



The Possession of Persons' Lands by Government and Municipalities (In Iran)

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ABSTRACT

Governmental organizations and municipalities can take possession of the properties of natural and legal persons in order to conduct their plans if necessary by carrying out special formalities. The case of possession only includes real property and it would not include personal ones. to take possession of lands, first it should be identified the kind of them, since waste lands are not considered as a property to special persons .the legal nature of possession as the case may be if the owner does not satisfy to grant his property, unilateral obligation, even if for different reasons including the government and municipalities make the owner to satisfy, in this case contract has not a specific meaning too. In fact, it can be considered as an imposed contract and the question of possession of person' properties is one of cause making ownership for government and municipalities. If governmental organizations and municipalities do not follow legal formalities in the identification of kind and possession of no wastelands or do not pay the price of property as the case may be Bureaucratic Justice court or public courts of justice administration would be as a competence authority for investigation. This article has dealt with two chapters .in the first chapter, legal nature of possession has been studied and in the second chapter, in the case of objection to the way of identification, the kind of lands and also objection to the way of possession, the competent authority that as the case may be is Bureaucratic Justice court or public court of justice administration has been considered.

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Introduction

The framework of subject

Since longtime ago although, there has been few population and extensive objects, domination basis has been a known and acceptable basis by all human societies .on this basis, the owner has right to take possession in his own ownership and he can prevent the others from taking possession in that. In the course of time and by increasing population, development of society, development of technology and industry, the government widely needed the land day by day to conduct their public constructive, military plans. this requirement of government led to aggression and possession of persons, properties and land for this reason and after course of legislation and need too governments to supply requirements and conduct administrative numerous laws were approved about way of how taking possession of persons' lands to carry out public and developmental plans .legislator obligated the government and municipalities to follow special formalities if they need the persons' lands; both real or natural one.

Research method by studying historical background

Is has not been taken a comprehensive research excluding a few number articles - many years ago – for this reason, this subject was studied and considered by referring to the university books and by studying different books.

Considering that at present both possession and domination basis have a special importance and the possession of person' lands by government and municipalities has been considered as an extraordinary matter, there is for just need of administrative organization to conduct their own plans is not a justification by itself to ignore the domination basis.

In this study it has been tried the ownership and possession basis of lands and rights due to it by administrative organization be identified and studied with domination basis and the rules of being in the serious straits and harmlessness and it has dealt with question such as...

- 1) What kind of property can government take possession?
- 2) Which authority is responsible for the identification the kind of lands?
- 3) When can government and municipalities take possession of the properties of persons and what conditions and formalities do they have to follow to take possession?
- 4) Is the legal nature of possession and ownership of persons' lands by administrative organizations a contract or a unilateral obligation?
- 5) If it is taken aggression to the rights of individuals in the course of identification of the kind of lands or their ownership and possession and individuals want to vindicate their right, Which authorities are competence one?

Chapter one

Legal Nature of Acquisition

Legal Nature of Individual Land Acquisition by Government

Due to various rules and regulations on land acquisition by government and municipalities in which we face with terms such as compromise and agreement with the owner, and transaction and agreement on the price and return, and given that these terms are also repeated in civil law, a question arises that whether legal nature of land acquisition is contract or unilateral obligation?

Contract theory: prior to examining the issue, we need to briefly explain the concept of contract, especially its social concept. What is interesting is that in order to form a contract,

the parties simply will not be adequate and in some cases, it is inevitable to consider social aspects of the contract; because the extension of guidance contracts such as transport insurance and rentals is a result of thinking about the acceptance of the contract's social concept, such that government allows itself to force individuals to sign contracts in order to protect the public interest. The government specifies the effects of a contract all by way of imperative rules, and this traditional means used by government turns the will into prefabricated social frameworks (Katouzian, pp. 29-1391). However, in its literal sense, contract means "to tie" (Moein, pp. 1388-2323), and in terms of law, some have defined contract as Cooperation between mutual will of two or more persons in establishing the nature of law" (Shahidi, pp. 48-1390). Others have defined contract as agreement between two or more wills to establish legal effects " (Katouzian, pp. 21-1391). However, what is understood from the contract definition is that in the legal system, agreement and cooperation between two wills are the main elements of the contracts.

(2-2) – Legal Nature of Acquisition by Agreement on price

Since in the rules of acquisition and possession the principle is based on agreement and compromise on transact, if there is an agreement between the owner (or owners) and the possessing executive body on doing transaction and determining its price with the damages incurred, then legal nature of the act mentioned is a contract to government or municipalities, and if they disagree, they would be forced through different ways specified in law to sell their property and finally to sign an agreement with government and executive bodies on the price of the property. In fact, sometimes in violating the principle of freedom of contracts, the government takes the freedom to transact from the parties. In such cases, the law imposes a legal relationship whose results are similar to a contract and that is why it is called "imposed contract", "mandatory contract", or "assumed contract" (Same, pp. 111-112).

(1-3) unilateral obligation Theory

Unilateral obligation (legal act) in its (Persian) literal sense means "to throw" and "to drop" (Moein, pp. 418 – 1388), and some come people consider it as a legal act based on the consent of one of the parties (Amid, pp. 218-1389), and some people consider it as a unilateral legal act whose composition requires a will (Ansari, Taheri, pp. 517-1384); however, in legal terms unilateral obligation has got two meanings, that is, infinitive and past participle meaning. In its infinitive sense, Unilateral obligation is "the composition of legal nature in the individual's will" and in its past participle sense, it means a unilateral legal nature which is predicted in law and realized in the world of credit by the will of the person engaging in unilateral obligation to compose (Shahidi, pp. 43 – 1390). In other words, unilateral obligation is an individual will whereby a right is created or aborted, and in terms of legal analysis, unilateral obligation is born of a unique will and no other will ever affects it. For this reason, an external explorer cannot be effective in its realization; however in order to be realized, contract and will should be available and they should agree (Emami, pp. 193-1377). Since laws and regulations related to land acquisition by the government and municipalities clearly, specify that despite non-consent of the landowner, still the government and municipalities for implementing public projects acquaint the land. In addition, because the will of one party has been effective, it is initially mistaken with unilateral obligation, while this act is also some kind of contract and it is called "imposed contract"

2- Provisions of Acquisition of real Estates (by Government)

In this discussion, we will try to investigate basic terms of a valid transaction and the owners and procedures for land acquisition by government and municipalities.

(2-1) Basic provisions of Valid Transactions: Legislator has stipulated basic conditions for accuracy of any legal act, whether a contract or a unilateral obligation, in Article 190 of Civil code, which must be complied with in all contracts. These provisions are 1- Intention of the parties and their consent 2- capacity of the parties 3- certain subject to be transacted 4- legitimacy to transact.

In other words, if these provision are not realized, then the transaction is not valid, and if these provisions are realized, then the transaction is valid, because contract is a matter of credit and it is valid when it has met the provisions the legislator stipulated for realizing this matter of credit (Yousefi, pp. 118-1383). Here we refer specially to each one.

(2-1-1)- Intention of the parties and their consent

First basic provision stipulated in Article 190 of the civil code is intention of the parties and their consent whose conditions are specified in Articles 199-191 of the civil code. What is the basic provision of a contract is intention and consent of both parties. Thus, if one party to a contract lacks intention or consent, then the contract will be legally invalid (Shahidi, pp. 126-1390). In order to create a legal nature - whether a contract of a unilateral obligation- intention and consent of the composers are essential.

(2-1-2) capacity of the parties: Another basic provision for a transaction to be valid is capacity, which is stipulated in paragraph 2 of Article 190 of the civil code. Capacity in its general sense means "competency of person to an implement right". In this sense, full capacity is desired. Occasionally, the term "capacity" is only intended to mean having right or implementing it, which is its special meaning (Safaei, and Ghasemzadeh, pp. 152-1377).

Rules relating to capacity are among rules relating to public order, so the contract cannot prevent their implementation. Capacity cannot be granted on any incapacitated person with consent, and no one has the right to deprive themselves of their capacity while contracting with others (Katouzian, pp. 14-1391). **(2-1-3) Object of Transaction:** Another basic provision for validity of a transaction, which is stipulated in paragraph 3 of Article 190 of the civil code, is object of transaction. In fact, each legal act- whether a contract or a unilateral obligation – should have an object, which is made against that legal act. In Articles 215 and 216 of the civil code, requirement for object of transaction has been stipulated. Lack of these requirements will result in revocation of a transaction.

(2-1-4) Legitimacy to Transact: The last basic provision for validity of a transaction, which is stipulated in paragraph 4 of Article 190 of the civil code, is legitimacy to transact. Legislator stipulates in Article 217 of the civil code that "In transaction, it is not necessary to specify the direction, however if it is specified, it should be legitimate, otherwise it will be invalid." "Direction" means "incentive" or "motive". The provisions of the above Article stipulates that while making a contract, it is not obligatory for the parties to state their incentive for forming the transaction. However, if they state their incentive, it should be legitimate and in case of lack of legitimacy, the transaction will be invalid. (Shahidi, pp. 331-1391)

(2-2) possessors. Under Article (1) of purchase and Acquisition of Land and properties Bill for implementing Public, development, and military plans, which was approved by the government in 1358/11/17 (according to Persian calendar), and

under Article 23 of mines law approved in 1361(also, Persian calendar), and according to subparagraph 3 of paragraph (B) of Article 22 of the same Law, individuals having a right to land acquisition and possession are : ministries, public institutions and companies, and institution that are required to mention their names in order to be covered by the law. Examining other laws makes it clear that besides public entities, private entities can also possess individual lands under some provisions. In this article, we will examine briefly the above-mentioned items.

(2-2-1) Ministries: paragraph (D) of Article one of the state Employment Act approved in 1345/3/31 (also, Persian calendar) defines ministry as follows: "ministry consists of government offices and agencies, which is formed to administer a series of public affairs and services." From the above definition, we understand that a ministry is a coherent well-ordered organization in which there is a hierarchy and its jurisdiction.

(2-2-2) a public Institution: public Audit Act, in its Article 3, defines public institution as follows: "A public institution is a certain organizational unit which is run under the supervision of one of the Three Branches, and it is not called a ministry.

(2-2-3) public companies: Article 4 of public Audit Act approved in 1366 (Persian calendar) defines public companies as follows: " A public company is a certain organizational unit which is either established in the form of a company under the authorization of law or it is nationalized or confiscated by decree or a competent It should be known as a public company, with 50% of its capital belonging to the government. Any commercial company which is established by the investment of public companies – as long as over 50% of its stock belong to public companies – is considered a public company."

(2-2-4) Municipalities

In Municipal Act, there is no definition of municipalities and only duties of municipalities have been mentioned there. However, according to duties of municipalities, we can consider a municipality a non- governmental non- profit public organization that undertakes the administration and responsibility of urban affairs under state license so as to establish and administer public facilities. It is a legal entity with financial and administrative autonomy.

(2-2-5) Private Entities: Under Article 3 of the Mine Act and according to subparagraph 3 of paragraph (B) of Article 23 of this Act, in addition to public entities, private entities can possess individual land only to exploit mines.

(2-3) Terms and conditions of land acquisition : In addition to essential provision of validity of a transaction stipulated in Article 190 of the civil code, certain terms and conditions are required for property acquisition and possession, that are briefly investigated in the present article :

(2-3-1) the Agency in possession of the properties: one necessary condition for individual land acquisition by an executive agency is its need to implement its plans in those lands. Legislator clearly stipulates in Article one of land and property purchase and Acquisition law approved in 1358 (Persian calendar) that "agencies gaining possession of land and properties should need land and building, constructions, facilities and other rights associated with the land belonging to natural and legal persons for implementing their public, developmental, and military plans." Accordingly, if an executive agency without any need, attempts to gain possession of individual land, their action will be invalid.

(2-3-2) presence of an Approved plan: simply the executive agency need for gaining possession of individual land is not sufficient.

In addition, there should be an approved plan signed by top executive official of the agency. If there is no approved plan, it is not possible to gain possession of individual land by force.

(2-3-3) Funding for purchase: under the law, in order to an executive agency to gain possession of individual land, it must pay the price and prior to acquisition attempt, the executive agency should ensure necessary funding for purchasing individual land by the executive agency itself or on behalf of the Planning and Budget organization (PBO), because in the last part of Article one of Land and Property Purchase and Acquisition bill for implementing public development and military plans approved by the government in 1358/11/17(Persian calendar) the issue of Funding prior to land acquisition has been clearly stipulated.

(2-3-4) lack of possibility to Gain possession of land belonging to the Government: simply the presence of plan, the executive agency need, and funding for purchasing land are not enough to gain possession of individual land. In addition, an executive agency should inquire Housing and Urban Development Organization or Agriculture Organization for assigning government land required for implementing their projects. In case of lack of government land, it should attempt to gain possession of land owned by legal or natural entities, because in note (1) of Article 2 of land and property purchase and Acquisition Bill Passed in 1358/11/17, the executive agency is explicitly required to do this way.

(2-3-5) Land Use: Another term and condition necessary for individual land and property acquisition and possession is that the use of the land and property for implementing government or municipality projects should be consistent with the approved project. In addition, the executive agency is not allowed to use the land other than in the specified usage.

(2-4) procedures Necessary for the acquisition: After the realization of the provisions necessary for land acquisition, the executive agency is required to observe the formalities. In case of non- compliance with any of the procedures set forth and upon beneficiary compliant, all the operation of acquisition will be void.

(2-4-1) Determining land registration status: under urban land Act, any organization intending to gain possession of land should first choose the desired land and then determine its registration number, demarcation, and specifications. When there is no access to the owner or the owner is not willing to provide a license plate, under Article 14 of Registration Act which states "registration of properties is determined in turn", the executive agency can gain registration number of the land it intends to possess based on registration number of properties and land adjoining the desired land and with regard to the definition of demarcations of the land or property in the title deed.

However, in clause 2 of Article 2 of land purchase and Acquisition approved in 1358/11/17, it is declared that " local Department of Real Estate Registration is required to declare the location and registration status of the property according to the provided map within a maximum of 15 days from the inquiry date." Therefore, the agency, which gains possession of the property, should declare its intention to the local registry office concerning acquisition after the registration number of the required property is determined. This is to prevent the transfer of the described properties.

(2-4-2) Recognition of type of Land: one who takes possession of a property should send the map and necessary documentation for to the Department of Housing and urban Development – commission of Article 12 - concerning land within the legal boundaries of cities, and to the seven- member Board of Land

Assignment concerning land outside legal boundaries of cities for land type recognition, after declaring to the Department of Registration under urban land Act prior to Acquisition.

The reason for obligation to obtain the opinion of "commission Article 12 and Seven- member Board of land Assignment" is that the type of land is effective on procedures and price of a transaction. Land is either waste or productive. Wasteland is considered a land, which was originally arid (having no productive history) (Ansari, translated by Mohammadi Hamedani, 1388, p.171). Some have considered wasteland a dry and arid land with no residents, or a land that does not benefit anyone (Moein, 1388, p 4416). If a land recognized to be wasteland, then there is no need to transact, because wasteland belongs to the government. Citing a Hadith, some Islamic jurists believe that wasteland and land not owned by anyone belong to God, his prophet (Mohammad), and to Muslims, respectively. (Ansari, translated by Mohammadi Hamedani, 1388, p.172). However, if the land is recognized to be non-barren, the expert prices it with regard to the opinion of "commission of Article 12".

(2-4-3) Declaring the Intention for Acquisition : under Executive Agency Act, the intention to land acquisition should be announced to the interested parties and the interested parties stipulated in law are the only owner or owners; however besides them, the acquisition intention should be declared to all parties claiming a right over the land, either objective or religious rights. Usually, the declaration of the issue is made through one of the following ways.

(2-4-3-1) written notice: one way to declare the intention to land acquisition to the interested parties is via a written notice in the form of administrative letter or sending declarations. All specifications of the land and the project to be implemented in it should be stated in the administrative letter or declaration. this is when full address of the interested individuals is available for the agency.

(2-4-3-2) publishing Ads: If an executive agency does not know the owner (or owners) or the beneficiaries, or does not have their address, then the announcement of the intention to land acquisition should, then published by local in which-as written notice does- all the specification of the property and project to be implemented there, should be stated, so that the interested parties could make ready for transaction.

(2-4-4-) Land Acquisition: After the necessary formalities, it is time to deal with one of the most important steps, which is doing transaction and transferring official land document or the object of acquisition. Acquisition is defined literally as " becoming an owner" (Moein, 1388, p.1142) others define it as "becoming a possessor" (Ansari, and Taheri, 1384, p.517). Transaction may be made with or without the agreement of owner or owners. In this paper, we will examine them.

(2-4-4-1) Transacting in Agreement with Beneficiaries: our legal system, the agreement between two wills is a basic element (Katouzian, 1391, p.27). In its (Persian) literal sense, contract means " integration" or " backing -up" (Dehkhoda, 1373, p.6212). Accordingly, in all laws on land acquisition (ownership) including Article 3 of land and property purchase Bill, and single Article on assessing buildings, properties, and land required by municipalities approved in 1370/7/27, it is stipulated that in order to a transaction to be valid, it should be made with consent and agreement of beneficiaries. However, discontent owner(s) have no way other than agreeing on transferring the property which is required by the government and municipalities, because in case of non- agreement on the price of the property or refraining from introducing an expert to

determine the price of the property, the price will be determined and paid according the law. In fact, we can say that whenever owner's interests are in conflict with another's right in the society, the owner's ownership right has priority over another's right within customs, habits, and regulation of the society. However, whenever this right is in conflict whit public interests of the society, the rule "no harm and no causing harm in Islam" requires that the society has priority over the owner's right of ownership, thus the principle of dominance can be referred to as ownership (Darabpour, 1391, p.79).

(2-4-4-2) Transacting without the Agreement of Beneficiaries

If there is not an agreement between an executive agency and the interested parties, then under the Act concerning the assessment of buildings, properties, and land required by municipalities approved in 1370/8/28 and citing single Article of the above Act: " In case of non- agreement between a municipality and an owner, the price of buildings, properties, and land must be assessed and pail in daily price." Now a question poses that how is daily price of properties determined. Note (1) of purchase Act approved in 1370 answers the above question like this : " Daily price will be determined by 3 trusted official experts of justice Department, one of whom is selected by the municipality, another one by the beneficiary, and the third one by the parties." If for some reasons the two parties are not able to agree on introducing the third party, in Note 2 of the same Act, the task has been entrusted to a competent court in the location of the property to introduce a third party itself, the above mentioned Act has even clearly stipulated that " when owner(s) within the deadline, one month after the date of declaration by the executive agency in the form of a written note or publishing in one of the widely circulated newspapers or publishing ads in local newspapers, do not attend the court, or in cases where the owner is unknown, there are disputes over ownership, the owner is dead, and there are obstacles, like these, it is not possible to select the third expert, a competent court within the location of the property attempts to determine the expert at most 15 days from the date the municipalities attend in the court. However, this should be performed observing the owner's interests and it should not be in a way that causes disruption in his/her current life.

Illegally desecration of properties has adverse effects on economic activities of the people in society, and ought to be performed with high care and pity (same, 1391, p.163). In line with the owners' rights and preventing the violation of the officers of the executive agency, Article(8) of purchase Act approved in 58/11/17 stipulates that "acquisition of land, building, and facilities and dispossession of owner and paying the price of the property or owner's rights are not allowed prior to transaction", and if the executive agency refrains from paying the price of the property, under the Note of Article 9 of the above Act, the owner is authorized to attend a competent court and call for closure of executive operation of the project. The court is required to hear the case out of turn. In case of paying the price by the executive agency, the seizure of the property will be eliminated; otherwise, the executive operation is stopped by law until the price is paid.

Competent Authorities to Deal with objections Against Individual Land Acquisition:

In previous discussions, we examined the procedures of individual land acquisition by executive agencies and essential formalities for gaining possession and paying the price of properties. In this chapter, we will investigate the issue of beneficiaries' objections and complaints against the way

acquisition, and even paying the price and competent authorities that deal with this issue:

1- Administrative Justice Court: with the expansion of government function in providing public and developmental services, in order to prevent unilateral authoritative action taken by executive agencies and possibly adjust their action, it is inevitable to have a competent authority who realizes people's rights through dealing with possible adjustment of these agencies and their officials.

Accordingly, in Article 173 of the Islamic Republic of Iran's constitution, the establishment of an institution to deal with people's complaint, grievances, and objections against government officials, units, or regulations and realize their right, which is called Administrative justice court and works under the supervision of Head of the Judiciary, has been stipulated. Its establishment was approved in 1360 (Persian calendar).

(1-1) Jurisdiction of the Administrative Justice court

Administrative Justice Court's jurisdiction to hear individuals' complaints, grievances, and objections has been stipulated in Article 11 of Administrative Justice court Act approved in 1360, which was repeated later in Article 13 of new Administrative Justice court passed in 85/10/22 with some amendments. Administrative Justice Court as a specialized authority has the competency to hear people's grievances and complaints regarding alleged violation of the implementation of legal obligations by a government agency. As for the issue of individual land acquisition by the government and municipalities. The court merely hears administrative decisions and actions with no contentious aspect. In case of non-observance of procedures concerning the way of acquisition, the court will cancel the executive operation.

2- public courts : Under Article one of principles of Justice authorized to hear all claims other than what is clearly excepted by law " Department of Justice can hear all claims unless claims which by law the jurisdiction to hear them is entitled to another authority. If other laws have not put the case into jurisdiction of a certain authority, Department of Justice as a general hearing authority will be competent to hear it. All applicable laws, especially land and property purchase and Acquisition Bill for implementing public, developmental, and military projects of the government approved in 58/11/17, which part of it is merely assigned to the assessment of land and properties required by municipalities Act (passed in 1370/8/28) indicate the jurisdiction of judicial authorities regarding the issue.

Conclusion

Although the possession of persons' properties by the government and municipalities makes limitations and in some cases, it leads to take away possession of persons, since possession has been an exceptional matter therefore, its range also is limited to the real property. In order to carry out the plans of administrative organizations, first they should use national and governmental properties and lands. it is necessary to take the possession of persons' properties and lands in the case of lack of mentioned properties or their insufficiency. To take possession of lands, first, their kind should be identified and if they are not considered as wastelands, it should be taken steps to take their possession. As the case may be the identification kind of lands is "Article 12 committee of urban lands law" (lands in the bound of cities) or a "seven members bound of grant of land" (lands out of bound of cities). The possession of estates at present is carried out based on the bill of purchase condition law and possession of lands to conduct public, constructive and military plans acted on 17/11/1358, law of statement way of constructions of required properties and lands by municipalities acted on 28/8/1370

"preservation law of monuments" acted of 47 (of course articles of law has been abolished), the law of mines acted, in 1361 the Law of urban land (excluding article 9 that its time credit has been expired) and another scattered laws.

As the mentioned laws the main principle bases on agreement and mutual consent among owner or owners or possessors of other legal rights with administrative organizations in respect to the price of properties or persons' rights where parties or selective experts come to agreement with the administrative organization, the legal mentioned action has contractual aspect. However, because persons are obligated to transfer their properties by act of law and in the case of not transfer, their properties the possession case is taken possession, the mentioned legal act is an imposed contract.

The observance of rights persons necessitates that government has to take steps to preserve public rights. Because the observance of human rights and including possession has had a major importance as where there has not been security for persons in this respect naturally many problem will be made in this way.

Considering that administrative organization should requested first from related authorities in the course of possession in order to identify the kind of lands and mentioned authorities may make a mistake about identification of kind and the rights of owners of these lands may be wasted thus "vote of committee" Article 12 of urban land law and "seven member boards" of the grant of waste lands after communication is objectionable in the public courts of justice administration, the time of objection to the votes of "article 12 committee according to act of assembly of expediency system" is from 3 months to dated communication of vote to the owner. but unfortunately the law remains silent about time of objection to the votes of seven member boards of grant lands in the identification kind of land and this makes seven members boards' votes objectionable by passing long years and they would never finalize without objection. However, it is necessary to make decision in this field with such importance of matter and prevention of disorder in the case of land.

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