

The Conflict between Expropriation in the "Special Court of Article 49 of the Iranian Constitution" and the "Right of Nationality" in "Private International Law"

Kamran Kahrom

Attorney At Law, Ph.D. Student Private Law, Islamic Azad University Central Branch

Received: July 24, 2015

Accepted: September 31, 2015

ABSTRACT

Following the victory of the Islamic revolution in Iran, a special court established for investigating the legitimacy or illegitimacy of the properties of the persons under the name of "Special Court of Article 49 of the Constitution". Hereunto, the expropriation of the persons issued with different arguments by this court. From another hand, the right of nationality, which is one of the important issues in the private international law, is a deep political and legal relation and link between the persons and the government that implies obligations for the government including preservation and veneration of the properties of the respective persons. Hence, it seems that the expropriations in the "Special Court of Article 49 of the Constitution" have conflict with the right of nationality of Iranians and while their Iranian nationality not revoked; their properties must preserved under the law and the support of the government. From another hand, there are some laws and rules, which enable the government to decide for the properties of the persons who left the country, while their nationality have not been revoked yet. So that, the arguments mentioned in the "Special Court of Article 49 of the Constitution" that has conflict with the nationality right of persons, would not be needed for the expropriation. This article is to explain this conflict and propose the Legal strategies as the solutions.

KEYWORDS: Expropriation, Special Court of Article 49 of the Iranian Constitution, Nationality.

1-INTRODUCTION

Following the victory of the Islamic revolution in Iran, a special court were created by the order of Ayatollah Ruhollah Moosavi Khomeini (Imam Khomeini, the founder and the leader of the Islamic Republic of Iran) entitled "Islamic Revolutionary Court"; and continues to work in the range of its jurisdiction. One of the important organs of the "Islamic Revolutionary Court", that has the responsibility adjudicating on the status of illegal properties, is "Special Court of Article 49 of the Constitution". This court proceeds to the expropriation of the Legal and natural persons, including Iranians and non-Iranians, on the basis of "governmental ordinances" (Hokm-e Hokumati) issued by Imam Khomeini and Ayatollah Ali Khamenei (Supreme Leader of the Islamic Republic of Iran) as well as some laws and bylaws.

From the other hand, this expropriation of the Iranians, including Muslim or non-Muslim, executed disregarding their Iranian nationality, which is one of the important issues in the private international law. It seems that these two issues are contradictory. The question is that: is there any conflict between the rights of nationality and the responsibility of the government in supporting the citizens and the expropriation of them in the "Special Court of Article 49 of the Constitution"? The aim of this research is to investigate these contradictions and to find the convincing legal answers to the case.

Evidently, this research is merely and exclusively on the expropriation of the Iranians. From one hand, this research is not going to explain and inspect the types of expropriation and the pillars and procedural law in the "Special Court of Article 49 of the Constitution". Expropriation occurs in this court based on different arguments; this research merely pursuits the expropriation due to quitclaim, leaving the country, discharge of custody and Assurance Covenant (Isti'man) of the Iranians; and dos not apply to the other issues.

Nothing found for the background of this research; from this regard, this research examines this subject for the first time with the analytical and descriptive method.

2- Expropriation in the "Special Court of Article 49 of the Constitution in Iran"

"Special Court of Article 49 of the Constitution" is one of the divisions of "Islamic Revolutionary Court" which has Jurisdiction over the investigation and adjudicate on the legitimacy or illegitimacy of properties of the persons and decide upon these properties in the form of orders and "governmental ordinances" (Hokm-e Hokumati) issued by Imam Khomeini and Ayatollah Ali Khamenei. The most important instances of such scattered laws are as follows: "governmental ordinance" issued on March 10, 1979 (1357/12/19) regarding the Expropriation of the properties of the Pahlavi Family and their relatives; article 49 of the the Iranian constitution, articles 2 and 12 of the bylaws of the Islamic Revolutionary Courts and Prosecutors Offices ratified by the "Council of the Islamic

* **Corresponding Author:** Kamran Kahrom, Attorney At Law, Ph.D Student Private Law, Islamic Azad University Central Branch
KmaranKahrom@Yahoo.com

Revolution" on June 17, 1979 (1358/07/02); article 8 of the "Manner of Execution of Article 49 of the Constitution Act" ratified on August 8, 1984 (1393/05/17) ; "governmental ordinance" issued by Imam Khomeini on April 25, 1989 (1368/02/26) regarding the administration of the properties in the possession of Wali Faqih (Guardian Jurist); "governmental ordinances" issued by Ayatollah Ali Khamenei on September 6, 1989 (1368/06/16) and October 9, 1991 (1370/07/17) regarding the of the properties in the possession of Wali Faqih (supreme leader) (Guardian Jurist); the bylaw of the procedure of the cases relating to subject of the article 49 ratified on October 20, 2001 (1380/07/28) of head of the Iranian judiciary power with its amendment on September 24, 2007 (1386/07/02).

After referring to the aforementioned issues, at least, it is necessary to mention the arguments and instance of expropriations in this court according to the above regulations. 1- Expropriation due to having relationship with the Pahlavi family 2- Expropriation due to the illegitimacy of the properties 3- Expropriation due to obtaining quitclaim of the owner from the property 4- Expropriation due to discharge of custody and Assurance Covenant (Isti'man) of the Islamic government 5- Expropriation due to leaving the country before ending the imposed war 6- Expropriation due to not paying one-fifth of "the earned profit" (Khums) 7- Expropriation due to not paying the administration costs practically or impractically.

As it mentioned in the introduction, the scope of this research is merely on the expropriation due to obtaining quitclaim of the owner from the property, leaving the country, discharge of custody and Assurance Covenant (Isti'man) of the Iranians. Although, it is necessary to refer to the other issues concisely and explain it.

2-1 Expropriation Due To Obtaining Quitclaim of the Owner from the Property (Abandon)

In some previous awards made by the "Special Court of Article 49 of the Constitution", the quitclaim considers as an evidentiary document for expropriation of the owner from the property; leaving the properties by the owner and his departure for abroad of the country considered as quitclaim and the verdict made to take possession the left properties. Whereas, the quitclaim is a kind of one-sided dispositions that cause the real right to lapse; although the quitclaim happens when the owner has intention to do it, but merely leaving the property is not evidence for waiving the ownership right.[1]

2-2 Leave the Support & Protect of the Islamic Government (Zemme)

The problem of discharge of custody and Assurance Covenant (Isti'man), is another title emerged after Islamic revolution following the Islamic creeds and presented as the opinions of the supreme Muslim authorities (hakim al-shar') in "Islamic Revolutionary Court"; and then approved by "governmental ordinances" (Hokm-e Hukumati) of Imam Khomeini and Ayatollah Khamenei and then inserted in article 3 of the "Law on Establishment of the Organization for Collecting and Selling the Possessory Properties" ratified on January 14, 1992 (1370/10/24). But it didn't designate precisely its definitions, scope and terms. Also, this expression never defined in any authentic source and reference. Anyway, the Assurance Covenant (Isti'man), safeguard and security mentioned in the juridical awards of the "Special Court of Article 49". Hence, if a non-Muslim leaves the Assurance Covenant (Isti'man) of the Islamic government deliberately, his properties have no prohibitions and thereupon it should be restored and confiscated in favor of Wali Amr al-Muslimin (guardian of the Muslims).[2]. It is worth mentioning, in article 11 of the bylaw of the procedure of the cases relating to subject of the article 49 ratified on October 20, 2001 (1380/07/28) by the head of the Iranian judiciary power mentioned that: all wealth of the persons who left Iran and made relationship with the belligerent groups will discharge of Assurance Covenant (Isti'man) and will confiscate by the award of the court [3]. It is clear that it is considered as an instance for discharging of Assurance Covenant (Isti'man) of Islamic government; and by referring to the word "persons" it can be applied to all persons including Muslim or non-Muslim, and Iranian or non-Iranian citizens.

2-3 Expropriation due to leaving the country

Article 13 of the bylaw of the procedure of the cases relating to subject of the article 49 ratified on October 20, 2001, (1380/07/28), dealt with this subject. Persons who left Iran before the end of imposed war and their wealth is under practical or non-practical guardianship and there were no evidence of document for attaining to the illegality of the wealth and also the person has no attorney of natural guardianship in Iran, so their wealth and properties will be confiscate and expropriated in favor of "Headquarters for Executing the Order of the Imam" or (Setad Ejraiye Farmane Hazrate Emam).

Accordingly, in this form of expropriation, leaving Iran before the imposed war, provides causes for expropriation and confiscation of the wealth by "Special Court of Article 49".

3- The Right of Nationality

The right of nationality is one of the essential and natural right of the persons and also it is a very important subject in private international law. Nationality defined as the relationship that refers a person to a state and plays an important role in holding considerable capacity for applying some laws including acquisition of the immovable properties. [4]. It is clear that this legal and political relationship is mutual and the other part is the government that his support for his citizens is of the legal elements and components due to nationality. Obviously, while this legal-political relationship of nationality is not ended officially, the government is responsible and committed to legal supports including maintenance and preservation of his citizens' properties and wealth.

Iran one of the counties that designates acquisition of immovable properties inclusively by his citizens and for the foreigner cases it is decided by very difficult and abundant regulations mentioned in the bylaw "Acquisition of Properties by Foreign Nationals" ratified by The Council of Ministers on 1949 (1328) and the bylaws of the quality of acquisition of immovable properties by non-residence foreign nationals in the Islamic Republic of Iran ratified by The Council of Ministers on December 10, 1995 (1374/09/19).

Article 41 of the constitution of the Islamic Republic of Iran says that the Iranian citizenship is the indisputable right of every Iranian, and the government cannot withdraw citizenship from any Iranian unless he himself requests it or acquires the citizenship of another country. Citizenship makes some rights for the citizen and makes some responsibilities for the government including respecting the ownership of the citizens by the government. While this political and legal relationship is not ended, the government is responsible and committed to reserve the legal rights due to citizenship. Some cods legislated in note 2 of the article 987 and Item 3 of article 988 of The Civil Code of the Islamic Republic of Iran for ones who deliberately abandoned their nationality which are a kind of expropriation. But even in these cases, after forcing to sell or selling by the government, the money earned by selling the property will be delivered to the one who abandoned the nationality after deducting expenses; this indicates the respectability of the properties of the one who abandoned the Iranian nationality, even it is in the form of changed to cash and legal support from him.

4- The Conflict between Expropriation and the Right of Nationality

After mentioning the primary introduction for the causes of expropriation in the "Special Court of Article 49" and also the short explanation on the right of nationality and supportive rights caused by that, we will reach to the important subject that "Is there any conflict between the expropriation of the Iranian nationals, due to quitclaim, abandoning the custody and Assurance Covenant (Isti'man) and leaving the country, and the right of nationality and the supportive rights caused by it as well as the commitment of the government to maintenance and preservation of financial rights of its citizens?"

We mentioned that the article 41 of the constitution of the Islamic Republic of Iran says that the Iranian citizenship is the indisputable right of every Iranian, and the government cannot withdraw citizenship from any Iranian unless he himself requests it or acquires the citizenship of another country. This principle is absolutely one of the most important principles governing over the rights of every Iranian including Muslim or non-Muslim. The right of ownership and respecting that, are from the requirements of the right of nationality, therefore every person with Iranian nationality, with any attitude and creed, benefits all rights of being Iranian and his nationality, including the right of respectable life and wealth.

In this regard, the Iranian Supreme Judicial Council requested for fatwa (Istifta') from Imam Khomeini about the non-Muslim living in Iran including the People of the Book ('Ahl al-Kitab) or the followers of other religions; Imam Khomeini answered: "By His (God's) name, the Most High – the mentioned unbelievers are in the safeguard of Islam and Islamic rules are applied to them like the Muslims and their blood is protected (Mahqun al-Dam) and their wealth are respectable." [5].

From the other hand. According to article 22 of the constitution of the Islamic Republic of Iran, the prestige, life, rights, housing, and job of the persons are inviolable, protected and in the safeguard of the announced constitution, in accordance with the article 20 of the constitution which mentioned that all citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria.

According to these principles and the viewpoint of Imam Khomeini, it seems that the answer to the raised question is clear now; all Iranians including Muslim or non-Muslim who have the Iranian nationality enjoy all rights containing the respectability of the ownership and the prohibition of divesting of ownership until the nationality of them is retained; the expropriations that is executing in the "Special Court of Article 49" under the name of quitclaim, abandoning the custody and Assurance Covenant (Isti'man) and leaving the country are totally in direct conflict with the right of nationality, and while the nationality is not lost or denied the expropriation is not justifiable.

5- Conclusions and recommendations

The right of nationality is one of the essential and natural right of the persons which makes a deep political and legal relationship and link between the government and the respective citizens. One of these rights is the commitment of the government to protect and safeguard and respect the life and wealth of his citizens. Expropriation due to quitclaim, abandoning the custody and Assurance Covenant (Isti'man) and leaving the country in the "Special Court of Article 49", as it is explained previously, is in contradiction with the right of nationality at least for the Iranian nationals; and while their Iranian nationality is not denied, their right of ownership is respectable and immune from any kind of aggression.

With an investigation in this regard, some legal authentic regulations found that will avert the conflict by applying them.

The rules governing over continuously absent mentioned in the Civil Codes and Iran's Non-Litigious Matter Act as well as the laws regarding the unowned properties ratified on May 6, 1934 (1313/02/16) and the chapter 8 of Iran's Non-Litigious Matter Act in the subject of the legacy of the heirless or with unknown heir, the rights of these persons are clearly designated and there is no need to expropriation via applying the evidences like quitclaim, abandoning the custody and Assurance Covenant (Isti'man) and leaving the country. Although it is worth mentioning that in the status

quo according to the “governmental ordinances” (Hokm-e Hokumati) issued by Imam Khomeini and Ayatollah Ali Khamenei, all the mentioned properties are in the possession of Wali Faqih (Guardian Jurist), and the word “government” in these laws are change to the proposed explanation.

According to the mentioned laws and in accordance with the article 4 of the law on the bona vacanti (unowned properties) and the article 335 of Iran's Non-Litigious Matter Act on the immovable bona vacanti, unknown owner, unknown heir, if the owners or heirs, after the Legal formalities, do not recourse after 10 years, these properties will be in the possession of the government and no claims of any rights for that property will be acceptable by no means.

Consequently, in the case of the Iranian nationals that travelled to abroad and didn't returned and there is no information about their relationship with their properties, the government can sell their properties after applying guardianship in the duration of 10 years and the lack of recourse or identifying the owner or his heirs; and then the government can transfer the earned money from selling the properties to Wali Faqih (Guardian Jurist).

It seems that applying the existing legal regulations on the Iranian nationals that have a long history of ratification are more useful than applying the regulations of quitclaim, abandoning the custody and Assurance Covenant (Isti'man) and leaving the country; the expropriation via the proposed regulations would be more comprehensible and acceptable for the Iranian citizens than the previous regulations. Subsequently, it doesn't have any conflict with the rights of Iranian nationality.

REFERENCES

- [1] Katouzian, Amir-Naser (2001) “Civil Code in the Current Legal Order” [Persian title: “Qanoone Madani Dar Nazme Hoquqiye Konuni”] (fifth Ed.) Nashr Dadgostar, p.172.
- [2] Kahrom, Kamran, (2010), “Expropriation in the Special Court of Article 49” [Persian title: “Salbe Malekiyat Dar Dadgahe Vije Asle 49”], thesis for M.A; Tehran University, Farabi branch (Qom), p. 107.
- [3] Bakhtar, Seyyed-Ahmad, (2001), “Special Court of Article 49 of the Iranian Constitution and its Written Regulations” [Persian title: “Dadgahe Vijeye Asle 49 Qanoone Asasi Dar Qavanin Va Moqarrarrate Mouzu'e”], second ed., Nashr Navaye Edalat, p. 54.
- [4] Ansari, Masoud, Mohammad-Ali Taheri (2009), “Encyclopedia of Private Law” [Persian title: “Daneshnameye Hoquqe Khosusi”], 3 volumes series, (third ed.), Jangal Javedane Publication, p. 614-615.
- [5] Mehrpour, Hosien; (2008); “New Approaches on legal Problems” [Persian title: “Didgahhaye Jaded Az Masa'ele Hoquqi”], Ettela'at Publication, p. 166-169.