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Legal Ground Governing Iran's Upstream Oil and Gas Contracts with an Emphasis on Sovereignty and Ownership of Oil Resources

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ABSTRACT

After the revolution, the legislator changed his attitude (Principle 45 of the Constitutional Law) and categorized oil and gas reservoirs (mines) among Anfal (property truly belonging to Prophet Mohammad or to any of the imam) and public wealth. In addition, it used the term "Public Ownership" in Principle 44. It seems that although the concept of national and public ownership is different from that of Anfal from ideological viewpoint, there are several similarities between these two concepts with respect to their effects. Most of the post revolution rules put an emphasis on maintaining ownership and sovereignty of oil resources. In this paper, these two concepts and the several interpretations made from them will be discussed. It should be noted that this paper has been written by using descriptive and analytical method.

Keywords:

Upstream Contracts, Sovereignty, Ownership, Anfal, Constitutional Law, Oil Contracts.

1. Introduction

Our guide to the feasibility of contract enforcement is based on the rules which are mostly rooted in the Constitutional Law and are mainly derived from the powers of parliament. Such principles are in the form of general rules and the exceptions to which are only possible based on the parliament permits. When doubted, exercise of any such rules or principles shall not be permitted. In addition, any violation of the governing principles will result in revocation of contract because in accordance with Article 10 of the Civil Code, contracts must not be contrary to or in violation of the laws. In other words, any oil contract which is concluded without observance of the basic principles prescribed by Law will be null and void. It is worth mentioning that until before general abrogation of Oil Law 1974; many of the general principles governing upstream contracts had been codified in the said Law. However, after ratification of the Oil Law as amended in 1987, the principles indicated in the said Law fell into disuse. Although lack of the said principles is a big lacuna, study of statutes leads us to some of the principles. One of the biggest lacunas in this regard is that before abrogation of Oil Law 1974, when the legislator talked about "buy back" in upstream oil and gas industry, we should interpret the said term in accordance with the contractual principles of Oil Law 1974. But after abrogation of the above law, although some of the other principles were inferred from other laws, these principles were quite general. In other words, if the legislator talks about buy back after abrogation of the above law, it should be interpreted based on nominate contracts of the Civil Code and/or Article 10 and the principle of freedom of contracts should be resorted.

Not for all Civil Code based contracts is buy back so much helpful as it is expected because the conditions of upstream oil and gas contracts are so inevitably important that some of the principles mentioned under the civil contracts cannot be a suitable substitute for Oil Law 1974. In addition, most of the said principles are among supplementary rules and not mandatory rules. It should be therefore concluded that if Law talks about buy back, it considers nothing more than the principles of freedom of contracts and agreements; however, such freedom does not mean absolute will and it is restricted with the following principles.

Preservation of national sovereignty and prohibition of domination by aliens

Literally, sovereignty means authority and its opposite concept is dependence. National means the superior power of government within the framework of borders (Saber, 2010: 181). Sovereignty requires this authority to be immune from invasion. This concern is indicated in principles 153 and clause 8 of the Constitution. According to these principles, conclusion of any contract which results in domination by aliens over economy and natural resources is forbidden. Therefore, it seems that foreign investment and economic relationship with aliens is not prohibited by the Constitutional Law and it is forbidden only in cases where it is followed by domination by aliens. Prohibition of domination by aliens is rooted in the jurisprudential rule of "Prohibition of Domination by Aliens" and Iran's bitter experience of concluding colonial contracts. (Emad Zadeh et al., 2015: 162)

The discussion here is that whether the ground for domination of aliens is clear in the Constitution and routine rules. The answer is that some of the principles of the Constitution and routine laws serve as a ground for this case. In other words, the purpose of these principles is in line with prohibition of domination by aliens. Some of these principles are stated below.

2. Principle 81 of the Constitution

According to Principle 81 of the Constitution, it is forbidden to grant concessions to aliens for establishment of companies and institutes in business, industrial, agricultural, mines and service affairs. In line with interpretation of this principle, some of jurists are on the opinion that the said prohibition includes any type of investment. They believe that the spirit of the Islamic Republic Constitution and revolutionary wrath upon its codification indicate absolute prohibition of direct foreign investment whether or not such investment is legally regarded as concession. To justify their theory, they use the term *Concession* in its conversational context more than in its legal concept. In other words, concession in conversational statement is called to any direct investment. (Khazaie, 1992: 102)

There seems to be some objections to the above theory. First, the above interpretation is contrary to the original meaning because Principle 81 stipulates concession and its interpretation is beyond the framework of concession and indicates Jihad against

the wording that is wrong. Second, foreign investment is defined as a method on which basis the material and nonmaterial assets are transferred from one country to another to produce wealth. Moreover, foreign investment is called to the investment made through capital market (stock exchange) which is indirect investment by portfolio. In contrast, there is the foreign direct investment which is realized through possession of companies' shares, establishment of economic enterprises and contractual arrangements. (Shirovi, 2011: 442)

In investment through contractual arrangements, sometimes capital is returned through the project itself and sometimes governments are obligated to materialize that. In BOT investment for example, capital is returned from the project, but in investment through contract of finance, the government is obligated to return the capital. It seems that if we accept the above argument which indicates absolute prohibition of foreign direct investment, it results in prohibition of all foreign investments such as BOT contracts and the contracts that result in obtaining loan facilities. This is while according to Article 80 of the Constitution, obtaining and granting loans by the government with domestic and foreign grants shall be ratified by the Islamic Parliament. In other words, the Constitution not only has not prohibited one of the forms of foreign investment, i.e., obtaining loans, but also it has subjected that to the parliament's ratification. Therefore, the assumption that concession is used in its conversational context and has prohibited all foreign investments is rejected.

It might be said that Principle 80 is an exception and it implies this assumption because since foreign investment is prohibited in the said principle, it implies that the said principle is based on prohibition of foreign investment and only contract of loan facilities is authorized. In other words, the relation between Principles 80 and 81 is a general and specific relation.

To answer this assumption, it should be said that the word *Concession* in Principle 81 is equal to the word *loan* in view of conventional value. In other words, besides non-stipulation of Principle 81, if we want to assume a conversational basis for interpretation of words, it can be argued that any investment in conversational context is called a loan. For example, obtaining bank loan facilities through reward or bailment is also called a loan. This is while the concept of loan contrasts with the said cases. In other words, if we consider the conversational concept, both legitimacy and prohibition of foreign investment are inferred from principles 80 and 81 of the Constitution. Therefore, it is better to avoid personalized perceptions and to interpret the words based on their appearance.

A second view has been put forth in contrast to the first one. On this basis, in consideration of the above arguments, it cannot be said that foreign direct investment is absolutely prohibited; rather, foreign investment is prohibited in those investments which are referred to as concession. (Hedayati, 2008: 43)

This inference also seems to have some disadvantages because the concession for establishment of companies and institutions is prohibited in the above principle. According to Principle 81 of the Constitution, concession in its absolute form is prohibited and prohibition shall include the concession for establishment of companies and commercial institutes.

There is also a third view which is a bit more realistic. On this basis, according to Principle 81, if the aliens want to establish companies and institutes based on their concession-based contracts, it is prohibited. In other words, followers of this view are on the opinion that companies and institutions arising from concession-based contracts are the subject of this prohibition. According to their interpretations, companies and institutes arising from concessions are the subject of prohibition. In other words, if the establishment of companies is the result of concession-based contracts, it is absolutely prohibited. (Hashemi, 2007: 12)

There seems to be two objections to this interpretation. First, according to this principle, establishment of companies and institutes is deemed as a concession and we regard it as absolutely forbidden. This interpretation is perceived from the context. Therefore, if the purpose of the Constitution is to prohibit the establishment of companies arising from a concession, the said principle should have been written as follows: "Establishment of companies and credit institutes by foreigners in business, industrial, agricultural, mines and service affairs is absolutely forbidden." In addition, the Guardian Council's view in its interpretations is quite different from that of the above jurists. According to the Guardian Council, subject of prohibition is just the establishment of

companies and institutes and aliens may only register branches in Iran.

In other words, establishment of any companies in Iran by aliens is forbidden except for branch registration. Again, the above jurists argue that the reason for authorization of branch registration was because title of the contract was not the basis for its validity. On this basis, branch registration was authorized. (Hashemi, former: 198)

As for this theory, it should be argued that basis of the nature of branch differs from establishment of company because if a company is established in Iran and its main center of activity is in Iran, it is considered as an Iranian company in accordance with Article 1 of Companies Registration Law and Article 591 of Commercial Law. But, if a foreign company establishes a branch in Iran, according to the executive bylaw of the Law authorizing registration of companies, this branch is affiliated to the principal company and it is therefore regarded as a foreign company.

Therefore, in accordance with the view of the Guardian Council, the prohibition stipulated in Principle 81 addresses the establishment of company. The reason that the term "Concession" is used at the beginning of the article is that if the aliens are authorized to establish companies, they will enjoy the privilege of being regarded as Iranian nationals. Moreover, the Guardian Council has stated in another view that the prohibition for registration of companies accounts for the cases where the foreign party holds more than 50% of the company's shares and/the right of its control and in case the share of the Iranian party is more than 50%, the said company is not subject to the restriction stipulated in Principle 81.

Some believe that in 1999, a ratification has been issued regarding authorization of investors in registration of company with over 40% foreign shareholders. In addition, some of the articles of the Law on encouragement and support of foreign investment enacted in 2002 implicitly indicate establishment of company with over 40% foreign shareholders. (Shrovi, former: 452)

It seems that Principle 81 is so explicit that it remains no other way for any commenting. In addition, if there is any expediency in this respect, the corresponding expediency authority is the Expediency Council and not the government.

The result is that in general, and in line with interpretations of the Guardian Council, firstly, foreign investment is not prohibited according to the Constitution. Second, the first ground for prohibition of domination by aliens is the prohibition of establishment of companies and institutes by aliens. Such restrictions decreased after the ratification of Expediency Council due to interests of the system in the laws pertinent to free zones and administration of special economic zones. In other words, foreign companies can register companies in free special economic zones with 100% foreign investors. Moreover, according to the interpretations of the Guardian Council, it is authorized to register branches and companies inside the main territory that less than 50% of their shares lack any foreign right of control.

3. Anfal at the time of absence

Before entering this discussion, we should first understand the concept of Anfal, its relationship with mines and operation methods of Anfal. Finally, we should review the status of this decree at the time of absence.

Anfal is the plural of spoil meaning any thing in surplus. Mustahabb prayers are called Nafl Prayers because they are in surplus to obligatory prayers. Properties are called Anfal that in addition to Sādah who are partners to Khums (one-fifth), they are the property of Imam and Sādah have no shares of them. (Mohammadi Khorasani, 2017: 234). Maybe the reason for calling some of the properties as Anfal is because they are in surplus to the common ownership methods and are possessed by the Supreme Leader. (Ghomi, 1997: 5)

In this discussion, the Islamic jurists have provided no specific definition and they have refused to provide a general rule by mentioning evidence. However, Imam Khomeini has argued in this relation: "The cases named in the Islamic traditions as Anfal belonging to Imam's property are all evidence. It is understood from all such traditions that whatsoever is related to Imam is a single title which includes several items. The criterion in all these cases is the lack of any specific owner". (Nadjar Zadeh, 2016: 58)

Regarding the philosophy of describing Anfal, Islamic jurists believe that this relation becomes meaningful after understanding the concept of Imam's ownership. Some other conclude that by Imam's ownership it does not mean his personal ownership,

but this ownership belongs to the position of imamate. Therefore, in his book entitled "Iltihabiyah", Sheikh Tousi has stated that Anfal at the time of the prophet were specific to him and after his death, they will belong to the prophet's substitute in the Muslims' affairs. Therefore, Anfal are originally the property of Imamate position and Islamic government and it cannot be inherited (Mousavi Khalkhali, 1427: 21) and the Islamic government will use Anfal for the benefits of the government. So, it is understood from the statements of the Islamic jurists that firstly, ownership of Anfal is pertinent to imamate position. Secondly, Imam's entitlement to possess Anfal is of objective right, but the benefits of such properties are used for the interests of the government. Moreover, regarding the philosophy of legitimacy of Anfal, Islamic jurists have stated that Anfal are among public property created by the Almighty God for human being and has given its control to Imam to use that based on justice and interests of people (Mohaghegh Damad Yazdi, 1427: 21). In other words, the purpose of describing the decree of Anfal was to avoid the rich people to control Anfal by using their wealth and to centralize wealth more than ever (Hashar Surah, Verse 51).

3.1. Inclusion of decree of Anfal to mines

Four views have been stated regarding the inclusion of decree of Anfal to mines. Firstly, a group of Islamic jurists such as Faquih Al-Hamedani believe that mines are absolutely regarded as Mubahat (rights or properties that belong to no specific persons) except for the mines in occupied and opened lands. In other words, according to this view, mines which are merely located in Anfal lands belong to the Islamic government and the rest are among Mubahat. Secondly, another group of Islamic jurists such as Helli, Fadhil and Shahid Sani consider the ownership of mines to be subject to the ownership of land. The third group have considered the mines to be absolutely among Anfal and believe that mines belong to the Islamic government. Sheikh Mofid, Tousi, Daylami, Quazi Ayn Peraj are among the latter group. The fourth view is for Sheikh Ansari. He considers the mines to be among Mubahat, but he has excluded three cases from this principle, first, the mine in Anfal lands, second, the lands taken from the infidels and third, the mines which are located in the lands that belong to individuals.

3.2. How to operate the Anfal

The first principle in Anfal is that no occupation is authorized without the permission of Islamic government; otherwise, it is regarded as usurpation. According to another view, the principle in Anfal is based on permission for reclamation unless prohibited by Imam.

In general, there are two methods for operation of Anfal. The first is that the Islamic government permits reclamation. This permission may be absolute and for an unlimited period or the said period may be limited. The question in this regard is that whether such reclamation brings ownership or a mere a right of occupation is created for the operator without any ownership. On this basis, if the first assumption is realized, the mine is excluded from the ownership of the Islamic government, but in the second case, the mine is not transferred and remained as Imam's property, but the reclaimer is granted the right of occupation. In this relation, the famous quote is based on the first assumption. In another quote from Sheikh Tousi in Mabsout, it has been said that permission for reclamation is not followed by transfer of the ownership of the property. Of course, the third quote considers division and states that if there are conditions stipulated in the permission for possession of property, ownership will not be transferred; otherwise, it will not be same. The second method is the reclamation by Islamic government. In this method, the government has the property reclaimed in trust or through a contract. So, in general, operation of Anfal (oil and gas reservoirs) is possible by two ways; first, issuance of a reclamation permit which may be absolute or limited and may consist of ownership of the property and second, reclamation by the Islamic government.

3.3. Operation of Anfal

During the absence period, Anfal are Mubah not only for all the Shiite people, but also for all the Muslims. In other words, the Muslims are generally permitted to operate Anfal during absence period. Some of the Islamic jurists have agreed to this decree. The question here is that in case of establishment of an Islamic government in the absence period, does the said permission continues? To answer this question, two views should be mentioned. The first decree is assumed for lack of any religious government. In the

assumption of existence of an Islamic government, Anfal will be naturally available to the legitimate governor because the legitimacy of the guardianship of the jurist requires that for all the issues related to leadership of Imam, the decree of his representative shall be referred to. One of these issues includes the properties such as Anfal that belong to imamate position. In addition, many of the jurists believe that after the prophet, Anfal are the property of the prophet's substitute (1413: 69).

Secondly, some other jurists rely on the secondary reasons to establish the restrictions pertinent to Anfal without causing any damage to the analysis of Anfal during absence period. In this regard, Ayatollah Makarem believes that use of Anfal during the absence period is authorized and Halal according to the reliable resources. Wastelands and mines are indications of Anfal. Time and place cause advancement in the equipment for operation of mines such that one may occupy several mines by using new equipment which will result in destruction of mines and classification of society. These conditions set some limitations in enforcement of decree. Therefore, enforcement of this decree is limited to preservation of system and lack of any violation of the rights of others. Discernment and inference of this restriction is made by the Islamic ruler who is qualified. On this basis, distribution of Anfal among the people is made under the supervision of ruler. As soon as this distribution causes any disturbance in the system and/or oppression, the Islamic ruler will restrict that. So, it becomes clear that the decree of Anfal has not changed for people except that its enforcement has been restricted (Makarem Shirazi, 1427: 69). Therefore, Anfal are properties that belong to the position of imamate and the successors. Imam's ownership of Anfal is the ownership of the original property. Operation of mines is made in two ways. The first is that Imam permits a person to reclaim the property. On this basis, the reclaimer of the property will become the owner according to some of the views. However, according to some other views, the reclaimer only obtains the right of possession and he is the owner of productions as long as he produces products. The second way is that Imam himself reclaims the mines. It is worth mentioning that firstly, there are disagreements regarding the inclusion of Anfal on mines. Secondly, according to a famous view, Anfal is among public Mubahat during the absence period. Thirdly, according to the viewpoint of Ayatollah Makarem and as it is inferred from the judgment of Imam Khomeini, in case of establishment of an Islamic government, the decree of permitted use of Anfal by the public remains enforceable, but such permission can be adjusted through secondary titles.

Public properties

As defined by the jurists, public properties are for direct usage of all people and allocated to the public interests. Government can administer such properties due to its guardianship of the people. These properties have two characteristics, the first is that these properties depend on ownership and the second is that they cannot be privately owned though government's rights for such properties is not of ownership type and it is only entitled to administer and control such properties (Katuzian, 2009: 69)

Regulations of public properties are stipulated in articles 24, 25 and 26 of the Civil Code. On this basis, some believe the principle in public properties is based on prohibited ownership unless in cases in which a specific law permits such ownership. Although the concept of public properties is rooted in common law (Hosseini Tehrani, 1959: 67), this theory has precedents. In Tahrir Al-Vasilah for example, Imam Khomeini considers the mosques, schools, waters and mines as common properties. In addition, in Sharaye Al-Islam, the researcher has used the term Common Interests and believes that mosques, loans and absolute endowments are among public properties. In this relation, the jurists believe that people are equal in operating the common properties and no one is entitled to reclaim, occupy and own such properties personally. In general, according to articles 23, 24, 25 and 26, public properties are those that belong to all people and cannot be privately owned. Before the revolution for example, legislator had specified the management of oil and gas resources by ratification of Oil Law 1974.

4. Criterion of statutes regarding the ownership of reservoirs (oil and gas mines)

It seems that there is no explicit order in the Constitution regarding the ownership of oil and gas reservoirs. In this regard, only principles 44 and 45 of the Constitution have ordered for the mines. Before reviewing this order, it should become clear if oil and

gas resources are regarded as mines? The answer is that in this regard, Islamic jurisprudence, like the Constitution, has used the general title of Mines to review the decree of Anfal and it has not defined mines to compare the decree to the evidence. It seems from the above definitions that firstly, oil reservoirs are evidence of mines. Secondly, application of the decree of Anfal on mines indicates that the oil reservoir itself is among Anfal. In other words, it can be concluded that by Mine, it is meant the concept of its location and application of mine to its product has a virtual application. In other words, the product of mine (if operated) is the product which belongs to its reclaimer. In article 1 of the Law of Mines, mine is defined based on what which is inside the mine. On this basis, mine is a mineral reserve of which operation is affordable. In other words, the Law of Mines considers as mine the mineral existing in it and not the mine itself. Anyway, it seems to make no difference whether we regard mine as the name of a place or the contents of it because before extraction, the mineral is among the interests of the place and has an independent nature. Therefore, oil reservoirs are regarded as mines based on the place or whatever exists in the place. In other words, when we talk about mines, we mean oil reservoirs.

4.1. Ownership of oil and gas reservoirs

It seems that ownership of oil and gas reservoirs is specified by Principles 44 and 45 of the Constitution. Due to the explicitness of Principle 45, we first examine the said principle and then, we examine Principle 44. According to Principle 45, Anfal and public wealth such as wastelands or abandoned lands, mines and the ones are available to the Islamic government to act upon them according to the public interests. Apparently, Principle 45 implies that the mines are available to the Islamic government, but it is not clear that such authority is related to the authorities of government for Anfal or it is merely a right of administration according to the theory of public ownership.

A few assumptions have been put forth in this regard. Firstly, since the legislator has used the two terms "Anfal" and "Public Wealth" at the beginning of the article, both assumptions are strengthened. In other words, mines are both regarded as Anfal and public wealth. But this seems to be basically impossible because in Anfal, mines are the property of government that has a proprietary relation with Anfal. But, in public ownership, properties are owned by the public and government is just obligated to administer such properties. Secondly, public wealth is an example of Anfal because in Islamic Law, the lands taken from infidels (which are regarded as Anfal according to some jurists) are called public wealth (Farahani Fard, 2001: 36). In other words, in this principle, legislator only wanted to specify the ownership of Anfal. It is worth mentioning that in this assumption, mentioning the term Public Wealth beside spoil aimed to put an emphasis. To analyze this assumption, it should be argued that such interpretation from Principle 45 is contrary to Article 44. Secondly, some of the evidence of Principle 45 cannot be regarded as Anfal. Thirdly, Principle 45 of the Constitution did not intend to determine the type of ownership of the mentioned evidence, but to make available the Anfal and public wealth to the government and the said evidence was just used as an example. Based on the latter view, we should seek other criteria to determine a procedure for the government. One of the criteria that help us on this issue is Principle 44 of the Constitution and the statutes. According to Principle 44, large mines are available to the government in the form of general ownership. In other word, based on this principle, large mines and especially oil and gas are among public properties and government does not own the reservoirs; rather, it should only administer them. The detailed negotiations of Assembly of Experts for Constitution enhance this assumption because one of the objections to Principle 45 was that all the instances mentioned in that principle were not among Anfal. In response to this objection, Shahid Beheshti argues that evidences such properties with unknown owners which are not regarded as Anfal will be considered as public assets and for this reason, the terms Anfal and Public Assets are used at the beginning of this principle. So, Principle 45 has just determined a procedure for the occupier of the property. It seems from Principle 44 that large mines are among public properties. The objections which may be made in this regard is that firstly, in Article 2 of Oil Law 1968 approved by the Guardian Council, oil resources are regarded as Anfal and public assets. Secondly, nothing has been stated about ownership of government in Paragraph 1 under Article 14 of the Law of the Forth Development Plan, in the note to Paragraph (a) under Article 125 of the Law on the Fifth Development Plan and note C to

Article 3 of the Law on exercising the policies of Principle 44. Therefore, it seems that these cases that indicate the ownership of government and nature of oil mines as Anfal are different from public ownership because in public ownership, public properties are available to the government that has just an administration right, while the Laws of the fourth and fifth development plans indicate the government's ownership. In response to the above objections, it should be said that following article 2 of Oil Law, legislator has used the term Public Ownership. In other words, the said article not only is not an objection to the third assumption, but also it confirms that. Moreover, writing of article 2 of Oil Law is influenced by its jurisprudential record. On this basis, legislator resorts to secondary orders and legislates the decree of public ownership to preserve the interests of the system to control and administer Anfal in the current age. In other words, legislators of Oil Law were on the opinion that mines are regarded as Anfal. They believed that Anfal are regarded as Mubahat during the absence period. Thus, they legislated the order of public ownership. The term Ownership in the laws of fourth and fifth plans and the implementation of policies of principle 44 shall not be inferred as a kind of objective right. In other words, considering the constitution and Oil Law, the said ownership is not the same as objective right. It is merely a type of limited ownership in line with administration of properties on behalf of the people, just as some lawyers have interpreted the right of government with respect to public properties as a limited ownership (administrative ownership). In addition, as it was said before, the founder of Islamic Republic of Iran believed that mines are among public properties. Moreover, if such properties are among Anfal, they should be under the control of the Islamic ruler who is the same guardian of the jurist. In other words, operation of the said properties was subject to obtaining his permission. This is while regulation of mines' affairs is made through Islamic Consultative Assembly. It seems that although the topic Anfal is used in different rules, legislators were aware of Mubah nature of Anfal during absence period. Hence, they stopped any misuse by putting forth public assets and properties to preserve the interests of the system. Therefore, in consideration of the above arguments, it seems that in the Iranian legal system, 1- Oil and gas reservoirs are among public properties; 2- Government has no right of ownership for such properties; 3- Government is only an administrator of the said properties; 4- The properties may not be privately owned unless upon ratification of the parliament; 5- The decree of public properties is merely applied to large mines, and medium and small mines are excluded from that. However, the ground for small or large size of the mines shall be specified base on regular laws.

4.2. Ownership of the produced oil and gas

In accordance with Articles 32 and 33 of the Civil Code, all products and appurtenances of movable and immovable properties earned naturally and/or as the result of an action will belong to the owner of the said properties. Therefore, in consideration of Articles 32 and 33 of the Civil Code, the products and interests of oil and gas reservoirs which is the very produced oil and gas are among public properties and all decrees of public properties are applied to that.

Effects of public ownership on oil and gas

- **Principle of prohibition of realization of any objective right for public property**

As it was examined, oil and gas reservoirs are among public properties according to the Constitution. Therefore, based on Article 26 of the Civil Code, there is no doubt that oil and gas reservoirs may not be privately owned. In addition, in accordance with Articles 32 and 33 of the Civil Code, this decree may be generalized to the interests and products of Anfal. In other words, the principle in public properties is based on prohibition of private ownership such as sale. Since ownership is the most complete sample of objective right, this prohibition includes other objective rights such as right of benefitting and permission of benefitting. In other words, government has no right to establish any objective rights such as ownership, benefitting and the ones for oil reservoirs or the produced oil. However, this prohibition is a rule of which exceptions shall be specified at the discretion of the parliament. In other words, sale, lease or establishment of the right of benefitting with respect to the produced oil and its reservoirs is pending on the permission of parliament.

- **No creation of any objective obligation relative to public properties**

Under no circumstances shall the government be entitled to create any objective obligation with respect to oil and gas reservoirs as well as produced oil and gas, because firstly, public properties are not transferable. Secondly, confiscation of public properties is of no use due to the principle of no transferability. Thirdly, any obligation without enforcement guarantee is not actually regarded as an obligation. Hence, debt-based obligation for public properties is impossible. It should be noted that such impossibility depends on the parliament's decision. If the parliament authorizes transfer of public properties, this impediment will be eliminated accordingly.

- **Government's administration of oil and gas resources**

The question here is that how operation and management of public properties is actually possible. To reply this question, it should be said that by virtue of Principles 44 and 45 of Constitutional Law and on the strength of Article 23 of Civil Code, the parliament will codify all criteria, domain of management requirements, administration, arrangement and details of using public properties. For this purpose, the parliament has legislated and upon ratifying some laws such as Oil Law enacted in 1987, firstly, the parliament has assigned the management of these resources to Ministry of Petroleum and subsidiary companies. Secondly, legislating certain criteria for management of these resources, the parliament has assigned designing the contractual patterns to the Ministry of Petroleum. Hence, administration of oil and gas resources as well as designing the contractual patterns within the framework of statutes are among the powers of the Ministry of Petroleum. Prior to Islamic revolution, on the strength of Article 2 and further to Paragraph 2 under Article 3 of Oil Law 1974, administration of these properties was undertaken by N.I.O.C. According to this law, N.I.O.C had two major duties: First, exercising the ownership right of the Iranians with respect to oil resources in the fields of exploration, development, production, operation and distribution; and second, after revolution and upon approval of the bill for establishment of Ministry of Petroleum in revolution council, the said Ministry managed exploratory and developmental operations of oil in free oil sectors, negotiation and conclusion of contracts with any Iranian or foreign entities based on contract work. After establishment, governance duties of oil industry were assigned to Ministry of Petroleum, deputy divisions of staff units. Management duties at upstream sector were assigned to NIOC and subsidiary companies. Based on the supplement to the law on establishment of Ministry of Petroleum, governance duties of the said ministry include preservation of reservoirs (Para. 1), supervising oil affairs (Para. 4), policy making and determining policies, planning (Para. 8), adjustment of oil organizational structure (Clause 11). Practical procedure of Ministry of Petroleum has remained the same up to date. In general, oil contracts have been assigned to NIOC. However, in 1987, upon enactment of the new Oil Law, Ministry of Petroleum was authorized to conclude oil contracts by virtue of articles 1, 3 and 5. However, since Oil Law had not been explicitly abrogated, the ground of action by Ministry of Petroleum was the same as before 1987. After enactment of Oil Law in 2011 as amended, Oil Law 1974 was explicitly abrogated. In article 4 of Oil Law as amended in 2011, Ministry of Petroleum undertakes the right to exercise the right of governance and public ownership of oil resources on behalf of I.R. Iran. Moreover, according to Para. 16 under Article 1 of this Law, Ministry of Petroleum and the subsidiary companies (NIOC) are competent authorities for conclusion of oil contracts. On the whole, in line with administration of oil resources, Ministry of Petroleum holds the right to exercise governance on oil. However, Ministry of Petroleum and subsidiary companies of NIOC are competent authorities for conclusion of oil contracts in upstream sectors. Another question is that with whom the competent authorities in upstream sector are authorized to conclude contracts that is there any possibility for foreign investment. Local entities are recognized as authorized parties to contract according to the rules prior to and after the revolution; however, this case is disputed with respect to aliens.

5. Conclusion

On the strength of Constitutional Law and statutes, oil reservoirs and their products are among public properties which may not be privately possessed. More importantly, creation of any objective rights and obligations with respect to these properties are prohibited. It should be noted that such prohibitions

are applied for more effective supervision of oil reservoirs and creation of the said rights will be possible at discretion of parliament. For this purpose, first, the legislator has not authorized transfer of ownership of resources as stipulated in Part III of Paragraph D of Article 3 of Law on Duties and Powers of Ministry of Petroleum 2012 and also it has emphasized on preservation of ownership of such resources accordingly.

Second, as for Anfal nature of oil and gas ownership, such authorization has not been issued to the Ministry of Petroleum. According to Paragraph A of the Fifth Plan Law, stipulating the contrary to the same, it has been stipulated that for exploratory, developmental and production activities, Ministry of Petroleum is authorized to issue an operation permit without right of ownership for oil and gas produced. Moreover, prior to abrogation of Oil Law 1974, according to the pertinent Article 19, N.I.O.C. is not authorized to transfer oil to another party as long as oil has not been extracted.

Third, according to Part III of Paragraph D of Article 14 of the Fourth Plan Law, Ministry of Petroleum has been authorized to create objective obligation with respect to field products or its benefits for the purpose of depreciation of the corresponding costs and wage of contractors; however, legal deadline of the Fourth Plan has expired. On the strength of Para. A under Article 125 of the Fifth Plan Law, the said permit has been extended only for buy back. Moreover, as for public properties, government is only an administrator. According to the corresponding rules, such administration has been summarized within the scope of the Ministry of Petroleum and the subsidiary companies. For this purpose, design of contractual patterns is undertaken by the Ministry of Petroleum which has resulted in design of new Iranian petroleum contracts (IPC).

Prior to abrogation of Oil Law 1974, there were specific principles governing the Iranian petroleum contracts because the said Law was identified as a sample contract. After abrogation of the above law, although there are so many gaps of its basic rules, review of Constitutional Law and statues lead us to the mandatory rules governing the design and using oil contracts. Ministry of Petroleum and subsidiary companies shall follow the above principles in using the oil contracts and the guarantee for non-violation of the said principles will be the cancellation of the same by virtue of Article 10 of the Civil Code. These principles are given as follows: First, oil contracts shall not include any specific and exclusive rights for foreign investors. In other words, Ministry of Petroleum shall not assign any contracts to the foreign investor with over 25% of total value of Iranian oil products. In addition, in case an investment contract includes registration of a company in Iran, the investing company will be entitled to register a company only in special free trade zones with 100% foreign shareholders. The said company is only entitled to register a branch inside the main territory with the companies of which foreign party holds less than 40% shares without the right of any control. Second, oil resources and its products are among public properties and they may not be privately possessed. Hence, sale of products by creating objective or debt-based right for the same is pending on obtaining a permit from the parliament. Third, any domestic and foreign investment in upstream oil industry is prohibited. Only in authorized cases, such investment is subject to obtaining an investment permit from the parliament. Fourth, Ministry of Petroleum and the subsidiary companies are authorized to exercise negotiation method for settlement of disputes arising from foreign investment; however, as for referring to arbitration or other substitute methods of dispute settlement, it is required to obtain a permit from parliament. As for domestic investments, ratification of the Cabinet of Ministers is sufficient. Fifth, Ministry of Petroleum is authorized to conclude oil contracts within the area of exploration, development and production. However, the said authorization excludes Khuzestan, Bushehr, Kohguilouyeh and Boir Ahamad provinces. In the said three provinces, it is even prohibited to conclude development and production contracts simultaneously. Sixth, Ministry of Petroleum and the subsidiary companies are obligated to assign oil contracts to the competent Iranian companies; however, in case there is a high-quality Iranian company, assignment of oil contracts to an Iranian and foreign joint venture and then, to a foreign company has no impediment. Anyway, in the above contracts, Iranian labor and services shall be used in 51% of price of goods and project works. Seventh, in the contracts concluded by and between Ministry of Petroleum and the subsidiary companies, noncertainty risk shall be transferred to the oil company. Eight, environmental standards and

preservation of production shall be included in conclusion of oil contracts. Nothing has been indicated in the Iran's statutes regarding these standards. Therefore, it seems that within this framework, the common law of oil industry in the said cases are obligatory. Ninth, contracts which consist of investment by foreign public governments shall be approved by the parliament. Other contracts are regarded as commercial contracts and they do not require any approval by the parliament. Tenth, Ministry of Petroleum and the subsidiary companies shall observe the formalities of tenders in conclusion of oil contracts. Any abandonment of such formalities is pending on the permit of a three-member committee except for the joint fields which require the decision of the Minister of Petroleum.

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