deer enters a person's land or a fish jumps into a ship, the owner cannot take possession of them rather anyone intending acquisition and occupying the water or the prey becomes the owner thereof. Sheikh Tusi and Saheb Jawaher have accepted the absence of opposing claim in these regards (Mohaqqeq Damad, 2006, 1: 303).

Since these waters are pervasive and satisfy the needs of the needful individuals in various uses, nobody is superior to the other in taking advantage of them. These waters are not possessed by anyone and everyone is equally authorized to use them.

The majority of the jurisprudents have explicitly stated that water is to be enumerated amongst the public and permitted properties. This is very much similar to the expression cited from the Sheikh in Mabsout. Many jurisprudents have remarked this idea but some of them know water as a type of tribute hence in possession of Imam.

### *9.9. Springs and Ditches:*

The ditches or springs the streams of which naturally flow with no acquisition like the sea and river water are amongst the public and permitted properties. The difference between them and the large rivers is clear. These waters cannot usually satisfy the needs of all the individuals. Therefore, saying that anyone can make use of them as needed would result in problem in practice (Hamiyyati Waqef, 2004, 1:102).

Article 155 of civil law states that: everyone has the right to irrigate lands using the permitted ditches or take tributary branches of them for land or mill as well as for other needs. The foresaid article targets the permitted ditches that are mostly utilized for agricultural irrigation while everyone can take advantage of the entire permitted waters, sea or rainfall or spring. The water can be permissibly exploited as long as it is in the river or sea and it is owned after it is poured into a ditch or pond or a container belonging to a certain person. This is why article 149 of the civil law states that: should anyone with the intention of acquiring permitted waters construct a ditch or conduit, s/he can own the permitted water entering the aforesaid ditch or the conduit and the water cannot be exploited by digging a separate ditch or used for irrigation of a land without the permission of the owner thereof (Musavi Khou'ei, 1989, 2: 150).

As it was mentioned, everybody has been permitted in the civil law to make a separate ditch of a permitted stream of water and irrigate his or her land. In case that some individuals have previously taken tributary streams from a river to irrigate their lands and another person wants to reclaim another land in the vicinity of the foresaid river, based on article 159 of the civil law, s/he can only do this if the river contains a large volume of water and it does not cause meagerness to the precedent owners of the lands otherwise the person is not authorized to make another tributary branch of the river. That is because the preceding owners of lands have preemptive rights for their earlier making of tributary streams and withdrawal of water from the river and this late-coming person cannot interfere with their use

of their rights and the land's being positioned in the upstream side of the river or its being closer to the river does not provide him or her with a superior right. In case that the water of the river increases in certain occasions of the year such as in spring or fall in such a manner that there is left an amount unused and wasted after the irrigation of the precedent lands, the other individuals can make separate tributary streams and take advantage of the wasted water in redundancy occasions and these latter individuals are granted a superiority right over the use of the wasted water and no other person can interfere with their use of the wasted father. This is why a person is granted a privacy right in case of digging wells or aqueducts in wastelands and permitted lands and finds water because, after withdrawing the groundwater, the person gains himself a superiority right over the water no other person can cause deficiency of the water in well or aqueduct by digging new wells or aqueducts and this has been safeguarded based on the law on privacy preservation, articles 136 and 139 (Emami, 1997, 1: 218).

### *9.10. Regulations Pertinent to Water Ownership:*

The regulations so far enacted on the water ownership are:

The civil law: articles 27, 29, 96, 100, 134, 147, 148, 149, 150 and 594 passed in 05/18/1928 along with their amendments and attachments; the law on aqueducts: articles 3 and 4 passed in 09/09/1930

The law on completion of aqueduct regulations: a single article passed in 09/13/1934

The law on authorization of establishing an irrigation foundation, passed in 05/29/1953

The law on the amendment of establishing a foundation for country's irrigation and related affairs, passed in 08/11/1955

The law on establishment of water and electricity ministry, paragraph C, article 1, passed in 03/26/1963

The law on preservation and protection of the country's groundwater resources, passed in 06/01/1966

The law on water and its nationalization method, passed in 07/27/1968

Islamic Republic of Iran's Constitution, passed in 12/11/1969

The law on fair distribution of water, passed in 03/16/1962

The other part of the imperative regulations pertain to the ownership of water resources and they are enacted by the legal authorities of the board of ministers or based on delegation of authority to the government in enacting executive rules to take effect in discussions on water resources ownership. The general policy of these procedures, enactments or the circulars issued by the cabinet substantially follows the imperative rules of the enforcement time and there are not many regulations the procedures of which are enacted beyond the rules inserted in the general body of the law.

1) The procedures of the landed property registration, passed in 1938
2) The procedures of water and electricity organization, Khouzestan Division, 06/11/1960

3) The procedures of discovery and exploitation of country's mineral waters passed in 01/16/1967
4) The executive procedures of water and its nationalization method, passed in 1969 and their amendments in 1970 and 1974
5) The procedures of delimitation of the basin and limit of rivers, ditches, channels and irrigation and drainage networks, passed in 05/08/1973
6) The executive procedures of fair water distribution law passed in 1984, 1986, 1990 and 1993
7) The procedures of demarcation of the basin and limit of the rivers, ditches, water channels and bogs and natural lakes passed in 07/12/1991
8) The procedures of the limits of the water reservoirs and installations and public channels of water direction for irrigation and drainage systems, passed in 07/24/1992
9) The procedures of the note to article 34 of the fair water distribution law passed in 03/15/1993

### *9.11. Mine:*

As for the mines and their inclusion by the tribute law, there is a discrepancy between the jurisprudents. There are three opinions in this regard. The majority of the jurisprudents decree the permissibility of the mines and their lack of being included by the laws on tribute. Of course, some of the individuals expressing the aforesaid notion believe in the inclusion of the mines situated in the unpossessed lands by the tribute law. Some other jurisprudents know mines as tributes in absolute terms and consider all the apparent and internal mines as tributes and properties of Imam. The third idea makes a distinction between the apparent and internal mines. The individuals expressing this latter opinion state that apparent mines are amongst the permitted properties and belong to the general public and the internal mines can be possessed via reclamation and authorization (Kan'ani, 2009, 1: 94).

In some jurists' mind, mines, the government can make laws for the fair distribution of wealth regarding the excavation and exploitation of mines, whether being belonging to Imam or the general public. That is because, assuming their being belonging to Imam, the Islamic government is the deputy of Imam according to the constitution. In case of their being belonging to the general public, the government, representing the people, has the right to make rules for the best way of administrating the affairs related to the mines because the intellectuals' confirmation of the issue is per se regarded as a source of canonization. According to intellectuals, people's free use of mines with no legal permit causes chaos and destruction of mines or possession of them by a few numbers of the people. Thus, the enacted rules imply the natural and preliminary right of the individuals in taking possession of the governments' mines meaning that the mine regulations do not contradict the jurisprudential rules and regulations on land reclamation rather, in cases that the individuals' possession is limited or prohibited, the relationship of this secondary verdicts with the preliminary verdicts becomes of the government and entry type and not of the nullifier and obsolete (Kan'ani, 2009, 1: 95).

According to civil law perspectives, if a mine is found in wasted and permitted lands, it is to be owned by a person who has first had his hands thereon and it is by this virtue that the mines can be considered as permitted lands in some of the cases. But, the enactment of the mine law has alternated the status and none of the mines are enumerated as permitted properties as ruled by the current laws.

Corresponding to the law passed in 28th of May, 1957, the mineral materials are divided into three sets:

The first set includes the minerals that are used in construction and related industries such as gypsum ore and limestone and marble and clay and sand and others of the like.

The second set incorporates the metal minerals like iron, copper and lead as well as solid fuels like coal; mineral water and edible salt and nitrates and phosphates, red soil and sulfur and refractory cotton and granite and others of the like; and, precious stones like diamond and emerald and sapphire and others of the like.

The third set encompasses all the petroleum materials, bitumen, natural gases and radioactive materials like radium, uranium and all of the other cases used for the creation of atomic force.

In compliance with the regulations of the same law, the mines containing the first set of materials belong to the owner of the land wherein they are found but their exploitation should take place by the permission of the general office of mines. The mines situated in the lands having no specific owner belong to the government. Discover and exploitation of the second set of mines is carried out either directly by the government or via licensing other individuals and institutions. The mines of the third set are also in possession of the government and the land wherein a mine is found or the land that is required for the extraction of the ores is sold to the government (article 2 of the same law).

## CONCLUSION:

In summarizing the discussion on preemptive right, it can be stated that it is drawn on the way of conduct practiced by intellectuals and fellows of tradition and it is, of course, endorsed by the canonical ruler and no contradictory proof has been offered, as well. Preemption axiom means that shall any Muslim overtake others in a using a thing of the primarily or commonly permitted properties, like mosque, roads and streets, s/he would be more deserving thereof. Of course, some narrations state that the preemption axiom only pertains to bazar and mosque. Based on the characteristics, the preemptive right can also be generalized to other public properties as ruled by the verdicts and the subject of the axiom and as determined in the mores.

But, the followings were proved in the present article:

1) Preemptive right is wholly a canonical issue and endorsed by the canonical ruler.
2) The assignment suffices the actualization of preemptive right.
3) The preemptive right holds in such cases as primary permitted properties (movable and immovable) as well as the public utilities.
4) Preemptive right is granted based on obligatory not situational considerations.

5) In case of conflict between two individuals in regard of preemption, fairness and justness should be exercised if possible otherwise chance determines which one is to be assigned with the right.
6) Partnership is not considered as a precondition in preemption actualization.
7) Preemption pivots about obligatory superiority in its occurrence and persistence.

The narrations that can be used regarding preemption axiom are typically weak. There are some narrations that have document problems and they are bound and limited and it is stated that "preemption right is to be used for bazar or mosque". If preemption is to be generalized to other things, in terms of enjoyment and in regard of the multiplicity of the narrations based on Shiites' way of conduct and customary ways of conduct, the common thing is preemption in using a public and common place albeit the commonality is envisioned total in respect to some properties and partial in respect to others. The vivid example of preemption takes place in mosque, bazar, street and caravansary.

As for the lands conquered by force that are considered as the properties of the Muslims and in regard of the wastelands and forests that are considered as tributes hence in possession of Imam Zaman (may Allah hasten his honorable reappearance) and according to the prophet who orders "should anyone reconstruct these lands with the permission of the landlord, s/he can own the land", there is raised the question as to whether the verdicts pertinent to the common properties and utilities can be generalized to them or not? The answer is yes. Based on decisive ways of conduct practiced by Muslims, these lands are empty stretches of land and they can be entered and passed through. For instance, in tributes that belong to Imam Zaman, a person can occupy these lands even with no intention to reconstruct them. Thus, according to the axiom of distress and hardship, these empty lands, in case of being impermissible for occupation, should be joined to the public and common properties.

So, should any one acquire a thing of the permitted properties or reclaimed a wasteland, s/he can own it without him or her being required to express possession intention. Corresponding to the second approach, to wit the non-originality of the acquirer, partnership in acquisition is not a precondition therefore it is believed that the acquisition of the permitted properties is amongst the legal actions and, based on the genera legal principles, the aforesaid actions can be done through a vice or deputy hence the acquisition of the permitted properties can be performed by an appointed deputy. Thus, the third hypothesis indicating that "according to the fact that acquisition is a voluntary (legal) action and a function of intention, it can be done through a vice" is resultantly confirmed. Thus, although the subject of preemption is sometimes unified with the subjects of acquisition, reclamation and fencing, such as when a person overtakes others in using a permitted property or a wasteland, the sole preemption does not suffice ownership and the acquisition or reclamation do not hold as long as the person has not intended ownership (in acquisition of permitted properties) or reclamation (in acquisition of wastelands). Also, it should not be envisaged as fencing with stone as long as stone walls are not laid with the intention of setting the ground for reclamation. According to the idea that everyone has the right to take advantage of primary permitted things, a person is proved of his or her enjoyment right in case that s/he is found preempting others with only enjoyment intention.

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