

The Legal Nature and the Effects of Privatization of Public Companies in Iranian Law

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Abstract

According to recent challenges in the past years and worries of the authorities in handing over the public sectors to the private sectors, we tried to study the legal and issues in this research which have studied the general policies of code 44, the sector of legal empowerment in terms of the assignment and legal loopholes in this regard, the type and weakness of assignment in terms of legal that was studied generally not partly with the aim of interpretation of the law by the authorities and the absence of known solutions and common law provisions on the right of states and as well as assignment and assignment as the shares via the stock and OTC, Face- to-face negotiation and not to transfer the ownership.

Keyword: Privatization; Article 44 of the Constitution; The Right to Property of Companies; Corporate Regulation.

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Introduction

The goals that come to mind due to the concerns and challenges of the last few years of the authorities about privatization that will hardly be achieved by reducing government outsourcing will lead to losses of next generations.

In this paper we will try to speak about property rights and economic growth and increasing prosperity that is stated legally in the form of article 44 and general policies of article 44- Twenty-year outlook- first to fifth development rules.

What is clear in the legal nature of the issue is that privatization from the 20th century of economic liberalization is increasing in the procedure of countries and the countries are not in an exception in this issue.

So that after the revolution with the formulation of Article 44 and then the general policies of Article 44,20 –year outlook and article 1 to 5 development articles, the governments are charged to advocate of economic privatization. thus in the law issue of related rules transferring ownership from the government to the not-government sector will be discussed. unfortunately in Iran transferring and assignment is done through stock and OTC ,face to face negotiation and transferring stock or a part of stock and is not done through ownership transfer and this is should be studied that why assignment is done through stock or a part of stock and is not done through ownership? because the state wants in this way have a leverage to lobby for the right to own property.

Also, it is worth to say that regulation and policy making in this area in Iran and the privatization rules is not mentioned in detail that characterizes all items in separation and from these generalizations the goals except interpreting the law with vote, in the policies of ownership assignment or the weakness of legislation in this area, can not be thought.

Honeymoon of assignments in the legal form, shrink the state, which was acquired by transfer, the disappearance of the weak system of inspections which was caused by the government ownership, increasing the competitions of productive units that is lead to economic prosperity and competitiveness of units to reduce costs and increase productivity and quality and supply with the most after-sales services which in this case by put the firm and right tax rules, creating jobs, the wealth flows from private units to the state that while employment in manufacturing and service units, this wealth can cause to become the state more wealthy and consequently the overall improvement of the country.

The importance of research

The experience of different countries shows that the consequences of transferring ownership and management of State-owned enterprises (regardless of the method of transferring) it will not be limited only to the enterprise but will put on a national or even supranational works. Because in one hand the state dominant to different developing parts of the country and it is necessary to shrink down economic relationships with the society and on the other hand non-state economic sections must continue to work in an area with less presence of the state and do compete in the market. Considering the foregoing, coinciding with the implementation of privatization policies should witness the fundamental changes in the structure of the control areas of legal, political, economic and social (Ghalibaf Asl, Hasan and Ranjbar Dargah, Fezeh, 2006). Given the extraordinary importance that the formulation of the fundamental reforms of legal rules and regulations can have a privatization affair, the present study aims to investigate the impact of privatization on the process and the legal nature of public companies answer the following questions:

- What changes occur in the legal aspects of the companies by the privatization of state enterprises?
- How will the legal nature of corporate ownership by privatization of state enterprises?
- What changes will occur in the organizational structure of the companies by the privatization of public companies legally?
- What changes will occur in the relationship between managers and employees in terms of the law?

Methods

Considering the nature of this study and to achieve the research objectives, this study was conducted by analyzing documents. Thus, in addition, to studying the collection of laws, books, and articles that have addressed the issue of private-making and legal aspects, consequences affecting the rights arising from the privatization laws were reviewed and analyzed. In this study, information has been collected as a library and from

various sources published in the official reports of relevant agencies in the executive and legislative branches. In this regard, all topics of interest in the privatization of national and international legal texts published in the press, the collection of laws of privatization law books, reference material and theses were studied and after gathering the information, the required data to review and respond to the questions were acquired. In this study, the analysis of data was done as comparative and documents.

An overview of the Legal Aspects of Privatization

By studying privatization objectives, clearly identifies that privatization has two main consequences which directly affects the national production, one of this consequence is that transfers funds from the private sector to the public sector and the other is that transfers the ownership of institutions from the public sector to the private sector (Ghalibaf Asl, Hasan, and Ranjbardargah, Faezeh, 2006). To achieve these goals, different methods of privatization are underway. According to Article (19) of the implementation of the general policies of Article 44 of the constitution and rules of procedure of delegate this article, the Divestiture Board is authorized to use all possible methods according to conditions in accordance with the provisions of this Article (Ghalibaf Asl, Hasan and Ranjbardargah, Faezeh, 2006)

A) The assignment of firms and ownership (rent with condition of ownership, sell all or part of the shares and the assignment property): in this regard the properties of official companies are transferred to a private sector in a certain time period and with certain economic and even political goals (using foreign investor), with registration contract.

B) Assignment management (rent, general contracting and management contract): Privatization may be performed only for business. In this case the management of work and the company is done by the government sector and business affairs of companies products is done by the private sector.

C) Analysis, the assignment, liquidation and mergers of companies, as the case: currently the assignment of companies in Iran is done generally as assignment of ownership through selling all shares of state companies to the private companies by

methods of exchange, OTC, auctions, and negotiations and is done by one of the methods of gradual, preferential and modules.

Considering each of these cases individually, we can say that privatization alone cannot lead to economic growth by itself because it is necessary any of the considered approaches, be done within the legal framework and this requires the necessary reforms in all required fields. Such as reform in the judicial system, laws and regulations, financial and monetary system, support of transactions and prevent monopoly laws, anti-corruption and many other legal issues that can help privatization, in general.

Assessing the legal aspects of privatization programs in developing countries show that privatization rights in these countries have a fixed place. Certainly, succeed in the full implementation of privatization and achieve all the objectives, requires the development of a comprehensive legal system of privatization. In Iran, legal obstacles were considered as the main problem in the way of privatization and the experts in economic, political and legal fields have tried to identify these obstacles and eliminate them by optimal measures and procedures and create new rules or modify past rules. Some of the most significant legal obstacles to the privatization of the research Mousavi Niyarak (2010) referred to as follows:

Foreign investment, tax, property law, labor law, rules and regulations regarding the competition-profit businesses, traders and consumers. They also note that each of these laws can, prevent implementation of privatization or at least slow the privatization.

Legal issues in the Implementation of the Privatization Policy

What is intended by this article, studying the role of foundations and legal infrastructure about the implementation of general policies of Article 44 of the constitution? So before getting into the details, it is necessary legal infrastructure in this area be examined. by studying implementation privatization policies in our country it is identify that from 1990 until now these policies arise in the set of rules and regulations of Iran. by considering how to assignment and impacts that these rules had on this process they can be divided into two courses before announcing general policies of article 44 and a sources after announcing it. in the first period is from 1990 to 2014 during which we can find a place to keep track of submissions in the regulation but this position does not have

the necessary conditions to accelerate the assignments but in the second period and by announcing general policies of article 44 of the constitution at 2006 and the article of implementation policies in the 2009 and consequently preparation and adoption of guidelines and criteria can be said that necessary and appropriate conditions for the assignment were prepared, and this was followed seriously (Chalibaf Asl, Hasan, and Ranjbardargah, Faezeh, 2006). Since then, privatization as a complex process, has always been faced with problems and challenges in a way that occurring a series of problems and raising some issues, not only cause dysfunction in the implementation of this policy but leads to reduce the impact of this process in reaching considered objectives. From the important and effective laws in this field, we can refer to issues of ownership and rights and laws related to regulations that is the main topic of our research.

Property Rights in Privatization

From a view, we can say that the most important aspect of privatization law is its own rights because during which some consequences of economic security, investment protection, protection of private property, prevent monopoly will be raised. In this section for better scrutiny of the concept of property rights in private discussion, various aspects of the subject go under examination.

The Importance of Property Rights

Security of property rights always has been known as the main topic in forming a dynamic economy and in no way cannot be denied. If stakeholders and economic actors do not feel safe to invest in any economic activities to maintain their return on capital will not be ready for investing economic activities. Thus, property rights and guaranteed is the necessary and sufficient conditions for encouraging people to invest and if ownership rights be uncertain, economic actors, will be reluctant to use of financial resources of banks (Hosseini, Sayed Mohammad Reza and Mohammadi Najafabadi, 2014). In the topic of the importance of ownership rights, various researchers have offered various opinions because the guaranteed ownership rights affects the economy from different channels. About the impact on the economy, property rights investigators have raised four principal aspects (Besley, T., & Ghatak, M. (2010)). The four aspects are:

A): If the property rights are not guaranteed, always Expropriation Risk arises. Uncertain property rights imply that people will fail in enjoying the results of investments and their efforts that from an economic perspective, these costs are not affordable.

C) Another effect of being certain of ownership rights is the productivity of the companies.

B) If the legal framework of property rights is not clear, leads that people tolerate unrelated costs to protect of ownership rights. Thus, in a productive economy, the assets used by people who are more productive than others. so improvement the ownership rights helps this issue. In other words, improving property rights will facilitate movement of assets as production factors (for example, through rent).

D) Using ownership is to support exchanges. Modern financial markets rely on collateral to support a variety of exchanges of financial markets. Improving property rights by increasing this facility, can increase production (Omidi, Mehdi, 2015).

Legal Aspects of Property Rights

In the legal debate about privatization can be examined from several aspects of it. one of them in terms of rights related to the method of assignment and transfer ownership, the second in terms of clarifying the concepts related to ownership and property. about the topic related to assignments and ownership issues such as "Whether while transferring of the company, its shares are transferred only, or the entire property will be transferred as well as issues like that." will be raised and resolved. because when the general ownership of a company transfers, the owner knows it like its property and almost manipulates in all its levels such as structure, rules and regulations within the company, etc. while when the shares of the company is deposited, in this case the owner only wants to increase its profit and maximizing the efficiency of the investment (Mehmet far and Jafari Samimi (2008) and both require separate law rules.

The Distinction Between Ownership Rights and Property Rights

In addition to this topic, another aspect that is raised in this regard is a distinction between ownership rights and property rights. Hence, before raising the argument, it is necessary to define the properties of each person in terms of the law: the property is any

tangible and intangible object that is owned by a person or jointly by a group of people. According to the nature of the asset owner has the authority to consume, sell, rent, lease, transfer, exchange or ruin of its assets, the owner also has the right to ban the other people to exercise of these rights other than to finance his acquisition. Accordingly the assets are divided to two categories of immovable properties (Land and any property which is connected to earth) and movable assets (all assets that are not part of immovable property) or in another perspective the assets are divided into public properties (public or state owned assets) and private assets (assets that are available to natural persons or groups of people) or on the basis of tangible or intangible assets the assets are divided into physical and intellectual properties (Hosseini, Saye Mohammad Reza and Mohammadi Najaf-Abadi, 2013).

According to mentioned definitions, it may raise a special definition of Property Rights. Review relevant literature also suggests scholars of different disciplines (such as law, economics, and sociology) is not primarily concerned about the definition of property rights. Sociologists know property rights as a bundle of rights. They insist that the ownership is not the relationship between people and objects, but the property is, in fact, the relationship between people that can be achieved in the face of objects. Then some of the different definitions of property rights have been investigated (Miami, Asadollah, 2008). Property rights from the perspective of legal knowledge, traditional look to the issue of property rights that include following items. 1) Control the use of property; 2) the right to receive any benefit from the property (for example, the extraction of resources and rent); 3) the transfer or sale of property; and 4) the right to prohibit other uses of the property. This traditional view does not include the following items: 1- the using that are unreasonable, annoying property rights of private persons (for example, the right to enjoy silence and tranquility) 2. the using that unreasonably annoying public property rights and includes usages that are including annoying health, security, peace and the convenience of the general public (Brojerdi, abode, Mohammad)

According to this view, the jurists have offered different definitions of property rights. Some of them see the ownership as a kind of relationship and say that: ownership is a link that connects owner and property. According to this interest and legal relationship, the owner will dominate to possess any authority to its property. On the other hand, what

is expressed in the law as the basis for civil rights in Iran in the definition of ownership is very similar to the above definition. According to the scholars of the law, the ownership or the right to property are the monarchy and authority of a person that is called the owner on what is called the property. Sometimes property rights are not called absolute rights and not consider property rights as a framework for resource allocation and distributed its efficiency (Koter and Ulen, 2009).

From another perspective, property rights are defined as the ability (or the ability to hold) of an economic factor for the use of an asset. Demsetz (2002) in one of the classical analysis believes that Property rights refer to a social institution that is the creator of incentives for effective use of assets for attaining investment business in the assets. It seems that his definition is another complete definition. by considering the cases that were expressed can easily draw a distinction between property rights and property rights in the juridical and economic. the scholars believe that the differences of the views of the two sciences of law and economic to the ownership rights can be interpreted under the titles of ownership rights and property rights. Because a part of the property rights may have been codified into law and implemented by the courts, and some have informally. In addition, property rights may be implemented by the norms, conventions, or the market through frequent exchanges) Lucek, D., & Miceli, T. J. (Eds. 2007) (Lucek, D., & Miceli, T. J. Eds. 2007).

In general, it can be said that those property rights are protected legally, in Knowledge law is checked as "property rights". In fact, property rights are the part of enforcement of the court's that rule on the creation, use, and transfer of property rights rule. Immaterial property rights (intellectual) similarly specify the circumstances under which the courts relating to intellectual property rights to timely perform.

Regulation Adjustment

Another type of interventions that the government can influence the behavior of firms and individuals to private sector involved in the regulation and regulation adjustment. in the economic literature regulatory been defined as " Government efforts to control the decisions of the private sector" or " Enforcement of the rules of the government and guaranteeing the enforcement of these rules". in this definition adjustment regulation is a

type of regulation that is applied to the purpose of effectiveness on the behavior of the private sector and its decisions on the market that of course has the enforcement guarantee on behalf of the state.

Regulatory Definition

In economic literature, several definitions of regulation action have been taken:

A) In very limited case, the regulation is considered to be the kind of governance and conduct market surveillance provisions to be applied by government agencies.

B) The purpose of the Regulation is the efforts of the government to conduct thorough the market. This definition also includes the first definition. Because in addition to supervision, activities such as taxation, subsidies, government ownership will be placed in the distribution market and Regulation.

The regulation covers all social control mechanisms conscious, including deliberate or non-deliberate. About Regulatory what is the most attention, is government intervention because the administration made such laws and regulations as leverage to control the situation on the market. Regulation is, in fact, a politico-economic concept and understanding of issues would be more appropriate within the framework of economic organizations, different legal forms governing these organizations. In legal and economic literature two types of system can be defined. In the first type that is a so-called market system, individuals and groups are free to pursue their welfare goals. There are only simple and specific constraints. Legal structure, often in the form of laws and Regulation, supports this system and regulation has not a key role in this situation. Second is the system based on the public sector in which the government is trying to direct or encourage behavior which is assumed and not occur without government intervention. The main purpose of this system is correct market inefficiencies of the market system with the aim of collective and public interest. The most important differences with the regulations existing in the market can be divided into three parts. First, set up rules refers to control problem by a higher authority and to functional and guidance

In other words, a higher power (the government) will force certain individuals and groups, to a special behavior and violation of which followed by punishment. Secondly, these rules are public and cannot be changed by agreements and treaties of the private

sector and only have the applicability to the government or government-affiliated institutions, thirdly, because the government has an essential role in the formation and implementation of this law, are often centralized (Naghibi, Saed Hossein, 2009). On the other hand, in the market system, the rules have the task of facilitating, and these rules are a coherent set of agreements between individuals and groups that helps to strengthen activities and well-being relationships. These agreements were based on mutual rights and in a case of the occurring problem will need to courts. This type of regulation is different with the regulation setting in two perspectives. Firstly, the people (not governments) who enact and implement laws. Secondly, the requirements have been accepted voluntarily and there is possibility of changing minds to the acceptance by the affected groups of these regulations for this reason, these laws are often decentralized. In the mentioned descriptions and expressing distinction of the laws that are dominant on the ownership system of public sector, the complicated and multi-dimensional performance of laws, are suggested more easily and it is clear that finding a market system that is run only by decentralized, facilitator and private laws.

Incentives for use Regulation

The states based on the various incentives (such as limiting a firm's economic power, providing the interests of a special firm or even in order to political exploitation) try to setting regulation. These incentives will be analyzed by scholars and experts from different methods and perspectives. One of the issues that the rejection of this issue is a priority review and consider is the problem of market failure. In some cases, a condition of market absence is occurs (For example, households are not able to purchase clean air and quiet environment in their residential area) that in this case, setting regulation, due to the uncontrolled market is not able to satisfy the public interest, is justified. Another issues such as natural allocation and external consequences of allocating economic resources in the market and keep the rights of consumers and providing goods and services with sufficient quality and quantity are of another topic makes it necessary the requirements for a regulatory institution that among the most important of them are the following items:

1. Start a business (company registration process)

2. Obtaining licenses (all binding process of obtaining a license to establish and operate a workshop)
3. Hiring and lay off employees Registration of ownership (notary is the process for property registration)
4. Obtaining credit
5. Support of investors (shareholders)
6. Payment of taxes
7. The cross-border trade
8. The dissolution of a task
9. Binding contracts (Naghbi, Sayed Hossein, 2009).

Laws and regulations in the general policies of Article 44 of constitution

General policies of principles of the 44, covers five clauses that were announced in two phases on the date of May 22, 2005, and July 1, 2006.

The first clause contains two parts: the first part refers to economic activities outside the scope of Article 44 which accordingly the government does not have the right of new activity (Notwithstanding the exceptions approved by Parliament in a certain time) and since the beginning of the fourth development plan is also required to give 20 percent of these activities. In the second part the awarding of a major part of economic activities of article 44 has been considered and allowed public firms and institutions to have investments and management and ownership in that items.

Clause "B" deals to the conceptual development of cooperatives and improve their levels of economic activity, clause "c" deals to transfer activities and firms, especially state-owned enterprises under Article 44 is devoted to non-state sector and in this clause a redefinition of the role of government and non-governmental sectors has come and with the exception of a few cases, such as upstream oil industry, national central banks, the Central Insurance of Iran and defense and security products, rented 80% of all government activities is subject to Article 44. the requirement to use stock mechanism in the assignments and pricing and to prevent the increase or continuation of the government's tenure crying privatized companies also noteworthy in this regard.

Clause "D" refers to the necessity of assignments and the method of consuming incomes results from selling dependent companies to the government and how to

continuity of government and private sector and avoiding monopoly of state section. therefore empowering the private and cooperate sections in the major economic firms ,using healthy and clear methods in the assignments and relying on the progressive, its beneficiary, the beneficiary being and emphasize the special attention of authorities in handing over to the families of the poor and disadvantaged, the less developed regions and cooperatives nationwide are the highlights of these clauses.

Conclusion

According to conducted studies it was shown that on the subjects of natural rights, the privatization in Iran have abundant weaknesses in terms of legal generalizations in the aspect of assignments ,authority of the owners of private sector, the lack of a clear explanation of how the assignment and lack of transferring ownership that its effects can be mentioned in lack of willingness of private sector to cooperation with the state in line with privatization that in this regard the statesman and legislators should with deeply looking analyze privatization laws an as well as produce new laws with studying and investigate in the laws of another countries that have free economic and with explaining how to and type of assignment and determine a special firm in line with doing these tasks and as well as assignment all the ownership and not the stock leads to willingness of private sector to the ownership and by creating supportive strategies causes development and competition in all fields and leads to employment ,producing wealth and transferring it with fair and legal methods through tax.

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