

LEGAL CHALLENGES OF THE PRINCIPLE 45 OF THE IRANIAN CONSTITUTION

Ahmad Torabi,

Assistant Professor in Islamic Azad University, Branch North Tehran, Law department

Abstract. This paper focuses on the situation of public property and public ownership in the current Iranian Constitution, mainly in principle 45. There is also an extensive discussion on Islamic terms that are employed in the principle. The author discusses ambiguities, misunderstandings and legal challenges of the words and terms employed in this principle that move the principle far from a clear explication of specific principles. The paper aims to explore the defects of this principle explicitly, and provides suggestions to improve it.

Key words: Iranian Constitution, Principle 44, Anfal, Mobahaat, Public property.

Introduction. In essence, the theme of the Constitution varies from country to country on the basis of their principles. However, written constitutions must be very normative and intelligible because they include most significant binding principles which are observed, more or less, in the actual operations of the political system. However, principle 45 of the Iranian constitution¹ has not followed such standard. This principle has determined some properties and items which must be at the disposal of the Islamic State to utilize in accordance with the public interest. The principle states:

“ Anfal and public wealth, such as dead or abandoned land, mines, seas, lakes, rivers and other public waterways, mountains, valleys, forests, marshlands, natural thicket, unenclosed pastures, legacy without heir, property of unknown ownership, and public property recovered from usurpers, shall be at the disposal of the Islamic State to utilize in accordance with the public interest. Law will specify detailed procedures for the utilization of the forgoing items”.

The founders of the constitution have tried, in this principle, to support public properties and resources as well as respect the fundamental principles of *Islamic sharia* at a high level. However, there are some ambiguities and misunderstandings of the words and terms employed in this principle that move the principle far from a clear explication of specific principles.

This article tries to collect the description of this principle from various views and reveals legal challenges which based on all these different sources. The paper also tries to explain such Islamic terms and sentences in the principle 45 of the Iranian constitution which have brought about some legal challenges and ambiguities in the principle.

Islam is a source of Iran Constitution. Many Muslim countries have adopted Islam as the main source of their constitutions. Some of them such as Saudi Arabia, Kuwait, Bahrain, Yemen, and the United Arab Emirates, have adopted Islamic law (Sharia) as a primary source for legislation. Some other Islamic countries have gone a step further and provided a deterrent clause in their constitution according which no law can be enacted in contrast with Islam. For instance, in Pakistan, it is constitutionally forbidden to enact legislation that is antithetical to Islam.² The Afghan Constitution similarly demands that “no law can be contrary to the beliefs and provisions of the sacred religion of Islam”.³

Iranian constitution has also adopted its provisions consistent with Islamic law and there is an impact of “Sharia guarantee clause” in principle 4 of the constitution.⁴ This is indeed a principle with a long pedigree in Islamic political thought.

According to the Principle 4 of the Iranian constitution 1979:

“All laws and regulations pertaining to civil, penal, financial, economic, administrative, cultural, military, political and other spheres must be based on Islamic criteria. This article governs absolutely and generally all articles of the Constitution, as well as all other laws and regulations, and the duty to ascertain this matter devolve on the jurists of the Guardian Council” Therefore the founders of the Iranian constitution, have employed many Islamic terms or sentences that are related to Islamic concepts, in order to reconcile the constitution with the Islamic standards. Some of such terms carry broad interpretation and need to be clarified.

Principle 45 of the constitution is one of principles in which there are some of Islamic concepts and sentences that are mixed with other legal notions and have brought about some legal challenges and ambiguities in the principle. We now look at such terms closer.

Anfal

Anfal is an Arabic and Islamic word. It refers to a type of property derived from a concept in the Holy Quran that says: ⁵

They ask thee (oh Muhammad) of the spoils of war.	
Say: The spoils of war belong to Allah and the messenger, so keep your duty to Allah, and adjust the matter of your difference, and obey Allah and His messenger, if you are (true) believers	

The said verse in the Quran has not defined the meaning of *Anfal* and it only refers to the owner of *Anfal* who is Allah and the messenger. Most Islamic commentators believe that *Anfal* has a specific as well as a general meaning. *Anfal*, in its specific meaning, means spoils of war and there are different views regarding its general meaning.⁶ As a whole, most Islamic writers believe that *Anfal* includes some types of properties as follows:

- Spoils of war
- All properties obtained without war
- Each property which is selected by Imam⁷
- Any specific property which belong to kings and obtained by Islam through wars or other means
- Any gift from people to Imam
- Properties of unknown ownership
- Legacy without heir
- Dead lands (Mawat lands)
- Mountains and valleys
- Mines
- Forests, marshlands, natural thicket and unenclosed pastures
- Rivers and water channels
- Seas and lakes

Although there could be many examples of such properties there is a similar criterion among all of them, i.e. “there is no specific owner” for such properties.⁸

Such property does not belong to anyone. They are indeed ownerless. They do not even belong the Imam who is the leader of an Islamic community; rather, it is at the disposal of him to utilize it in accordance with the public interests.

Relationship between *Anfal* and two Latin maxims *Res communis* and *Res nullius*

It seems that what the Iranian legislator has in mind and enacted in the principle 45 as *Anfal* may be close to the Latin terms *res communis* and *res nullius*.

Res communis and *res nullius* are indeed the two legal maxims which are derived from Roman private law and mostly discussed in property law system and have significant effects in the laws related to seas, space and many natural resources. *Res communis* has a positive meaning i.e. something which is property of all and can be owned or being used commonly by all, like seas, underground water, rain water, air and many other natural resources. The concept of *res communis* also includes biological elements like fish and aquatic animals in the seas, plants in seas and rivers and many others. These things may not be object of private rights. In the modern concepts of law, *res communis* also includes public domain and common heritage of mankind and plays a significant role in developing some branches of law such as maritime law, space law, law of seas, rules of usage of the continent Antarctica.⁹

Res nullius, on the other hand, is also a Latin term derived from Roman law which means any object which is an ownerless property and is usually free to be owned. Some examples of *res nullius* are wild animals or abandoned property, a thing which is completely lost or abandoned is also *res nullius* and belonged to the first taker.

We see that the difference between *res communis* and *res nullius* is taking possession of the property. Both *res communis* and *res nullius* are ownerless. However, property of *res communis* is not capable of being possessed and owned by private rights while property of *res nullius* are capable of being possessed and owned by private persons.

As mentioned the concept of *Anfal* is close to both concepts of *res communis* and *res nullius*; i.e. properties of *Anfal* are principally ownerless and at the disposal of Imam, (or I say at the supervision of Imam) and some of *Anfal* properties may, based on some conditions and circumstances, be legally assigned to private persons.

Public wealth and public property. The Iranian legislator has used the term “public wealth” in the principle 45 of the Constitution alongside the term *Anfal*. There may be a question as to why the legislator has used the term “public wealth” instead of public property. Is there a real distinction between public property and public wealth, or are these two terms interchangeable?

It seems that public wealth has a wider meaning than public property. It includes all things in a country that may be considered property as well as the things that do not belong to the narrower concept of property. As Katouzian notes: A property has two basic elements:

- 1- It must be useful and secure a need, whether material or immaterial;
- 2- It can be dedicated to a determined nation or person.

Things such as the high seas, air and the sun are the most necessary instruments for a human’s life; however, since nobody can claim them for his or her exclusive ownership, they cannot be considered property.¹⁰

This quotation appears to confuse the well-known possibility that “property” may denote the thing or the right. It is quite possible to have a thing (an item of property) that is not owned (not subject to a right of property). The water in the sea could be an example.

However, if one accepts the quotation at face value, the concept of “wealth” can be argued to denote a wider concept. We may generally define wealth as anything of value and abundance of items of economic value. It is not a static concept and it may vary in different contexts. Wealth involves different items of property such as money, real estate, and intellectual property. There is a relationship between wealth and property upon which we may say that “every property is a wealth but not every wealth is a property”.

It seems that the Iranian legislator has intended the use of the term of public wealth to cover all things and items that would be useful for the next generations. The examples of *Anfal* and public wealth indicate that the intention of the legislator is to cover all properties or things that can be considered as property.

6. Properties which are capable of being *Mobahaat*

According to principle 45 of the Iranian Constitution, dead or abandoned land, mines, seas, lakes, rivers and other public waterways, mountains, valleys, forests, marshlands, natural thicket and unenclosed pastures are properties that are basically public and are at the disposal of the State.

Such properties, in Islamic terminology, are indeed capable of being turned into *Mobahaat*.

Mobahaat is an Islamic legal term for property that has no private owner, but it can be open to ownership or use by an individual or individuals in accordance with laws. The Iranian Civil Code states in this regard:¹¹

“The properties that are not privately owned, and which individuals in accordance with regulations contained in this law and the special laws dealing with each particular category are allowed to take into their possession and exploit, shall be termed *Mobahaat*. Under this heading shall come dead lands, that is to say, lands that have fallen into disuse and on which are neither habitations nor cultivation”.

Mobahaat is indeed a property that is ownerless, but it can be legally acquired by the person who first takes possession of it, regardless of any deeds providing for ownership. Indeed, this acquisition is considered as a step to obtain the right of ownership, and therefore it may be done without existing titles of any sort. This means that this right (or more properly, this freedom) to acquire *Mobahaat* is a public right in that it is freely available to the whole of the public. Of course, once they have exercised this freedom, the possessor or possessors must apply some laws in order to prove their rights. Presumably, in the simplest case, this can be done by proving two things, first that the item in question has been *Mobahaat* and, second, the fact of occupation or actual possession by the person claiming title.

This procedure has been anticipated in the Constitution, which says in the last paragraph of principle 45: “Law will specify detailed procedures for the utilization of each of the foregoing items”.

Therefore, we may conclude that the relationship between *Mobahaat* and public property is that every *Mobahaat* is public property but every public property is not *Mobahaat*.

Also we may reach to this conclusion that *Mobahaat* is close to the Latin maxim *res nullius* because both terms refer to properties which are capable of being possessed and owned by private persons.

7. Legacy without heir

Legacy without heir is another type of property which has been mentioned in the principle 45 of the Iranian constitution. As mentioned above, this term is a property of *Anfal*. This type of property is at the disposal of the Islamic State to utilize it in¹³:accordance with the public interest.¹² This issue has also been mentioned in the Iranian Civil Code, which states

“If there is no heir, the judge will make dispositions concerning the estate”.

Therefore, if there is a case in which the estate of the deceased is without a traceable heir, the judge, according to the said article, will have to issue the decree for transferring of the legacy to the State.

This article is capable of criticize. Because sometimes after the death of a deceased there is no heir but there is a beneficiary who can take the estate of the deceased.

There is a point, of course, relating to distinction between an heir and beneficiary in the Islamic legal system and western legal system. This requires to be more examined.

Two things, basically, give rise to inheritance including blood relationship and marriage relationship and an heir is potentially entitled to money or property after someone dies. Two examples of an heir are a child (blood relationship) and spouse (marriage relationship). Laws in each country legal system outline the exact order by which heirs inherit property. On the other hand, a beneficiary is a person or organization who receives money or property because someone specifically has mentioned such a person or organization in his Will or trust. Beneficiaries can include charities, places of worship or a decedent’s close friend.

However, there is a distinction between Islamic legal system and other legal systems regarding the eligibility of beneficiary. Basically, in Islamic legal system, the legacies of the deceased will be valid only to one third of the estate and more than such amount needs the permission of the heirs. As a result, a beneficiary, in Islamic legal system, may not take more than one third of the estate of the deceased. The point has been mentioned in the Iranian Civil Code which states:

“The testamentary disposition of more than one - third of the estate is not valid.....”¹⁴

As it was criticized the article 866 of the Iranian Civil Code has not mentioned of the right of beneficiary while the duty to act upon a testament of the deceased has been many times emphasized in the holy Quran.¹⁵

So, in the case that there is beneficiary but no heir, the beneficiary can only take one third of the estate of the deceased and the rest will be considered as legacy without heir which is indeed a property of *Anfal* and it is assigned to the Islamic State. There is duration of ten years in the law of non-litigious matters to determine whether there is any heir or not. The said law provides:

“If, within ten years from the date of counting the estate of the deceased, the heir of the deceased is determined, the estate of the deceased will be left to him, and after the said time, it will be handed over to the treasury of the government, and any claim of right to the estate of the deceased will not be accepted.”¹⁶

The said law is again capable of similar criticize because there is no mention of the situation of the beneficiary in it. So one may imagine the situation in which there is no heir for the deceased but a beneficiary can prove his/her rights within ten years. It is not fair to the beneficiary that cannot obtain his/her rights by proving the existence of the deceased’s testament and it is no justification for the legislator to ignore this right. So it seems both articles 866 of the Iran Civil Code and article 335 of Iran non-litigious matters need to be reviewed and amended.

We may also arrive to this right conclusion that the terminology “ legacy without heir” used in the Principle 45 of the Iran Constitution needs to be revised and amended to “ legacy without heir and beneficiary”.

7.1. The nature of the State to possess legacy without heir and payment taxes

There may be a question that how the right of the State is? Is a State an heir or it is a beneficiary.

The State indeed acts on behalf of the society and for the public interests and therefore the State is not a real heir. In the principle 45 of the Iranian constitution, the State is not introduced as an heir; rather the State must act like a trustee and utilize it in accordance with the public interests. So, such a right is a sovereign right because the State acts on behalf of the society and for the public interests.

However, some organizations of the State may also be selected as a beneficiary in a will where a bequest has been left to it. In such cases some inheritance taxes must be paid to the State Treasury.¹⁷

One may assume another case in which some estate of the deceased has been left to an organization of the State (as beneficiary) in the deceased’s will and the rest of it has no heir. In such a case, that organization must pay the inheritance tax to the State Treasury and the rest of it will be transferred to the State according to principle 45 of the Iran Constitution.

We may draw the following table to clarify the issue.

Inheritance	
When there is beneficiary in the will of the deceased	When there is no beneficiary
Beneficiary takes one third of the inheritance and the rest will be transferred to the State. The beneficiary must pay the inheritance tax even if it is government organization	Inheritance will be transferred to the State as a whole

Situations where legacy with no heir occurs

There are some situations in which legacy without heir may occur.

1- Someone dies and has no heir, (no child, no brother, no sister, no parents or no spouse etc.).

2- Murder is an obstacle to succession. A person convicted of an intentional killing cannot inherit from his victim, which is based on the obvious equitable principle that a killer should not profit from his crime. This is what is recognized in common law as “the slayer rule”.¹⁸

In Islam, all schools of Islamic law indeed accept the general principle that a killer does not inherit from his victim, since it might encourage the murderer.¹⁹ Therefore, if a person who is the only heir has killed the deceased intentionally, he or she will be prevented from taking any inheritance from the deceased and the legacy would be with no heir.²⁰ It is worthy of note that the killing must be done intentionally, and killing unintentionally, such as killing through neglect or in an accident, is not a murder.²¹ Therefore, the one who commits involuntary manslaughter may take inheritance after the payment of the deceased’s blood money (Diyye) to other heirs who are entitled to it. The view has recently been confirmed in a judgment issued by the court of appeal.²² Also, if the intentional killing of the deceased has been performed by process of law, or for justified defence, murder would not be accounted as a deterrent of taking inheritance.²³ It is worth mentioning that depriving from inheritance is an exception and cannot be expanded to other cases.

3- An unbeliever in God and his messenger (Mohammad, prophet of Islam) who is known in Islamic terms as *Kafer*, cannot take an inheritance from a Muslim. Also, if there is a Muslim among the heirs of a deceased unbeliever, other unbelieving heirs do not take inheritance even if they are prior to the Muslim as concerns class and degree.²⁴ Some points here may be considered.

(a) The above rules generally apply to all individual legacies as well as the entire inheritance.

(b) There is no bar in law to the giving of a lifetime gift to a Christian or Jewish person by a Muslim, and the donee shall possess it absolutely, or return it if the Muslim donor should survive.

(c) A corporation may be regarded as the beneficiary of the legacy if it is mentioned in the will. Indeed, there is a possibility to transfer one third of the estate (if other heirs exist) to any legal person in the will, regardless of their religion.

(d) If there is only one heir who is an unbeliever, he or she will not take the inheritance and therefore the legacy would be accounted without an heir and it would be at the disposal of the Islamic State as public property.

(e) If the heir who is an unbeliever in God becomes Muslim after the death of the deceased, and before the division of the inheritance, then he or she would be entitled to possess and own the inheritance. However, such an heir would have no right to the inheritance after the division of the inheritance.²⁵ Also, if the heir becomes a Muslim after the inheritance has been set at the disposal of the Islamic State, some Islamic jurists believe that the legacy of the deceased must be given back to the new Muslim heir.²⁶ In contrast, some other Islamic jurists believe that if the heir becomes a Muslim before the inheritance has been set at the disposal of the Islamic State, then the new Muslim heir would be entitled to the legacy of the deceased. However, if this event occurs after the dominance of the Islamic State over the inheritance, then there would be no right for the new Muslim heir to recover the legacy.²⁷

Article 881 of the Iranian Civil Code, which deprives non-Muslim heirs from the inheritance when there is a Muslim among the heirs, could be criticized. It seems this article is in contrast with some principles of the Iranian Constitution. One of these principles states:²⁸
“All the people of Iran, regardless of ethnic group or tribe, enjoy equal rights; colour, race, language and the like do not .bestow any privilege

”Another principle of the Iranian Constitution states:²⁹
“Zoroastrians, Jews, and Christians among Iranians are the only recognized religious minorities and they are free to perform their religious rites and ceremonies within the framework of law and to act in accordance with their own canon in matters of .personal law and religious education
Also another principle of the Iranian Constitution states³⁰:

.The investigation of the beliefs of persons is forbidden, and no one may be molested or prosecuted for holding a belief Since Zoroastrians, Jews and Christians are recognized in the Constitution, article 881 of the Civil Code could be considered as discrimination toward religious minorities. Therefore, it is crucial to add a note to this article to ensure that religious minorities can inherit equally.

4- An illegitimate child, who also known in Islamic *Sharia* law as *Valad-Al Zena*, does not take inheritance from father and mother unless it is stated in the will (for one third of the estate).³¹ Indeed, such a child may obtain all other rights from the mother other than inheritance and there is a general consensus among Islamic jurists regarding to this point. Therefore, if there is an estate of a deceased with an illegitimate child, it would be presumed that the estate is intestate and thus such property would be at the disposal of the State as public property.³²

From comparative law view, it seems that the importance of legitimacy has decreased considerably in Western countries. Under English Law, The *Family Law Reform Act* 1969 (c. 46) allowed a bastard to inherit on the intestacy of his parents. In Canon and in Civil law, the offspring of putative marriages have also been considered legitimate. Since 2003 in England and Wales, 2002 in Northern Ireland and 2006 in Scotland, an unmarried father has parental responsibility if he is listed on the birth certificate.³³

5- In the circumstance where no heir exists other than the wife or husband, the husband takes all inheritance of the deceased wife. In contrast, in such circumstances, the wife does not take all inheritance of the deceased husband; rather, she would only take her definite share of inheritance, meaning one fourth of it.³⁴ Obviously, in such a case, the estate of the deceased would be the subject of legacy with no heir and at the disposal of the State and considered as public property. Of course, the husband can give away his property to his wife during his lifetime if he wishes to, and therefore avoid ceding his property to the State.

8. Property of unknown ownership

Property of unknown ownership is another type of property which according to the principle 45 of the Iranian Constitution must be at the disposal of the Islamic State. This property may be experienced where the ownership of a property is uncertain.

8.1. Property of unknown ownership in common law

Under common law, there are three classification of property whose ownership is in doubt and each classification carries its own responsibilities. The classifications of unknown ownership property are: mislaid property, lost property and abandoned property.

Mislaid property is property that usually has been put aside by the right owner and then has been forgotten to be picked up again. This usually occurs in public places such as hotels and restaurants and stores where customers may forget to take their goods. Therefore, it is sometimes called forgotten property.³⁵

Lost property is a property that generally is found in a place where the right owner probably did not intend to set it down, and where it is not likely to be found by the true owner. In Common Law jurisdictions, “the finder of lost property has the right to possession as against the entire world but the true owner”.³⁶ As a corollary to this exception recognised in some

Common Law jurisdictions, a landowner has a superior claim over a find made within the non-public areas of his property, so if a customer finds lost property in the public area of a store, the customer has superior claim to the lost property over that of the store-owner, but if the customer finds the lost property in the non-public area of that store, such as an area marked "Employees Only", the store-owner will have superior claim, as the customer was trespassing when he found it.³⁷ A property is abandoned when the owner abandons it and has no intention to return and reclaim it. Of course, it may be difficult to determine when a property has been abandoned and not just misplaced or lost. Under common law, a finder has no obligation to take care of abandoned property and protect of it. In addition, the finder of abandoned property is not required to seek out its true owner. Many items and goods which are abandoned in hotels are examples of this type of property.

Property of unknown ownership in Islamic law and Iranian Civil Code

Under Islamic law, property of unknown ownership is called "*Luqatah*" which refers to anything that is found and picked up from the ground. An Islamic writer has defined "*Loghateh*" in his book as follows: "*Loghateh* is any lost thing that has been found with no owner".³⁸ In order for a property to be regarded as *Loghateh* some conditions must be met, including:³⁹

- 1- *Loghateh* can only be a moveable property because immovable property such as land cannot be lost; rather, land can only be abandoned.
- 2- The property must have been owned by someone. Therefore, property that had no prior owner may not be accounted as a "found" object.
- 3- The prior owner must have lost it. Therefore, stolen property or property that has intentionally been left in a place by the owner may not be accounted as a "found" object.
- 4- Such property must be found with no owner at the time of finding property, meaning that if a property is lost by its owner but another person possesses it, it may not be accounted as found property.
- 5- It must not be certain that the owner has abandoned the property, because if this is the case, it can be accounted as *Mobahaat*.

Found objects may be divided into several groups:

(a) According to Islamic *Sharia* law, articles that cost less than one Dirham⁴⁰ are deemed "allowed" properties and belong to their possessor; i.e. the possessor can own the property without any advertisement or other proceedings.⁴¹ This is a sensible *de minimis* exception allowed for practicality sake.

(b) Articles more than one Dirham. In this case, if someone finds such a property, he must issue a notice appropriately for one year, and if after one year its owner does not appear, the finder can possess it. However, if its owner does appear, the finder must deliver such property to its owner and if the finder loses it, he or she would need to deliver a similar item or to pay for its cost.⁴²

It does not seem reasonable that the Iranian legislator admits the currency of other countries as the scale to assess the value of lost goods. Moreover, this seems to be a difficult duty for the finder to calculate the value of the lost property according to a foreign currency. It is also hard for the finder to issue notification for one year in order to notify others of a lost property.

A notice of the finding of an object consists in publishing and advertising according to religious requirements in such a way that the finding of the object is brought to the notice of the inhabitants of a place in a customary way. But if someone finds an object in a deserted or ruined place, which is uninhabited and which is not privately owned, he can take possession of such property and need not announce it.⁴³

If someone finds an object on another's property or on property that has been bought from another and presumes that the article belongs to the proprietor or the former proprietors, he must inform them. If these proprietors claim the object and if there is some proof of their ownership, the object must be returned to them.⁴⁴

The regulations for lost articles have been criticised by some jurists because they are insufficient and they are not helpful to the finder to assist him to find the prior owner. It seems that the best solution for such properties is that people are

obliged to deliver found articles to a public office and the owner of the articles can go there and take them back by identifying the objects and showing their title.⁴⁵ In such a case, the property can be kept for a while and after the period of time it can be deemed with no owner and accordingly it can be accounted as a public property and sold with the receipts available for public use. There is a broad similarity with the effect of the Scottish rule *quod nullius est fit domini regis*. Therefore, a found object (*Loghateh*) is not basically a public property but it may be diverted to a public use in some circumstances.

Public Property taken from usurpers (*Ghaseb*)⁴⁶

The last category that is considered as public property in principle 45 of the Iranian Constitution is the property that is taken from usurpers. This sentence offers a brief description of the concept and causes some ambiguities.

Usurpation (*ghasb*) is an Islamic term⁴⁷ and has a broad meaning. It generally includes all acts of encroachment, in bad faith, on the property or property rights of another. It involves taking property (moveable or immovable) from another person and owning it without any legitimate reasons of possession or any legitimate means of control, and forcibly occupying the property of another in order to benefit from its profits without the consent of the property's owner. The usurpation (*ghasb*) may be caused by criminal or civil acts depending on circumstances. For example, a usurper (*ghaseb*) may possess a plot of land by fraud (a criminal act). This act causes criminal liability for fraud as well as civil liability for usurpation (*ghasb*) of the land. Another example may be where a tenant continues his possession after the deadline for leaving his unit according to the leasing contract. Although the act of such a tenant is not criminal, it is usurpation (*ghasb*) of the unit to which he has no right and this act causes civil liability. Another example of usurpation (*ghasb*) by actions includes fencing someone else's land, building a property on someone else's land and so on. If those actions result in the domination/occupation on another property, they would be considered as usurpation (*ghasb*).

However, there are varying Islamic views regarding the definition of usurpation (*ghasb*). For example, Hanafi's view defines it as occurring when possession is taken from the rightful owner and usurpation comes into effect against the ownership rights instead of involving possession alone. The view also states that usurpation cannot occur in land cases and therefore may not cause civil liability in land cases.⁴⁸ However, according to Shafi and Shia views, wrongful possession of someone else's property (including land) constitutes usurpation (*ghasb*).⁴⁹

The Iranian legislator has considered the Shia view and has defined usurpation as follows:⁵⁰

Usurpation is domination of another right by violence. Laying hands on another's property without authorization is also considered usurpation.

According to the above article, usurpation (*ghasb*) could be applied on any type of property (moveable or immovable). It also includes any type of unlawful act, including criminal or civil acts. The Civil Code has made reference to usurpation on land and states:⁵¹

“If anyone buys land from one who has usurped it, the former is also responsible...”

Also, if a trustee denies the property (moveable or immovable) has been deposited or delivered to him or her, he or she would be deemed to be a usurper (*ghaseb*) from the date of denial.⁵² For example, if A borrows some books from B for three days, A is a type of trustee in a wide use of that term. A is obliged to give back those books to B after three days. If A denies that he has borrowed those books from B, he will be deemed a usurper from the date of denial.

9.1. Usurpation in chains of people

Ghasb or usurpation can occur in chains of people; that is, it may involve successors. For example, B usurps a property from A and then sells it to C. Here, C is responsible for giving the property back to B and B would be responsible for giving the property back to A. Indeed, the responsibility would be on someone in the chain.⁵³ Therefore, owner A can claim for the property from either B or C.⁵⁴ Usurpation (*ghasb*) in chain is similar to the doctrine of *vitium reale* in Scotland upon which

the stolen property belongs to the victim and it never passes to the thief or anyone to whom he sells it.⁵⁵ However, usurpation (*ghasb*) is a more general term and it could apply to both immovable and movable properties.⁵⁶ *Vitium reale* includes stolen properties, whereas *ghasb* or usurpation, includes (but is not limited to) theft, encroachment and misuse of a land.⁵⁷

Property that is confiscated from a usurper (*ghaseb*) may belong to private claimants or the public. The Iranian Civil Code has provided some provisions regarding usurpation (*ghasb*) on which the aggrieved party can claim for his or her right. However, if there is no aggrieved party available, then the court has a duty to examine the case and it may be considered as public property.

There have been cases where the issue of *ghasb* has been the subject of controversy between private individuals and the government. In one case, the government confiscated a property according to a decree from a Revolutionary Court,⁵⁸ and then sold the property to a third party. However, after a period of time, the initial owner claimed ownership of the confiscated property and appealed the decision of confiscation through the civil courts. The appeal resulted in cancellation of confiscation and the government was forced to return the sold property. This case led to a decision of the General Board of Supreme Court⁵⁹ that the examination of such cases is within the competence of civil courts. However, after about 10 months, the General Board of Supreme Court issued another decree⁶⁰ that held that the examination of such cases is only within the competence of the Revolutionary courts. This latter decree could be criticized since the issue of proving ownership is a complicated civil process, and Revolutionary courts are criminal courts. In addition, it is worth noting that no mechanism is anticipated for compensation for the cases where *ghasb* has occurred in chain of people.

Public property under *ghasb*

According to the principle 45 of the Iranian Constitution public property recovered from usurpers, shall be at the disposal of the Islamic State to utilize in accordance with the public interest. Indeed, there are many public properties which may be usurped. For example, excavation and trafficking of antiquities has become very big business but it can be considered as usurpation of public property. Also, many lands located in the seaside up to the farthest distance that waves can reach in winter in addition to sand and gravel beaches... as well as those saline lakes adjoining the sea are such public properties which are usually at the risk of illegal adverse possession⁶¹ and usurpation. When such public properties are covered from usurpers they would become at the disposal of Islamic State.

There are some laws enacted to prevent possession and incursion of public properties. Some of such laws are as follows:

- 1- The law of punishment for any disconnect and destruction of tools of electricity and telecommunication 1959
- 2- The law of water upon which there is necessary to get permission for digging water wells in every land.⁶² Also, everyone who makes changes in the water distribution tools or disrupt the distribution of water may be sentenced to 2 month until 6 month imprisonment⁶³ and if someone deliberately destroys the installations of any dam may be sentenced to 3 till 15 years imprisonment.⁶⁴

There is also the law of Fair Distribution of water 1982 according which the punishment for making changes in the water distribution tools or disrupt the distribution of water was decreased to only 15 days till 3 month imprisonment.⁶⁵ The article is worth of criticize. While 70 percent of the earth is covered by water, it is still considered a precious resource because only a very small amount is fresh water and smaller amount is safe for human use. The water shortages and droughts are already common in most parts of Iran and lack of having enough water, or having poor quality water, is an issue facing approximately most Iran's population. However, despite that the protection of water source is vital, the said water laws are insufficient to cover such protection and the punishment for destruction distribution tools or disrupt the distribution of water cannot be enough deterrent of such offences.

3- The law of off shore lands and built offshore lands 1975. Offshore lands have been coastal for a long period of time and built offshore lands are newly made by the tide of the seas or lakes.⁶⁶ According to this law any private possession and ownership on such lands is forbidden.⁶⁷ If someone privately occupies and possess such lands, he/she will be punishable up to 3 years imprisonment.⁶⁸

4- The law of Taazirat⁶⁹ upon which everyone who destroys monuments or religious places can be punished to 1 till 10 years imprisonment.⁷⁰

This article in the law is worth of criticize. Although the rationale behind the article is protection of public property prolonged length of punishment, i.e. 1-10 years imprisonment, may harm to criminal justice. Because one can imagine two culprits with the same offence of destroying who are sentenced in different cities or in two branches of criminal courts. One of them may be sentenced to 1 year imprisonment and the other may be sentenced to 10 years imprisonment.

So, there are many laws, in the Iranian legal system, which have been enacted in order to protect public property in the Iranian legal system but they need to assessed and revised according to the new circumstances.

Conclusion. The main and first contribution of this paper is to reveal legal challenges of principle 45 of the Iranian Constitution which is related to public property. This may lead the legislator to the theory that can better explain some Islamic concepts in the principle 45 and better performance of those concepts. Some distinctions exist between Islamic rules and common rules which need more attention.

The second purpose of this paper is to highlight specific performance of the principle 45 according to the Islamic law and Iranian Civil Code while suggesting amendments to some laws.

References

1 Assistant Professor in Islamic Azad University, Branch North Tehran, Law department

2 The Constitution of the Islamic Republic of Iran was adopted by a referendum on October 24, 1979, and came into force on December 3 of that year, replacing the Constitution of 1906. However, the new constitution was amended on July 28, 1989. The new Constitution contains a preamble outlining a broad ideological vision for the nation as a whole, 14 chapters and 177 principles.

3 Pakistan Constitution 1973, Principle 227

4 Afghanistan Constitution 2004, Principle 3

5 From one point of view, one may raise a question that constitutions containing such a clause will inevitably prevent a country from realizing democracy or from respecting liberal rights.

6 The Holy Quran, Sura Anfal, Verse 1

7 There are different views regarding the exact numbers of Anfal. Some Islamic writers say Anfal includes 7 types of , page44), some believe it 2004properties (Zanjani, Amid, *Political jurisprudence*, 4th volume, Amirkabir publication, includes 11 types of properties (Shams, Ahmad, *Legal regime of nationalized lands*, 3th edition, Dadgostar publication, 2007, page 50), and some believe it includes 12 types of properties (Khamenei, Mohammad, *Public ownership*, Tak publication, 1991, page 75)

8 In general, Imam, in Islamic terms, means Islamic leadership position. The term is most commonly used as the title of a worship leader of a mosque or Muslim community who may lead that community and provide some religious guidance. However, Shia Muslims believe that this term is dedicated for successors of Mohammad (Prophet of Islam). Shia consider Ali as the one who divinely appointed by Mohammad as the first successor and as the first Imam. This term is extended to Muhammad's family who is so called Ahl-albayt. According to this belief, there are 12 Imam who are divinely appointed after Mohammad. There are also some slight differences between some schools of thoughts among Shia Muslims regarding the number of Imams.

9 Tabatabai, Mohammad Hossein, Tafsir Almizan, Dar Al kotob Al Eslamieh Publication, 1991, pages 5&6

10 For more information see: K.Baslar, The concept of the common heritage of Mankind in International Law, Martinus Nijhoff Publisher, 1998, pages 40&41

11 N. Katouzian, *Property and ownership*, Mizan publishing, 18th ed, 2007, page 9

12 Iranian Civil Code 1928, article 27

13 In most Common Law systems and in the mixed jurisdiction of Scotland, if there are no surviving relatives, the estate goes to the Crown. This estate is known as *bona vacantia*. See for more information: Carey-Miller, DL. & Irvine, D. (2005). *Corporeal Moveables in Scots Law (second edition)*, W.Green, 42

14 Iran Civil Code 1928, article 866.

15 Iran Civil Code 1928, article 843

16 See the holy Quran for example:

Sura4, verse 4 which says:

.....

This verse refers that inheritance must be distributed after fulfilling any bequest and paying off debts.

Also see the holy Quran Sura2, verse 180 which says:

Bequest is prescribed for you when death approaches one of you.

The language, in this verse, is that of an obligatory rule, because prescribed is used in the Qur'an always for definitely obligatory laws.

17 Iran non-litigious matters 1940, article 335

18 The Ministry of Finance and Economic Affairs is, in Iran, the government agency authorized to levy and collect taxes.

19 See for more information Cohen. Nili, *The slayer rule*, Boston University Law Review, Vol 92, page 793; Riggs v. Palms, 22 N.E. 188, 189 (N.Y. 1889)

20 See for example:

1- Najafi, Mohammadhosein, *Javaher al kalam*, Darol makatebol Eslamieh publication, 1977, Volume 39. Page 23

2- Khomeini, Roholah, *Tahrir al wasileh*, Bita publication, Volume 2, page 367

3- Toosi, M., *Al Mabsoot*, Bija publication, 1967, Volume 30, page 30

4- Abaee, Malek ebn Anas, *Almoota*, Ehya al Kotobel Arabia publication, 1950, Volume 2, page 519

3, Volume 4, page 75 2005- Zarghani, Mohammad ben Abdolbaghi, Sharhol Zarghani, Darolfekr publication,

21 Iran Civil Code 1928, Article 880.

22 Murder may be defined as unlawful killing of a reasonable creature in being with malice aforethought. The term "malice aforethought" is the *mens rea* of murder and consists of 1- the intention to cause death in any person or 2- the intention to do grievous bodily harm to any person or 3- knowingly to expose the victim to the real and probable risk or grievous bodily harm.

On the other hand, we may discuss of manslaughter, which is unlawfully causing the death of another without malice aforethought. One of the situations where involuntary manslaughter occurs is the case where killing is not intended and includes unlawful and dangerous acts, gross negligence and unlawful omission.

The legal effect of such a distinction between involuntary manslaughter and ordinary heir in the case of inheritance occurs where the one who commits involuntary manslaughter takes inheritance after the payment of the deceased's blood money (Diyee) to other heirs who are entitled to it.

23 Tehran Court of appeal, Branch number 1, judgment number: 9209970220100345, date: 18/June/2013

24 Iran Civil Code 1928, Article 881

25 Iran Civil Code 1928, Article 881; also see Mr D. v. Mrs T. & Mr A., in which the plaintiff proved that the deceased's brother had become a Muslim and therefore had a right to be the only heir of his brother (the deceased). Tehran Supreme Court branch 10, Decree number: 10557 & 10558, Date: 08/Jan/1992. (B. Yadollah, *The Decrees of the Supreme Court in Non-litigious matters*, Javedaneh Publishing, 2011, page 304)

26 Ibn Abi Jomhor, *Al-aghtabol-feghhie*, Ayatolah Marashi Najafi publishing, Qom, 1th edition, 1989, p 154.

27 Mohagheghin, *Izahol-favaed*, Qom Hozeh Publishing, 1967, Volume 4, p 174.

28 S. Sarakhsi, *Al-Mabsoot*, Mortazavieh publishing 1990, Volume 4, p 79.

29 Iran Constitution 1979, principle 19.

30 Ibid 1979, Principle 13.

31 Iran Constitution 1979, Principle 23.

32 Iran Civil Code, Article 884.

33 It seems that the cases of deprivation from the legacy of the deceased by virtue of unbelief in God and his messenger and illegitimate child may be in contrast with the Universal Declaration of Human Rights, December 10, 1948, in particular, with Article 2 that provides:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty."

It is to be noted that Iran is a signatory to this declaration. Also, this may be in contrast with the articles 4 and 26 of the International Covenant on Civil and Political Rights (ICCPR) 1966. The covenant was enacted by the Iranian Parliament in 1976.

34 For more information see: R. H. Helmholz, *Bastardy Litigation in Medieval England*, *The American Journal of Legal*

35 Iran Civil Code 1928, Article 949

36 RW Aigler, Rights of Finders, Michigan Law Review (1922-3) 21, p 664

37 M Roy, “Rights of Finders of Lost Property”, Kentucky Law Journal (1927-28) Vol 19, page 4

38 This rule derived from an old case called *Bridges v Hawkesworth* (1851) (21 LJ QB 75). In this case, the plaintiff (Bridge) went to the defendant’s shop for business. When he wanted to leave the shop, he found an envelope containing banknotes on the floor of Hawkesworth’s shop. Bridges showed the notes to the shopman and requested him to keep them and deliver them to the right owner. Three years elapsed and nobody requested the lost notes. The plaintiff applied the defendant to give the notes back and the defendant refused. The plaintiff brought an action to the court. However, the judge held that the defendant was entitled to keep them. This case, however, posed many questions and legal challenges. For example, at what point did the defendant become entitled to the notes? Or, in another example, what would have changed if the notes had been found in the street by someone passing by?

39 NAJ Helli, *Sharaye Al-Eslam*, Vol 1,(Abd Alrahim Press Year 1999), p 324.

40 H Safai, *Individuals and Properties*, 6th ed. (Mizan 2007), p 162.

41 The United Arab Emirates Dirham is now the currency of the United Arab Emirates.

42 Iranian Civil Code 1928, article 162.

43 Ibid, articles 162 and 163.

44 Ibid, articles 164 and 165.

45 Ibid, article 166.

46 SH Safai (n 26) 164; Cf Civic Government (Scotland) Act 1982, Part VI.

47 Usurpation is an official translation from the Islamic term “*Ghasb*” which has a broad meaning and is frequently used in texts. Since this term is directly used in Iranian legal texts, we refer to it as “usurpation” in this chapter. However, it seems that the term usurpation is not an exact match for the concept of *Ghasb*. In this article, usurper or “*Ghaseb*” is the person who commits the act of *Ghasb*. Usurped property is a property that has been taken by *Ghaseb*. *Ghasb* is an independent legal term and covers both moveable and immoveable properties, and it should not be mistaken with other terms such as “encroachment”.

48 Usurpation is forbidden according to the consensus of the Muslims, because Allaah says (interpretation of the meaning): “*And eat up not one another’s property unjustly (in any illegal way, e.g. stealing, robbing, deceiving)*” [al-Baqarah 2:188] one of the major sins and one who commits it will be subjected to severe chastisement on the Day of Judgement. It has been reported from the Holy Prophet (s.a.w.a.) “*that whoever usurps one span of another’s land, seven layers of that land will be put round his neck like a yoke on the Day of Judgement*”.

49 For more information, see M.A. Mughal, *Islamic concept of Ghasb*, Punjab University Law College; Superior Law College; LIMIT Law College, Lahore, May 28, 2012.

50 It is said that later Hanafi jurists held that usurpation of lands can also occur. See Sarakhsi, *Al-Mabsut*, Vol Xi, p. 65.

51 Iran Civil Code 1928, Article 308.

52 Ibid 1928, Article 323.

53 Ibid 1928, Article 310.

54 Ibid 1928, Article 316.

55 Ibid 1928, Article 317.

56 For more information regarding the term *Vitium Reale* see: H. Baklay, *Note in the inner house*, Journal of jurisprudence, 1882, Vol xxvi, page 421

57 In *Asghar v. Golab* (2008), the plaintiff requested the removal of possession of the defendant from his land. The plaintiff claimed that the defendant had possessed the land without permission and no contractual relationship. The defendant said in response that he had hired the land from Mr Mash-hadi Reza. The court recognized the act of both the defendant and Mr Mash-hadi as *Ghasb* in chain and held that the defendant had to leave the land to the plaintiff. (Case number: 1513/35/86, Tehran High Court branch 35, Decree number: 1530, Date: 30/Jan/2008). It is worth noting that if the number of people in the chain increases, the judgment will be more complicated and may involve different types of compensations.

58 It is important to note that although *Ghasb* has a legal definition in the Iranian legal system, it is also a religious doctrine that holds that no one has the right to possess another’s property through illegitimate means. It extends to any type of property from anyone (from any criminal offenders or innocent) with any beliefs (Atheist and non Atheist). The term could also be applied for a nation’s homeland, public property and private property. In this doctrine, *Ghasb* is a sin and no religious ritual (such as daily prayer) can be conducted in a property that is obtained by *ghasb*. Since *ghasb* or usurpation covers a broad range of concepts, it has been the subject of controversy among Islamic jurists.

59 The Revolutionary courts were established by the Revolutionary Council immediately after the revolution in 1979; however, they became official in 1983 as a result of legislation passed by the Islamic Consultative Assembly. Revolutionary courts are, in principle, criminal courts that examine crimes against national security, terrorism, drug related crimes, crimes from the officials of previous regime, and all crimes that are related to principle 45 and 49.

60 Decree Number 575, Case Number: 34/70, Date: 05/05/1993.

61 Decree Number 581, Case Number: 8571 , Date: 21/02/1994.

62 Adverse possession is a legal term that is used to describe the situation that a person who does not have legal title to a piece of property—usually land (real property)—attempts to claim legal ownership based upon a history of possession or occupation of the land without the permission of its legal owner. The term is sometimes called as "squatter's rights". In which may result in title with observing some requirements for the possessor. Islamic law, the term refers to 63

The law of water and the method of its nationalization 1968, article 34

64 Ibid, article 60

65 Ibid, article 61

66 law of Fair Distribution of water 1982, article 45

67 The law of off shore lands and built offshore lands 1975, article 1

68 Ibid, article 7

69 Ibid, article 11

, refers to punishment for offenses at the discretion of the judge or ruler of the state. 70 In Islamic Law, taazir, Arabic

This punishment is one of three major types of punishments or sanctions under Islamic sharia law — hadd, qisas and taazir.

The punishments for the hudud offenses are fixed by the Qur'an or Hadith and they can not basically changed, increased or decreased because they are indeed have been defined by God. Quisas is another type of Islamic punishment which allows equal retaliation in cases of intentional bodily harm. However taazir refers to punishments applied to the other offenses for which no punishment is specified in the Qur'an or the Hadith. Most crimes are basically defined by taazir.

996, article 558171 The law of Tazirat,