Instruments of Right of Choice

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Abstract

The «right of priority» or «right of allocation» is among acquired rights created for a person due to taking the lead by the person in «commonalities and public property». By virtue of this right, in temporary use of the mentioned matters the person takes antecedence and priority over others such that others are not permitted to intrude in his or her right before his or her agreement and permission. The reason for legitimacy of the right of priority and allocation is mainly Islamic exemplum and in some cases tradition of the wise and Muslim Jurisdiction and at times by consensus. In theological books it has been said: «the instruments of the right of priority and allocation are: «precedence, marking the land, reviving the inanimate, lawful possession and authorization». In other words, each of the mentioned cases by itself leads to arising of the right to take antecedence over others in taking advantage of a series of permissible matters (such as commonalities, public property and public permissions). Yet, we see that a common element exists in all these cases which are « time precedence» and generalizing of prophetic saying (greetings to him and his family):
Therefore precedence includes all the mentioned cases.

Keywords: Right of Allocation, Right of Priority, Instrument of Allocation, Instrument of Priority.
Introduction

«Right of priority» is the same as «right of allocation». The reason is that in a number of theological books, the two words «priority» and «allocation» are reflected on each other and are apparently synonyms. In some theological sources, it has been said that: «the instruments of the right of priority and allocation are: precedence, marking the land, reviving the inanimate, lawful possession and authorization». In other words, each of the mentioned cases lead to creation of the right of precedence of the individual with respect to others in taking advantage of a series of permitted matters (such as commonalities, public property and public permissions). Yet, a common element exists in all these cases which is «time precedence». Therefore, in this paper with evaluation of arguments, we wish to see what exactly leads to arising of the right of priority and allocation? Is it «the number of instruments»? (In other words, do all instruments of priority in fact converge to taking precedence and join it?) If it is the number of instruments (diversity), it is religiously limited and the verdict on such instruments as expressed in sayings cannot be transferred to other instants. Yet, if unification is the cause we can transfer the principle of precedence namely «importance of arising of the right of priority for the precedence taker» to «precedence in any permitted matter». (Hopefully, in this paper, we will investigate this issue)

Definition of individual terms under discussion:

1- Instruments:
Instruments the plural of instrument means cord in the Persian language or what one pulls him or herself up with its use. Next, this word is used as a synonym for anything that is used to make

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1 A group of researcher guided by Shahroudi, Seyed Mahmoud Hashemi, Encyclopedia of Theology of the Followers (greetings to them), 3 covers, Institute of Islamic Theology Encyclopedia on the Religion of the Followers (greetings to them), Ghom-Iran, 1st, 2004, cover 3, p331.
2 In a number of theological books, the two words of «priority» and «allocation» are reflected upon each other and are apparently synonyms; such as: Khansari, Seyed Ahmad Ebn Usef, Jame Almadarek fi Sharhe Mokhtasr Alnaf, 7 covers, Ismailian Institute, Ghom-Iran, second, 1983, cover 5, p 233
an achievement in affairs. In the book Alein, it has been mentioned that: «Instrument: Chord or Rope» and in the book Mesbah Almonir, it has been stated that:

For the word «instrument» multiple expresional meanings exists:

«Instrument or cause» in theoretical sciences means anything other than God the glorious- that is the reason for existence of something (yet, God the glorious is not called an instrument because he is the provider of all instruments). Instrument in the expression of the science of theory has another meaning:

In other words, instrument in theological science means: what the lack of, necessitates lack and its existence, existence. Some Shafeiyeh at times have neglectfully referred to it as a criterion.

In another expresional definition for instrument, it has been said: any adjective or power in existence that leads to another adjective:

The difference between «instrument» and «cause» is that: a verdict is proven without a mediator by cause (yet, in instrument it is not so). Hence, they are different also in that at times its rule or verdict succeeds it and at times it deviates from it, while delay or violation (in rule) in cause is not imaginable.9

Considering the difference mentioned between «instrument» and «cause», when we speak of «instruments of the right of priority» or «instrument» of priority, we mean matters that by virtue of the rule of the lawyer or wise judgment proves «priority» for the person.

Therefore, the mentioned priority is not without mediation, forcible and inviolable. Instead, it is mediated by the stance of the lawyer or wise judgment, such that the holy religion or wise had not placed the matter reason for arising of the right of priority. It was not such that «the right of priority» automatically and forcibly follows as a consequence of these affairs. These matters are not the cause of arising of the priority, but just an instrument for it.

2- Right

The term right lexically means «necessity», «proof» and «negation of the void»:

Regarding the expresional meaning of «right» and also its distinction from «rule» and «ownership» in the words of theologians, numerous discussions and various opinions have been proposed. Yet, overall it can be stated that: right in theological expression has been used as «sovereignty». This meaning is also used in the honorable verse

The reason is that the meaning of sovereignty in this honorable verse is the right that the guardian of the people implements in vindication of nemesis from the murderer or «acquisition of blood money» from him or her. In civil law also, right has the same meaning. For example when it is said «the right of choice», it refers to the sovereignty that the rightful obtains in

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4 Farahidi, Khalil Ebn Ahmad, Ketab Alein, 8 covers, Hejrat Publications, Ghom-Iran, second, 1988, cover 7, p 203.

9 Mahmoud Abdolrahman, Mojem Almostalehat va Alalfaz Alfeghieh, 3 covers, , cover 2, p 537.
termination of the transaction and also when it is stated that «right of survivorship», «right of inheritance», «right of alimony» and etc, it is referred to the sovereignty acquired by the rightful due to participation, inheritance, marriage and the like. Therefore, the expressional meaning of right in all cases is the same as «sovereignty».

The expressional meaning of right (namely sovereignty) can be divided into two groups general and specific:

In its general meaning, right is «special dominance or ability of someone or some people relative to a person or thing standing or credible and by virtue of this ability, the owner of the right can acquire possession or take advantage of it». Therefore, right is a kind of sovereignty and a person’s hegemony over something else, whether it wants to be wealth or objects or a human. In this general meaning, right includes possession and both are in fact the same. Yet, right is at a lower level than possession. In other words, possession is a graded concept and has levels, where its lowest level is rights. In contemporary law, based on this general meaning of right, it has been divided into objective and religious right.

Right in its specific meaning refers to «particular ability for performance of an act sometimes absolute, at times by contract and at times as a possession of an individual, such as the right of fencing, right of choice and right of vindication».

By virtue of this definition (the specific meaning of right) although the topic of right in various cases is one of three instances: the guardian owning the right at all situations, an action that belongs to one of them, and for this reason is clearly different from possession. The reason is that possession is take over and sovereignty over the absolute or benefits. For example, the owner of the right of fencing has the right to revive the fenced land to own it, or the owner of right of choice has the right to annul the discretionary contract. Yet, when it comes to possession, it is not so. Instead, the owner has complete and absolute sovereignty over the possession (and this ownership pertains to absolute and benefits and not just the action of the owner on them).

3- Priority:
Difference does not exist between the lexical and expressional meaning of «priority» and overall, having priority in something means being more deserving of it compared to someone else. In the Alein dictionary it has been stated that:

Translation: having priority to something means being more deserving of it compared to someone else. Also, in Majma AlBahrain it has been stated that:

15 Yazdi, Seyed Mostafa Mohaghegh Damad, Ghavaed Fegh, 4 covers, Humanities Sciences Center Publication, Tehran-Iran, cover 12, 1984, cover 1, p 17-18.
Translation: (According to Fakhreddin Tarihi) the meaning by exalted God from this verse is most prioritized people to Abraham (greetings to him) namely the most deserving and closest of them to him. The reason is that the word «priority» used in this verse is taken from «friend» meaning «closeness».

Priority has been defined as being better, knowledge and precedence, qualification and importance and the like, where these priorities are sometimes acquired and sometimes not acquired.

Acquired priority means one that results from the individuals’ efforts not genetic or legal. The kinds of «right of allocation» mentioned are: a right that is created with instruments such as «priority», «life», «fencing» and «reviving uncultivated land» and the like. (More precisely—which is acceptable by the author- the source of acquired right of priority and the single cause for it, is precedence in performance of an affair such as lawful possession, fencing, reviving uncultivated land and the like) the most important one being rational methodology.

Non acquisitive priority: This priority results from legal or genetic rule such as right of discretion, right of survivorship, mother’s guardianship in breastfeeding, right of kind, right of guardianship over the dead and … Non acquisitive rights resulting from law and rule of religion and set by the holy religion can in fact be called a rule and not a right.

As mentioned above, the word «priority» is not expressed by itself. Yes, the «right of priority» is a special theological and legal expression which will be defined later.

4- Allocation:
In Lesan Al Arab «allocation» is defined as:
Which means when something is related to a specific person and not others, it is said that the person is specific to that matter and it is in his or her specialty.

The word «allocation» is not expressed by itself. Yes, the «right to allocation» is a special theological and legal expression that will be mentioned below.

5- Definition of right of priority or allocation:
«Right of priority» or «right of allocation» in theological and legal expression refers to a constant right for a person to something by virtue of a belonging other than possession between him or her and the thing. This right is among acquired rights.
The theological rule of the right of priority and allocation is that the owner of such right in use of the object of right is the most deserving. Therefore, in cases of proof of the right of allocation,

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20 Mostafavi, Hassan, Altahghigh fi Kalamat AlQuran Alkarim, 14 covers, Alketab Altarjomeh va Alnashr Center, Tehran-Iran, cover 1, 1980, cover 3, p 66.
21 The reason is that the law of Islamic countries (civil or punitive) is based on the same theological foundation and therefore, theological expressions (such as right to priority and right to allocation and etc) have the same definition for Islamic legal specialists as theologians.
22 A group of researchers guided by Shahroudi, Seyed Mahmoud Hashemi, Encyclopedia of Theology in Accord with Religion of the Followers (greetings to them), cover 3, p 330.
any disturbance or ignoring of the owner of the right and also intrusion in the object of right without the owner’s permission is religiously prohibited.²³

Evaluation of arguments related to the right of priority resulting from precedence:

Among famous principles in the words of theologians is «the principle of precedence» which they have reasoned by in various theological subjects (such as the subject of lawful possessions) and regulations of mosques and manners of trade and in the book of reviving uncultivated land and the accompaniments such as fencing and etc. This principle similar to most theological principles is famous among the wise and the system of their livelihood and living revolves around it and the divine laws by way of ruling conditions for this principle have undersigned it. The result of this principle is that anyone who takes precedence towards something among main permissible- not with the intention to possess it- or does so towards something that is among common interests (such as roads, mosques, public endowments, public residences and etc), then he or she is in brief more deserving of it compared to others and takes priority (in benefiting of it) and it is not permissible to disturb him or her regarding it unless he or she has disclaimed it or such a time interval has passed that his or her right has been annulled.

The reasons for proving right of (resulting from) precedence- in addition to consensus where experts have claimed in their words- are general and specific sayings and induction from wise traditions and theologians.²⁴

The first reason for the right of priority resulting from precedence is Islamic tradition or saying

From tradition, we will mention sayings that some are general and some specific.

General Sayings:
1- Talhe Ebn Zid has quoted Imam Jafar Sadegh (greetings to him) who has quoted leader of the Muslims (Ali) (may God bless him and greetings to him) who has said:
Which means the market of Muslims is like their mosque. Therefore, wherever a person takes precedence, he or she is more deserving until the night to that place and that the majesty (greetings to him) did not get rents for the market booths.
²⁵

The words of the majesty (greetings to him):
Place this saying among general exemplum which absolutely imply that places are favorable. Yes, unless it is said that: this saying ultimately is about the rule in the mosque, where it is among specific sayings and is only specific to the mosque and the market.

²³ the same.
²⁴ Shirazi, Naser Makarem, Alghavaed Alfeghieh, 2 covers, School of Imam Amir Almomenin (greetings to him), Ghom-Iran, cover 3, 1989, cover 2, p 139.
Hence, this saying proves what was standard in those days namely that the market place and shops were not specific and were not possessed by anybody. Therefore, markets were like mosques and other public places were possessions of all Muslims and permitted for them. The standard method was that retailers displayed their merchandise for sale every day until night. They would then pack their commodities and redisplay them the next day. Therefore, each of the retailers had the right of priority to his or her place only until night time.²⁶

2- Exemplum that Mohammad Ebn Esmail has cited from his companions about Imam Jafar Sadegh (greetings to him) which notes: I said to that majesty that we are in Mecca, Medina, Hirah or other places where there is hope for merit. At times a man might leave for ablution and another person takes his or her place. The majesty (greetings to him) has mentioned that: anyone who takes precedence in a location is more deserving towards it that day or night and has priority.²⁷

In this exemplum- like the previous one- the issue is generalization (public) or specificity (privacy) of it; although, public nature is the stronger view.²⁸

3- There is also a narration by Jomhur from Esmer Ebn Mozaras who has said: I presented to the honorable prophet of Islam (may god bless him and his family) and showed my followership. The majesty then said:

That means anyone who takes precedence to something where a Muslim had not been there before, then it is for him or her.²⁹

In Mostadrek Alvasael, Mohades Nouri has narrated the same story of the prophet (may God bless him and his family) as such:

That means that anyone who takes precedence in a matter that a Muslim (previously) has not done so, then he or she is more deserving of it (in other words, has right of priority).

The domain of this story is broader that all and companions of Imams have referred to it in various subjects. Yet, is such documentation sufficient for compensating for its credibility or is there a higher degree? The latter is not free of problems.

Yet, it is not far from possible to be able to repeal specificity from the exemplum of companions mentioned before and what has been said about sources of sayings³¹ (in this way, the general and public principle resulting from precedence can be obtained).

²⁶ Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 140.
²⁷ Ameli, Hor, Mohammad Ebn Hassan, Vasael Alshieh, 30 covers, Ale Beit (greetings to them) Institute, Ghom-Iran, 1st edition, 1987, cover 5, p 278. (Ketab Ale Salat, Abvab Ahkam Almasajed, Albab 56, Alhadis 1).
²⁸ Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 140.
²⁹ Ahmad Ebn Alhossein Albeihaghi (passed away 1889), Alsonan Alkobra, 6 covers, Dar Alfekr Publications, cover 6, p 142.
Specific narrations:
Here, other examples of specific cases have been brought that from them repeal of specificity can be made and a general principle can be induced from it:

1) Ebn Abi Amir from some of our companions has cited the majesty Imam Jafar Sadegh (greetings to him) that the majesty has said:

Apparently from the word «meaning» to the end of the saying is related to the narrator and not the pious Imam (greetings to him). Therefore, it cannot be made reference to like a saying.  

2) The same meaning by way of public (faithful in the tradition) Asbagh Ebn Nabateh has cited that the majesty leader of the faithful, Ali (greetings to him), went towards the market and suddenly encountered booths that had been built in it. He subsequently orders that they be destructed to the ground. It has also been sited of him that the majesty leader of the faithful, Ali (greetings to him), was passing by the homes of the tribe of Beka and said: this is part of the Muslim market and should be destructed. He has also cited that leader of the faithful, Ali (greetings to him), has said:

And that means that here we saw a man today who buys and sells and tomorrow at another place. 

3) There is also narration of the saying of the prophet of Islam (may God bless him and his family) by Abiharireh cited by Abousaleh which says: «when a man leaves his seat and then returns to it, he or she is more deserving of that place. » Therefore, a man stood up from his seat and I sat there. After he returned, Abousaleh asked him to leave the seat.

4) There is a story narrated by Nafe of Ebne Omar that the majesty prophet of God (may God bless him and his family) has said:
Translation: an individual should not raise someone from his or her place and sit there. Such a matter (namely forbidding of the second person from such a behavior) is only because of precedence of the first person in that place.

31 Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 141. 
32 Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 141. 
34 Ahmad Ebn Alhossein Albeihaghi (passed away 1089), Alsonan Alkobra, cover 6, p 151. 
35 Ahmad Ebn Alhossein Albeihaghi (passed away 1089), cover 6, p 151. 
37 Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 142.
5) The accurate narration of Moavie Ebn Amar:

Translation: Moavie Ebn Amar cites Imam Sadegh (greetings to him) that two people came to the gracious prophet (may God bless him and his family). One of them was a man from supporters and the other was a man from the tribe of Saghif. The second man spoke earlier and said that: Dear prophet of God I have a wish. The prophet faced him and said: this supporter brother of yours has precedence over you and his right comes first. The Saghifi man stated that: Dear prophet of God (may God bless him and his family) I have intention to travel and am in a hurry. The supporter man stated that: Dear prophet of God (may God bless him and his family) I gave him permission to take precedence over me. Next, the Saghifi man asked his questions from the prophet (may God bless him and his family). (In this story also the cause of right of priority is having precedence).

What has been said about the subjects of reviving uncultivated land and fencing and etc and precedence over things that someone else has not taken precedence confirms what we have said similar to the following narrations:

1- Translation: whoever places confinement on a land, he or she will have precedence over that land. This story- that is made reference to regarding fencing- has been mentioned for public and private situations and is used by both factions. It is evident that the story’s use of the word «whoever» is meant as anyone that has precedence in this task over others and has initiated such an act before others. Therefore, according to this story also the reason for arising of the right of priority is the same «taking precedence».

2- Whoever plants a tree where no one has taken precedence to him or her or develops land of people, it will belong to him or her. This is the rule of God and his prophet.

Translation: Anyone who develops the land of men which are not the right of a Muslim, the land belongs to him. It is evident that the story’s use of the word «anyone» refers to whoever has precedence in this task over others and has initiated it sooner than them. Therefore, according to this religious story also the cause of arising of the right of priority is «taking precedence»; although, the expression «which are not the right of a Muslim» states this meaning indirectly and implicitly.

Therefore, as evident, in the mentioned religious stories, there is talk of causality of «precedence» in arising of a right (at least: arising of the right of priority) for the earlier person. Therefore, these stories even though do not argue for the desired (because what is said about the rule of precedence only pertains to creation of a right that is created by virtue of precedence
without need for fencing, reviving or mining, digging wells or other similar matters) but emphasize it.\textsuperscript{43}

Therefore, if someone takes precedence in permissible (such as water of the seas, birds without owner, fish in the sea, wood and desert weed, open mines and etc) just with the purpose of taking advantage of them and not possession, he or she will have priority as long as being there and when migrating from there, anyone who takes precedence in replacing him or her will gain priority such as in open mines (like clay or salt soil).

The same topic is mentioned by Sheikh Tousi- among important theologians in the tradition of Imams- expansively in his book:

\textbf{The second reason for right of priority resulting from precedence:}

Is another reason for permission of the right resulting from precedence? The reason is that no one will doubt in the reasons of the wise: «the person who has precedence in something has priority over it compared to others» whether it be from main permitted or of the interests of public such as taking advantage of mosques, roads, desserts, mountains and waters as long as there is no intention for their possession. The intention should only be their use and taking advantage of them. Therefore, no one doubts that the precedent person is more deserving and has right of priority. If someone else disturbs him or her, the person’s action is considered improper and invasion.

It is evident that tradition on this matter has existed even before religion. Among matters that confirm the logic of this principle before it became a religious principle is that it is famous and well known among those who do not believe in religion or any divine religious law. Therefore, these individuals consider precedence in something which is permissive or public interest (such as roads, bridges, hotels and etc) cause for having the right to own it and lack of disturbance by others. Yet, in their opinion, this principle has limits and conditions.

Here, it becomes evident that consensus of theologians on the topic of right of precedence in the past and now is not a discovery by a certain religion that has reached them and not us. Instead the consensus or documentation by public and private stories supports this topic or it is documented in the principles of the wise which has been undersigned by religion. Addressing this matter by the wise has persistently been under the observation and supervision of the pious (greetings to them), but has also been there before religion.\textsuperscript{45}

The conditionality of the intention of taking advantage in arising of the right of priority:

«Precedence» is the cause for priority for the person who has taken precedence with the condition that he or she has «intention to take advantage». Otherwise if it just has a futile reason, there is no cause for priority and being more deserving compared to others.

\textsuperscript{43} Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 142.
\textsuperscript{45} Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 142-143.
If there is doubt in this regard (in the existence or lack of his or her intention), apparently it is a state of wishing possession, but if the person claims to have intention for taking advantage, his or her word is accepted. The reason is that this problem is a matter that will not be known without the expression of the person.\textsuperscript{46} (Yet, if he or she in fact lies- such that it violates the rights of others- he or she is responsible to God and does not have the right to take advantage of the object. For example, a person might have thrown wood chucks or dessert stones in a corner for play or futility and they are piled up and when he or she sees that someone else has shown up to take them, the person might lie and say: I have attempted to collect them with the purpose of taking advantage from them.)

The perimeter of right of priority resulting from precedence:

We found out that this principle (the principle of precedence) has been taken from the tradition of theologians and the wise and tradition and reasoning of the experts. Therefore, the priority resulting from it will be different in various cases based on the difference in its source. All these differences and disagreements are due to differences in custom and is due to serious difference in the method of meeting one’s needs in such cases and determining an overall principle for the sum of what we have mentioned (mosques, schools, hotels, roads, uncultivated land and etc) is not possible. Instead, each has its own special principle. The reason for all of this is the initiative of those who favor tradition and the signature of religion along with useful mentions of them in religious stories.\textsuperscript{47}

Summing up and conclusion:

The above argument showed that:

Regarding the right of priority and allocation, there is unity in causality and not instruments. In other words, the cause of priority and allocation is nothing but one issue which is «taking precedence in permitted matters». It is not such that each of the matters of fencing, reviving of uncultivated land, lawful permissive and etc is a separate cause for right of priority.

Yes, interpretation of each case is different. In other words: whenever it is precedence in publicly permitted matters that have the capacity for private possession, it is interpreted as «lawfully permissive» (such as precedence in taking advantage of water in rivers, or fishing in the sea or profiting from open mines and etc). Whenever, precedence is in commonalities and public interests which do not have capability for private possession, it has been interpreted as «right of precedence» (such as precedence in taking advantage of public prohibited such as mosques, public roadways, hotels and the like). Whenever precedence is in developing uncultivated land or hidden mine, it is referred to as «reviving» (such as agriculture, planting trees, construction of buildings in uncultivated land or mining gold or iron from relevant mines).

\textsuperscript{46} Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 144.
\textsuperscript{47} Shirazi, Naser Makarem, Alghavaed Alfeghieh, cover 2, p 144.
Therefore, in the language of sayings, at times there is referral to «It is him, it is his, he is to them» and the like and at times there is referral to «deserving to her, deserving to him » and the like and both have been used both for «possession» and just the «the right of priority». Even though, the second interpretation includes the first; yet, the determination of what the intention of the exemplum is in each case (does it refer to public or private) depends on two issues: on the one hand the traits and capabilities of the case and on the other hand, to purpose and intention of the precedence taker. In other words, if the task is not performed in futility «the right of priority» due to having a public or general meaning is constant for a case. Yet, more than this amount (namely «possession») which is private or specific in priority depends of capability of possessing the object and the intention to own by the precedence taker. For example, if someone (not in futility) separates a conduit from the river for him or herself, if he or she has intention to possess it, the person will become the owner. Yet, if there is no intention for owning, the person has priority in taking advantage of it over others and as a result, when abandoning it and leaving, his or her right will be annulled and others can use it.
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