

Right in Islamic Jurisprudence and Law

Ali Nikpour

Islamic Azad University, Miyandoab Branch, Miyandoab, Iran

ABSTRACT

Everyone knows what the right is but it is almost impossible to provide a precise definition for this term. The proof is the achievement of no common conclusion within the studies undertaken so far. For this reason in the 20th century and the beginning of the 21st century different aspects of right have been studied extensively by the theoreticians. There have been extensive researches under the areas of Islamic jurisprudence and laws. Each of the scholars has answered a part of the aspects of right in their theories and the greater part of the aspects of right has remained unnoticed. The present article studies different aspects of right in Islamic jurisprudence and laws under two major discussions.

KEYWORDS: Right, Islamic jurisprudence, law

INTRODUCTION

There is no doubt that the early human beings noticed their surroundings while the history was still young and the world was a new and wonderful place. The humans had to ask their questions from themselves but nobody else. There was nobody else to answer their questions but they were in possession of an amazing thing, the brain. Through the help of their cerebral powers they started to slowly and painfully gain experiences and learn from them. So, from the ancient times human beings have been searching and finding many things, but there are still many secrets uncovered. Through progress they will discover many vast territories in their chosen path only to understand how far they are from their endless journey to knowledge [1-2].

If not one of the most important parts of morality, law and politics in the modern world, right is obviously one of the most important areas of them. Based on this reason through the last century and the begging of this century different aspects of right have been studied extensively by the theoreticians [3].

In all of the cases right gives meaning to each of the social events so that those events can have legal effects. Most of the scholars believe that right is given to events based on the social values namely the things that are considered truth, good and correct based on known standards. And for this reason each of these values, based on their importance, are effective in the design, implementation and transition of right to the extent that the realization of right depends on them [3-4].

Within thousands of years human beings have tried to study different aspects of right. Religion, philosophy and morality have studied this issue and have provided many answers. Each of the scholars has answered some parts of the aspects of right and the greater part of it has remained unnoticed. Basically religion has tried to provide a complete and decisive answer to this issue. Philosophy and the science of law and Islamic jurisprudence have their doubts in giving the answer. Because it is the nature of these sciences not to be decisive and carry on analysis and reasoning and rely on cerebral powers of human beings it is possible that we could not give an answer in confidence to the issue related to the search of human beings but we can see that the nature of research and search have gone in to two paths; meaning that the human beings have searched within themselves and outside of their internal world. They have tried to understand right and also have tried to realize the nature of right [4-7].

The first discussion: the Nature of Right in Islamic Jurisprudence

The nature of a phenomenon means its quiddity and whatever is the answer of the question whatness, is the nature. The nature of different phenomenon is understood through different definitions among which are the definitions with positive and causal concepts and the definitions with negative and negatory concepts, both of which are common in this science. In the causal definition of right, its nature is understood through verbal and law categories. In the negatory definition right is known through its opposite and corresponding meaning.

In the manner that opposite descriptions are eliminated. Like being typical that is omitted from right and considered as its opposition meaning; judgment. Or vice versa the essential nature of judgment is taken and added to right. Knowing right in both causal and negatory is common in Islamic jurisprudence that it can of course be said the definition of Islamic jurists is more of negatory form and have used positive definition [8-9].

1-1. Right in the Verses of Quran

The word "right" is used in many verses in Quran. It has been used almost 227 times in Quran. The essence of Allah in Quran is defined under the word "Hagh" (right):

That is because Allah, He is the Truth. Right means positiveness, against evilness and the positive entity, the lasting entity that cannot be disapproved also meaning the absolute and free existence, which is the nature of the His Holy essence [9-10].

In the following Verses of Holy Quran Haq (right) is defined as positiveness:

"In order that you may warn a people whose", "And Allah will establish and make apparent the truth by His Words" and "That He might cause the truth to triumph and bring falsehood to nothing"[8-10]

One of the names and attributes of holly God is "Haq" or Right. The essence of the meaning of right is justification and harmony. The reason of attributing this name to God is that his holy presence is the greatest undeniable truth and the expression of his qualities and the perfection of his unique essence that is science and human beings, proves the reality and rightfulness of his holy existence and any uncertainty is taken away from true thinkers with pure hearts. Right against evil-minded is like existence against inexistence. The Holy God says: "That is because Allah He is the Truth, and what they invoke besides Him, it is *Batil* (falsehood)" [9-11]

1-2. Right in the idea of Islamic Jurists

In Islamic jurisprudence texts the word right is described under different meanings. Some have considered it as a weak ownership and some other have considered it as a type of kingdom. A group has taken it as a relative matter and another group has defined it as the authority of doing an action. Any way in the substantive definition there is no consent between Islamic jurisprudences. The attitude of Islamic jurists towards the realization of right has more been of the point of view of negatory and they have compared right with its opposites and similarities. They have for example compared it to judgment, property and kingship and have provided definitions by considering the differences and negating some of the properties of right though using different methods [11-12].

Before Sheikh Ansari wrote the book 'AlMakaseb' in the Islamic jurisprudence sources of Shia there were little mentioning of right and its meanings. But after Sheikh Ansari started to study different types of right under the topic of sales, his followers and the contemporary jurisprudents started to study comprehensively the concept and different types of right and its relation with concepts such as property and judgment.

In the sources of Islamic jurists sometimes right is used close to its lexical meaning: anything that the lawgiver has imposed and concepts such as judgment, substance, profit and right in its particular meaning [5-8]

Some of the Islamic jurists believe that right in its particular jurisprudence meaning, is a type of contract kingship on substance (such as the right of demarcation and mortgage) or on another human being (such as retaliation and child custody) or on a relative matter (such as the right of rescission in contracts). In this perspective right is considered as a type of property but a weak ownership that is sometimes referred to as "unripe ownership". Sheikh Ansari believed that right is a kind of actual kingship, in other words "actual domination" is called right. For example when a person sells his property to another person at the same time he has considered the right of rescission for himself for selling to another person between the person and the sold property there is no relation between him and his property but because the clause of rescission is present this owner has the right of rescission and so he has the right to cancel the contract and return the property to himself and so it can be said "right is an actual kinship, but this kinship sometimes depends on an object, such as the right of rescission and the right of demarcation and sometimes depends on a person such as retaliation, i.e. the owner of the right has dominancy over the guilty person, he can pose retaliation and retaliate his crime [11-14].

According to Ayatollah Khomeini the object under ownership (substance) is sometimes independent (such as external substance like home and substance under obligation such as low price on trust) and is sometimes dependant on other things that its credibility is reliant to the owner, this kind of property is interpreted as "right". Such as the right of relation that depends on the existence of the criminal whose death will take away the right of retaliation. Thus, all of the external properties, the obligations and the benefits of standing property are outside the limits of law because the credibility of the ownership is impossible without referring to the owner. This Islamic jurist have considered the difference between right and property in that ownership is both for standing property and also to the actual, but right is just for actual property[10-13].

Based on Akhond Khorassani's idea the nature of right is not to have dominancy, rather dominancy is one of the judgments and effects of right, and it's also one of the effects of ownership. In fact right is a special credibility that has special effects such as the right of rescission and the right of pre-emption that has effects like kingship on the right of revocation.

Based on Esfahani's idea right is kinship, but of a relative kind and not obligatory, because kingship and responsibility just include cases such as the right for revocation and the signing of contracts and does not include the right of under interdiction. In his opinion for each of the meanings of right, there is a special credibility with special effects. For example the right of guardianship means the credibility of the guardianship of a king or a father with the

permit to occupancy or the right of demarcation meaning having priority credibility for the owner of a piece of land. Sometimes the reason that proves the existence of right has considered it as a kind of kinship such as the right to retaliate under Words of Quran "We have given his heir the authority" Nonetheless right does not always mean kingship.[11-15].

Imam Khomeini also accepted this attitude that right is neither property nor kinship; rather it is a place between these two. He realized right as a credibility and imposing order that is based on reason or the word of the lawyer and its nature is different from the nature of property, because they are meanings of right that are not like property such as the right of the first person who gets into a mosque that cannot claim he is the owner of the mosque. Against Esfahani's idea and referring to the common law right has independent concepts in both cases.

The attitudes of the mentioned Islamic jurists towards the realization of right, is more of the nugatory perspective, but just a few of them have used causal definitions for the nature of right among which the definition of the great Islamic jurist Abdollah Mamaqani can be mentioned in his book *Nihayat Al-Maghal*: He considers right as a credit for any person and defined judgment in this way: "judgment has a generic aspect and does not belong to the person". As it can be seen in his attitude right is a type of asset and attachment that does not belong just to one or several people.

This humble Islamic jurist uses the comparison with a rope in order to make the nature of right understandable and its relation and attachment to a person. He mentions a rope that is drawn between the rightful, property and the person standing against the right and connects them to each other in a way that is not found in any judgment and if it is found then it will be general and unreachable. Against the efforts of Islamic jurists the Islamic jurisprudents have not given enough attention to this case. And if from time to time a jurist has complaint about this subject it has been on the level of the ideas of the Islamic jurisprudents and western jurisprudents. Some of them have tried to provide some definitions for right. Abd Olrazagh Ahmad Sanhoury, the famous Egyptian jurisprudent, defined right as having a legal value supported by the law and whatever that is not supported by the government is not considered as right. Although this definition is a marvelous effort, it does not deny other definitions, because there are interests that are supported by the law but they are not right, such as judgments like the right of annexation and divorce that are supported by the law. So in order to omit other things we have to include them in the definition [12-15].

1-3. Conclusion

Among the given definitions the most comprehensive one is that right is of the type of kinship and not ownership. When there is the question of right, there is a kind of kingship and ownership hidden: right is actual kinship that is not imaginable with just one party present, rather it should include two parties, one side of the party that possess the right and the other one who is undertaking the right and has to take care of it.

Finally, the definition that has gained popularity among Islamic jurists is the definition of right as "the absolute authority and power". Authority in this definition is the ability of law and the authority of doing the action under which the person is permissible in complete or incomplete possession. In ownership the owner is permissible to have complete possession and has the authority for different types of possession of his properties and in the right of interest based on the authority of incomplete possession can collect the interests of his properties. In fact in a similar sense of right like the property that is considered different from right by the Islamic jurists is the first level of right. In other words it is one of the types of right in Islamic jurisprudence and the right itself falls on the next level. Thus, right is a weak level of property and possibly a type of ownership: "right is the power of a human being based on the law over another person, or on a property being tangible and materialized like a house or not tangible such as a claim or on another property or person such as the landholder's rights"[14-16].

The Second discussion: the Nature of Right in Law

The concept of right did not play an important role in political and moral dialogues until the end of the middle ages. The concept of right was not given attention to in the great moral system of Plato and Aristotle and ancient Greek laws. The concept of right, in case of existence, did not reach the self-conscious level from the time of Greek philosophers to the end of the middle ages. For example in Plato's *Crito* Dialogue the question Aristotle faces is formed in this way: Does a person who believes that have been condemned unjustly has the right to escape prison? The precise consideration of Aristotle's text shows that the mentioned dialogue has not been written in the language of law. There is no word in this text that has the lexical meaning of right. Rather the issue Aristotle is facing is that is it correct or just to escape the prison. On the surface it may seem that there is just a delicate difference of use of language between "the correctness of doing something" and "having the right to do something". But on a deeper level there is an important conceptual difference hidden.

The second example is provided from Saint Thomas Aquinas the most influential thinker of the natural law school in Middle Ages. While defending the doctrine of natural law and against the existence of the concept of right in the thinking pattern of his time, Aquinas did not have a doctrine on the natural law. Aquinas like Aristotle in *Crito* Dialogue poses a question that can be well said in the language of law: does a starving person have the right to steal

a loaf of bread? Aquinas has not used this language to make his question, rather he asks: Is the stealing under heavy pressure legitimate? [12-14].

Also some of the translators of Aquinas attribute the issue of originating “private ownership right” from “natural or human right” to him. But Aquinas in fact has asked whether it is natural that human beings take possession of outside objects and answers that private ownership is not the opposite of right and natural justice. Aquinas did not say and could not say like Locke, that human beings have the natural right of ownership. Aquinas believed in natural right but he had no list of the meanings of natural right.

2-1. Definition of right

Everybody knows what the right is, but precise definition poses many questions. In order to justify it is enough to say that many studies show that so far no common conclusion has been achieved. As Immanuel Kant puts it, “jurisprudents are still in search of a definition for the concept of right.” (Immanuel Kant). Maybe this is not far from the truth even at present times, because while the general and vague concept of right is enough for some private purposes, it is not enough for higher purposes of knowledge. Everyone knows the common expressions of right in the way presented, but the higher and more general issues are not dealt with, such as the right place of the concept of right in the knowledge system, determining its main elements and also differentiating it from other topics or similar cases there appears similarities and problems that cannot be resolved by the common concept of right [8-11].

The jurisprudents have dealt with the nature of right and have tried to show it. In legal considerations, just a part of truth about the nature of right have been dealt with and it seems that giving a general and comprehensive definition that can include all of the facts about the concept of right is an impossible thing. For this reason it is a mistake to go after an ideal definition for right. For example Kant’s definition of right is “the set of conditions under which the free will of anybody can co-exist with other’s free wills under a general law of freedom (Immanuel Kant, German Philosopher). This definition is in fact under the concept of perfect right but does not provide a logical concept for right. The mentioned definition may reach the conclusion that maybe the true right has not found an external existence because the law systems are in different ways far from the above principle, so we have to omit all of the systems that does not consider equal freedom for everybody, for example Rome’s law that have accepted the freedom of slavery-denying the law of freedom for all of the people of the society- should not be considered as right.

So following this method, attitude toward right as ideal and perfect, won’t make it possible to define right. In fact the points of view toward right and providing a definition are relative and in each definition only a part of truth is mentioned. Between western jurisprudents that have provided ideas about the nature of right, Windshield, a German jurisprudent, can be mentioned. He considered right as the will power. The problem with this theory is that if right is considered as the will power then the under interdiction that have no will power should not have any right while they enjoy rights, though they don’t have the power in the interdiction period, so although they have signs of the presence of the right, they don’t have the will power. So this theory cannot be right [3-8].

The other theory about the nature of the right in the European laws is related to Ihering- the famous jurisprudent from Germany (1818-1890). Ihering’s theory about the nature of right is built upon the concept of benefit. The mentioned concept comes from the truth that right deals with a subject on a mental point of view so it is an extract of personal will. The aim and topic of will is considered as profit, reaching something from the point of view of the person after it. Desire is not possible alone, always there should be something present, and this content of will is the basic extract of right. So Ihering defined right in this manner: “the profit supported by the law”. This concept wants to be realistic and even benefit oriented, because the aim of it is to touch the objective truth or direct purpose.

Ihering’s theory has faced many criticisms. One of them is that the aim of law’s support of something does not give right to that thing and there maybe obligations involved. On the other hand in his definition determining the aim is equal to determining a means. For example the aim of a safe is to protect valuable objects from fire, meaning that the safe is used as an instrument but this does not define the safe. In the same way if we accept that right provides the benefits of human beings, this formula does not give the logical definition of right. There are profits that in spite of having basic role in our lives, there is no law support for them and there is no possibility for them. Like the life of human beings that is based on materialistic and global conditions that is naturally outside of the realm of laws. In addition to that even in cases that the law support has been foreseen and can be practically implemented, it is not true that this support has provided law for all of the profits at hand. This is a general profit upon which the criminals are described, government’s calculations are done regularly, the territories of the country are defended, all of which are supported by the law, but there is no special right for each of the members of the society for these things[6-10].

Some of the law philosophers have noticed the relation between legal right and moral right in order to define the nature of right (i.e. the relation between “what is” and “what should be”). These theoreticians believe that right is exactly the morality and their argument is moralistic. Only the true right in any society is moral right. If the

lawmaker chooses a right against morality and law, that right has not credibility. In association with this view, the legal system of a dictatorship system such as German Nazis was not even law.

In fact the followers of this theory believe that right is the dos that are determined by the morality. The problem with this theory is that this view does not comply with the acts of lawyers and judges in the real world. When the law is vague or controversial about a right, the lawyers and judges usually provide legal logics for the claim related to the controversial case and do not mention what the right should be. For example, do the pains and sufferings of an accident allow the person to claim compensation? If the law remains silent in this case, we should look for a more general rule to show that if there is a right for claiming compensations for the sentimental losses of an accident. In the logics of lawyers and judges maybe moral beliefs are involved. Almost all of the lawyers and judges consent that in considering right, this should be looked at as “as it is” and not “as it should be”.

The other theory about the nature of right is that right and obligation are correlative. In this theory right means a legitimate privilege that is proved for a person or society and makes a relation between at least two parties that are called “the owner of the right” and the “opponent of the right”. So correlativeness comes with the proof of obligation toward the other party. In other words right and obligation are two things that come together meaning that inventing and imposing of each of them relies on the other. When a person has a right then there is another person who has obligations toward him [12-15].

This theory has the deficiency that there is no right that has logical necessity to an obligation. Right has many meanings that do not come with obligation. For example, the right of freedom for a person depends on that person and does not come with obligations of others. The right of freedom of speech is one of these rights. The owner of the right can use this type of right and the use of this right does not involve the obligation of others to provide the conditions for the use of this right, the right of marriage, divorce, heritance are the privileges that the owner of the right can use but others does not have any obligations toward this person. It can be said that in some cases having right without other’s obligations to respect it will be useless. But this cannot prove the existence of a logical relation between right and obligation. Right is divided into two parts regarding obligation. In cases that right is with obligation it should not be considered that obligation is caught in the concept of right in way that is imagined the analysis of the concept of right will lead to obligation.

For example if the debtor is obligated toward the creditor (the owner of the right) is obliged to pay the debt so this obligation will not be part of the right of the creditor to receive the debt, rather it is the result of a nominal thing that the lawmaker has foreseen and does not have an objective and real aspect. The lawmaker enacted this general rule: “to get possession of something” is forbidden and in fact the obligation of the debtor to pay the debt is based on the rule of unjust getting possession of something not on the basis that obligation is part of the right.

John Stuart Mill has realized the true right as self-protection. In one of the most effective speeches in the philosophy of law and contemporary politics he says:

“The only thing guaranteed for human beings, whether personal or collective, against any kind of freedom of action is guarding the right. The only case in which power implementation against the will of any member of the society can be used is to stop harming other’s right and their personal interest of this member, whether moral or materialistic, is not enough permission.” [2-6].

Based on this principle there is no justification to use law against the citizens, with any aim, except preventing harm to the right of other citizens. Law’s commitment to society is limited to defending right and if a personal act is dangerous for the society in any way, then its use is legitimate because it has no contradiction with the true right.

From Bentham’s point of view, Mill’s argument is totally meaningless. In his idea the logic of defending the impediment of social welfare is basically incorrect. He thinks a logical legal system should be able to suspend the lawful right-providing barrier on social welfare with any profits. He hated common law-being the advocate of traditional right- because in providing the social welfare it was not in harmony with real interests. In Bentham’s logical system any specific right being against the social welfare should be abandoned.

This should be considered as a criticism for Bentham’s system, that right is to some extent considered as a barrier for profit. If there are no pre-assumptions about the right to have priority over other benefits and right become the common welfare to some extent, it will be impossible to talk about right in any way. Right only becomes important when it can also be deniable and this is exactly when it will be considered unpleasant for most of the people, especially when in a democratic society most of the people face this accusation that with refusing to give the minority’s rights, injustice will surface. Defending such right is in fact the same thing mentioned by Dworkin as “taking right serious”.

Dworkin’s view about right in its broad sense, both moral and legal, is based on the assumption that right inferred from judicial decisions has different dimensions in complicated disputes. In metaphorical sense of Dworkin’s idea, right is like playing cards. A right in its right senses is the winning card of the game that threw away all of the predictions of the opponent: “Right is best illustrated through a game card that dominates over some of the backgrounds of political decision’s justifications that explain collective goal for the society”.

Saying that such an aim goes out of picture with the arrival of right does not mean that any right is absolute and will never marginalize. There is always this possibility that other more valuable cards come to the table. It is

possible that a right exist with other rights of special considerations of the dominant method. This does not mean that freedom of speech is for example unlimited. The basic condition is that in order for a right to be effective it should possess real power and overcome the considerations of society's goals[12-16].

It should have real power to cause difficulty. The same right like card game is likely to fail and there might be another right to overcome it. The right of freedom of speech sometimes contradicts with the right to protect the reputation of people under protection of the law against defamation, but this right of the opponent is itself a card game that rises against social welfare. When social welfare is referred to as a reason for taking away a right, the right of the opponent should be clarified. If the right of freedom of speech results in humiliating words, its support should be stopped because it is a misuse and an offense for another person.

There are many criticisms for Dworkin's view. Firstly the only assumption showing the right is not strong enough to be defended fervently, secondly this weakness does not have a separate ground of interest for the mentioned right of Dorkin and thirdly the right that is defended by Dorkin is rooted in just criterions that are created from common law, while this is only a part of the truth and not all of it.

2-2. Conclusion

Although in recent decades there has been a great change in the attitude towards knowing global right in different countries, there are no signs of an agreement and the attention has more shifted to the analysis and comparison of main ideas about right by theoreticians such as Dworkin, Rawls and others.

The existence of right always depends on a relation between people. What a person can do legally is in fact a power or authority in relation with others. Morality in moral law is specific to a person. On the opposite, right in law is always two sided. The possibility of doing an act by a person is limited to the obligation corresponding to it from another person, which works in both ways. Each party gets his meaning and effect from the other party of the right.

Based on what was said, right can be defined in this way: "legal authority effective between different people based on a legal rule that has determined its limits and prohibit any objection and infringement against it."

REFERENCES

- 1- Amoli, Javad, right and obligation in Islam, Asra,(Vol.3), spring of 2009.
- 2- Ebdali, Meherzad, An introduction to philosophy of law and law theories, Majd, (Vol. 1), 2009.
- 3- Esfahani, Mohammad Hosein, an Interpretation of Makaseb Book, (Vol.1). Abbas Mohammad Al Saba Ghatifi, Qom, 2002.
- 4- Al Moghri Al Ghayomi, AhmadIbn Ali, Qom, Daralhejrat, 1984.
- 5- Tabit, Mark, the philosophy of law, 1950, translated by Hassan RezaeiKhavari, Mashahd, Razavi Islamic science University, 2nd publication, 2007.
- 6- Tahanavi, Mohammad Ali, Studying the terms of Sciences, Beirut, Makteba Lebanon, 1st pub, 1966.
- 7- Khorasani, Mohammad KazimIbnHossein, an Interpretation of Makasib Book, (Vol.1). Mahdi Shams Al Din, Tehran, 1985.
- 8- KhansariNajafi, Mosa,ManiyahTalib fi Sharh al Makasib, Writings of AyatoallahNayinee lessons, (Vol.1), Qom, 1997-2000.
- 9- Khoei, Writings on Mesbah al Feghaha, (Vol.2). Beiroot, 1991.
10. DelVecchio, the philosophy of law, translated by JavadVahedi, Mizan, 2ndpublication, 2007.
11. Khomeini,Ruhollah, Kitab al-Bay,(Vol.1), 2000.
12. Saghiri, Esmail, the Booklet of philosophy of law, phd of private law, Islamic Azad University at Tabriz.
13. Tabatabaei, Sheikh Mohammad Kazem, Notes on Trades, (Vol.2), QomSorbi publication.
14. FakharTousi, Javad, in presence of Sheikh Ansari, Sales Explanation, (Vol.10), Ghadir, second publication, 2006.
15. Katouzian, Naser, the philosophy of law, (Vol.3), SherkatSahamiEnteshar, 3rdpublication, 2006.
16. Katouzian, Naser, the philosophy of law, (Vol.1), SherkatSahamiEnteshar publication, fifth publication, 2009.