

# Pathology of Iran's Legislative Criminal Policy Regarding the cession of Public Lands

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## Abstract

The method and type of cession of public land by the legislator has created illegal possession of the public wealth. It is required to investigate the existing condition and the causes of occurrence of these possessions in legislative criminal policy and formulate policies to reduce these abnormal behaviors. The present study is a descriptive-analytic design via the evaluation of the relevant rules and library studies and it examines the basics of the possession of public land and evaluation of the performance of the legislator in Iran. The studies show the lack of comprehensive, purposeful, effective policies by the legislator in this field. Based on the great power of the legislator in cession of public land and the confusion of the rules in this regard, general policies of the government in land field and its emphasis on the necessity of legislation in the framework of Spatial planning can reduce the illegal possessions of public land.

**Key words:** Legislative Criminal Policy, Public Land, Illegal Possession, Land Cession, Land Hunger

## INTRODUCTION

Illegal possession of public land<sup>1</sup> is one of the crimes with adverse effect on economy, housing, agriculture, environment and natural resources. Today, based on its occurrence, it is one of the main concerns of Islamic Republic of Iran. One of the important factors in unfair possessions of the land is the performance of Iranian legislator regarding the cession of the land.

The method of cession of public land by the legislator causes the illegal possession of public land and this leads to the possession against the public benefit of the land by some people. In some cases, the lack of taking comprehensive, purposeful, efficient policies by the law maker in the rules regarding the protection of public land has caused that some people misuse the legal confusions and illegally possess the public land. In some cases, although these cession are legal based on the law, based

on the basics of cession of public land, these cession are against the public benefit. In some cases, the legislator legalizes the illegal possessions.

Based on the above discussions, it is necessary to have good response to this abnormal phenomenon by the people and its organization should be considered based on the criminal policy. Criminal policy is the set of methods by which the social body (society board) organizes their responses to the criminal phenomenon (Hosseini, 2004:14). These methods refer to the action, reaction and preventive behaviors against crime and deviation (Lazrezh, 2011:53). The concept of criminal policy is based on the definition of Mark Ansel and it is recognized as a technology from the use aspects and it includes different aspects of legislative, legal, executive and participative (Najafi Abrandabadi, 1999:515). The legislative criminal policy controls the activity of the law maker and the rules in accordance to the ones explaining the basic principles and the plans of criminal policy and emphasize on the principles of the law maker and the formal legislative organizations regarding the fight against delinquency and control of crime and deviation (Najafi Abrandabadi, 1999:515).

Explanation of the legislative criminal policy in Iran regarding the cession of public land and evaluation of its effectiveness can include some issues such as the basics of

### Access this article online



www.ijss-sn.com

Month of Submission : 07-2017  
Month of Peer Review : 08-2017  
Month of Acceptance : 10-2017  
Month of Publishing : 11-2017

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possession of property and public land and evaluation of the performance of the Iranian legislator in these cession. The present study is a descriptive-analytic approach via the evaluation of the rules and library studies.

No valuable study<sup>2</sup> has been performed regarding the cession of land but the basics of possession of public land and analysis of the performance of the law maker are not considered and the present study defines this issue.

### **The basics of property possession and public land**

#### *The principle of non-cession of public property*

One of the most important principles for public ownership is the non-cession of public property. This principle is based on two issues, first the nature of public property in which, the followers of natural law believed that some properties are not privately owned based on their nature and in other words, they are not ceded to others. In the modern era, voluntarists consider all objects as owned based on the technology power and the principle of non-cession of the public property changed its natural nature to the voluntary concept (Karami, 2014:171).

Another cause is the avoidance of the interference of the power owners in the public property and misuse of the property by which a separation is made between the public property and the personal property of the king in order that the king cannot transfer or sell the public property (Karami, 2014:26). As most of the monarchies are declined and public property is ceded to the people, this principle allows the representatives to cede the public property.

For example, in France, recently the legislators have found that the property of kingdom is owned by the French people and there is no barrier to apply the ownership rights to these properties by the representatives of nation to represent the nation. According to the article 34 of French constitution, the transfer of public ownership to private ownership is possible based on the law. In US law, the government owns the public property and on behalf of the US administration, the congress can own and cede the public property (Kanani, 2008:205).

In Iranian legal system, the lack of private ownership of public property in article 26 of civil law is defined based on article 538 of French constitution. In the article 83 of constitution, it is defined that “ the governmental properties as defined as the national treasury are not transferred to others unless with the approval of Islamic council parliament as the treasury is not unique. Thus, the government properties as the national treasures but not unique treasures, as being prioritized, other governmental buildings are transferred to others with the approval of Islamic council parliament. Some believe that the

representatives of nation as the representative of nation should observe the benefit of the people and some public properties such as historical works, museums, military earthworks and other properties as explained in article 26 of civil code as not be transferred can not be transferred even by law (Kanani, 2008:26).

The public and government ownership is necessary in non-profit cases in which public services and social justice are required and in the cases in which the private sector has no motivation to invest in these fields and most of the economic activities require the economic freedom, competitive space, following the rules of supply and demand and the market price. The administrative management is inefficient in these cases and it hinders the growth and prosperity of individual talent and capabilities and can suppress the human talents (Kanani, 2008:25).

Although privatization is encountered with some cases as unduly wealth for the social class of society (Kanani, 2008:21), these problems can be removed by the balance between the public and private ownership, but it has many advantages in the economy of society and this makes the cession of public property with its regulations. In other words, some reasons as fair distribution of wealth, using the income of natural resources and avoidance of economic confusions can be defined (Karami and Pourmand, 2011:61-62).

The government-based natural resources and belonging of property to Imam doesn't mean that these properties are not available to the poor in society and it means that this wealth should be distributed fairly based on the long-term benefits of the Islamic nation among the poor and its profit can be used as tax for government expenses and it has some results as increasing the national income, self-sufficiency, removing poverty and full employment (Khamenei, 1992, 96). As it is said later, in Islam, renovation of land leads to the creation of private right or ownership. Thus, the Islamic government can possess the public land based on some criteria.

The article 45 of the constitution considers most of Mobahat owned by the Islamic government and it doesn't mean that these properties are not transferred and it means that the government owns the public property and this doesn't avoid the ownership of the private sector and the partial transfer of the public property via the ratification of rules (Kanani, 2008:30). The principle “to act in accordance to the public benefit” indicates that if the public benefit requires the cession, we can act. In these cession, the exact conditions should be considered to avoid the breach of the rights of the public.

Now, the principle of non-ownership of the public property or non-cession of the public property has the exception of “by virtue of law” and based on observing the required regulations, the law maker can cede the public property. In other words, the basis is the non-cession of the public property, unless the law maker acts opposite to it.

#### *The prohibition of occupation of Mobahat*

The properties which are not privately owned and which private individuals, in accordance with the regulations contained in this law and the especial laws dealing with each particular category, are allowed to take into their possession and exploit, shall be termed “mobahat” and under this heading shall come waste lands, that is to say, lands which have fallen into disuse and on which are neither habitations nor cultivation. (civil code, article 27).

The basis of this difference is regarding the relationship between Mobahat and Anfal. Those considering the difference between Anfal and Mobahat, as based on the initial order, Anfal are owned by Imam or government, the restriction to occupation in Mobahat by the government is possible based on the secondary order. These restrictions should be confined to the benefit of society, necessity state, necessity value and fully based on the benefits (Sadr, 2000, Vol. 1, 42-49).

Some people consider Mobahat as one type of Anfal. Anfal is one of the properties as its occupation is based on the permission of Imam (specific meaning of Anfal) or the property as any possession by Imam is free for the public (Mobahat). In other words, Mobahat is one of the properties of Imam as Imam considers it permitted based on the general permission. Based on this view, creating limitation to the possession in Mobahat is the first order and the limitations of the secondary order are not observed in it (Khamenei, 2007:77-78).

Others consider the ownership of Imam on Anfal as the guardianship in possession (management) and based on the criterion (اقل تبر ال) as in Anfal and Mobahat, consider Mobahat as the management of Imam and he organizes its exploitation based on the benefits of the generations in different periods. In other words, it is possible that at one period, one property is dedicated to Anfal and the relevant rules and in another period, it is Mobahat. Indeed, there is no pre-determined Anfal and everything is based on the time and place conditions (Saadi, 2009, p. 49). This approach is similar to the recent approach ignoring the ownership or guardianship in possession of people regarding the properties by which the public property is dedicated to the Islamic ruler and the Islamic ruler can confine them based on the benefits. The effect we can observe in the separation between Anfal and Mobahat is

the necessity or the lack of necessity of getting permission from the government in occupation cases. As one of the contemporary jurists state in this regard: some people don't consider the separation of Anfal and Mobahat practical and it is a theoretical discussion (MosaviKhuyi, Bita, 363) but the main result of this separation is that if we consider any property of “Anfal”, it is dedicated to the government in the formation of Islamic government and it is prohibited based on the first order.

However, if we consider the same property of “Mobahat”, its possession doesn't require getting permission of the Islamic government, unless the government prohibits it based on the secondary order (MakaremShirazi, 1416:608).

Ignoring the mentioned differences, the similar concept in all approaches is the confinement in the possession of Mobahat by the Islamic government. It is possible that the majority of public wealth is Mobahat, observing the justice and public law of people regarding fair distribution requires that the government controls the quality ownership, its quantity and occupation as with the destruction (Amid Zanjani, 2004, p.31). This is also true about the land belonging to the nation (based on the approach of the difference between the public and government ownership)<sup>3</sup>. For example, regarding the Maftuholonve land as shared in the ownership by people, if this ownership means permission of individual occupation, it leads to great corruption and it provides the destruction of natural resources and exclusion for some people. As based on reasoning and logic, the public property belongs to all people and the private ownership via law making and with the permission of government and the power of the ruler should be fulfilled (Kanani, 2008:138). Based on the conditions of the current society, the Iranian law maker confines the occupation of the majority of the property as considered in Mobahat group based on the jurisprudence rules. The main fact in this confinement is observed in the supreme law of Islamic Republic of Iran, article (45) of the constitution and the law maker cedes the majority of public wealth to the government to act in accordance to the public benefit.

In the ordinary rules, such restrictions are observed. For example, the legal restrictions to own the dead land via Hayazat can be observed in the legal draft of registration of the dead land around Tehran (1955), article 6 of land reform law (approved 1960), article 1 of the law of abolishing the ownership of urban land and the quality of its civil nature (approved 1979), the law of detection of the dead land and the cancellation of its documents (approved 1986), article 5 of urban land law (approved 1987) and unique article approved in 1988 of expediency council regarding the resolution of unused land<sup>4</sup>. As it

is referred later, the renovation and occupation of dead land requires the permission of government and there is no initial permission to them but the law maker has defined some restrictions explicitly in the mentioned rules to occupy the land. Although some land is dedicated to Mobahat, occupation of land is different from other types of Mobahat from the view of jurists and we discuss the rules of renovation of land later.

### ***The necessity of permission of government in renovation and occupation of land***

The occupation and ownership of land in accordance to the view of those considering the difference between the public and government land has some different rules. For example, Shahid Sadr considered the difference between them regarding the public land (e.g. occupied land being green during the occupation), referring to some jurists as Sheikh Tusi and FaghihhIsfahani, this land is dedicated to the public for public benefits and it is stated that when this land is transferred to be exploited by the farmers, he can not have the personal right in the land and he is the tenant cultivating the land and pays the fee or tax in accordance to the terms in the contract. When the contract is expired, he has no right about the land and exploitation and occupation is possible only by re-conclusion of the contract and re-coordination with the Muslim ruler. The renovation of the unused land is only possible via the permission of the legitimate ruler and the permitted renovation doesn't create any private right for the one renovating despite the renovation of governmental land (Sadr, 2000, Vol. 2:103).

Regarding the renovation of government land and creating ownership right for the one renovating, there are two views from jurisprudence aspects. Most of the jurists believe that renovation of government land by the permission of Imam leads to the transfer of government ownership to the private ownership (Najafi, 1404:9). Other jurists such as Sheikh Tusi (Tusi, 2008:29) and AllameBahrololum (Bahrololum, 1403:274) don't consider renovation leading to the ownership of the land itself and they consider the priority of occupation in land for the one renovating and paying the land tax is necessary. The reason of this difference is observed in the narrations of renovation and the verses of Anfal and the necessity of payment of tax (Tasgh). Regarding the renovation as expressed in the words of Imam (pbuh), "هل يهف أضرا يي ح ا نم" (Tusi, 1407:517), this is found that with the permission of the religious ruler, the ownership of this property is transferred to the one renovating. As it was said, according to the verses and narrations of Anfal, the land of Anfal belongs to Imam and there are some narrations of renovation such as «نم ح ا نم» (Horameli, 1409:549) explaining the tax payment (Tasgh).

In this regard, Shahid Sadr states that based on the necessity of payment of fee to the government, with the renovation of the land, the private ownership are not manifested. Indeed, the land is in the ownership of Imam and he has the right enabling him to exploit it and no one is entitled to get the land and Imam determines rent fee for him (Sadr, 2000, Vol. 2, 116). Thus, dead land belongs to the government and the one renovating has the priority to others not the government. It means that the government can get the renovated land based on the public benefit. This priority right is formed based on renovation not based on the land and if it is turned into dead, this right is canceled naturally (Sadr, 2000, Vol. 2:121-122). He considers the ownership of land to government but the efforts of the one renovating lead to his private right on the land.

Regarding all the verses and narrations, others consider the ownership of Imam ignoring the normal ownership as the ownership of Imam is based on the state ownership and the dominance of Imam as the representative of the Islamic government and the dead land is not the personal estate of Imam. Although their ownership should be with the permission of Imam (government) and in return to this permission, the government should consider the principle of fair distribution of income and wealth but the ownership of the property is transferred to others (Kanani, 2008:133-134).

In conclusion, as it was said, the occupation of public land depends upon the permission of government and any occupation of public land without the permission of government is illegal occupation. The government can occupy the land by people. The only difference regarding the ownership of people is that based on the two views, it seems that the government has no religious barrier to transfer the ownership. As it was said, in transfer of ownership, exact regulations should be determined to fulfill both the fair distribution of wealth and using the land should be based on the public benefit. Regarding the cession method, any cession should be by virtue of law.

### **Evaluation of the performance of the legislator of Iran regarding the protection and exploitation of public land**

#### ***The legislative evolution of cession of public land***

In 1962, the law maker approved the legal draft of nationalizing forest, field of all forests, natural pasture and forest land as the public property belonging to government, their protection was dedicated to the Iranian forest protection organization and in 1967 with the ratification of the law on protection and exploitation of forests and pastures, attempted to protect the public land but after the Islamic revolution, some rules of delegating public land were approved and the majority of land was removed out of the public land. Before the revolution, there were some rules considering the cession of public land as allowed<sup>3</sup> but the majority of the transfer is dedicated to the rules after the revolution.

Despite the view (the group of public law researches, 1999:57) believing that land hunger phenomenon should be observed in the note 1, article 2 of the legal draft of nationalizing forests and pastures<sup>6</sup> and it seems that this article is not including the permanent cession of land or transfer of ownership to the private sector. In this note and article 2 of the executive code of the law on nationalizing the forests approved in 1963 and article 3 of the law on protection and exploitation, the exploitation of the land is referred and “it is obvious that the term “exploitation” is based on the plan approved and issuing the exploitation permission regarding the concept of permanent cession. . . The investment of government in the companies being established for the mentioned exploitations shouldn't be less than the 51% of share and this defines keeping the decision making power and supervision of government in using national land (Shams, 2015:167).

The law of protection and exploitation as referred in articles 31 to 41 regarding land transfer, ignoring the exceptional cases with specific regulations, the permanent transfer of national land is not prescribed (Shams, 2015:167). At the beginning of revolution, the public land was ceded based on the legal draft of reform of the draft of cession and renovation of land approved on 1359/2/31 of revolution council and articles 31, 32 and its executive regulation as rent fee. In 1989, with the ratification of the law of adding two notes to article 32 of this code<sup>7</sup> and the permanent transfer of the land was possible. This transfer was with the necessity of some conditions but based on the extension of the transferred land, it was a beginning to remove the public land from the dominance of government<sup>8</sup> and the policy of permanent transfer of public land to private sector in other legal cases as the law on reform of article 34 of the law on protection and exploitation of forest and pastures approved on 1354/3/14 and adding some notes to it approved in 1373/07/07 of expediency council, articles 75, 84 of the law of collection of some government incomes and its consumption in definite cases approved on 1373/12/28, note 54 of the rules of budget in the 1994, 1995, 1996, article 108 of the law of the third plan of economic, social and cultural development of Islamic Republic of Iran approved on 2000/01/17 and its enforcement in article 20 of the law of the forth plan of economic, social and cultural development of Islamic Republic of Iran approved on 2004/06/11<sup>9</sup>.

Among the mentioned rules, the article of reform law of article 34 of the protection and exploitation, ignoring the permanent cession, it has legitimized the illegal possessions of public land. According to this law, the ministry of construction was obliged to use forest land of north and pastures without trees within 3 years (as extended in 2000 by the parliament to the end of 2003) being turned into irrigated gardens without the legal permission to the end of 1986 or being used for production of livestock and other non-agriculture

plans based on the detection of a commission consisting of the representatives of construction Jihad, agriculture and the forest and pasture organization and governor's office with the responsibility of construction Jihad in return to receive rent or the determined price being ceded or sold and this has legitimized the performance of those illegally occupying. This land is ceded with cheap price and those not occupying illegally were deprived of this facility.

Based on the criticism on the mentioned cessions and their adverse effect in terms of the easy illegal occupation of public land and the bad behavior of those occupying (MirmohammadSadeghi and Rajabali, 2017:61; Tahmasebi et al., 2013:165), by approving the law on the increase of exploitation of agriculture sector and natural resources approved on 2010/04/23, permanent transfer is state as prohibited. According to note 2, article 9 of this law “with the ratification of this law, the permanent transfer of the government ownership is prohibited regarding the national, government and dead land to those filing the case from the date of notification of this law. In articles 10, 12 of this law, only “rent contracts, exploitation right and the right to take benefit of national and government land” are explicated showing the will of the legislator to prohibit the permanent cessions of the land.

In 2015, the legislator approved the law of removing the barriers of competitive production and improving the financial system of our country and prohibited the permanent cessions. According to note 2, article 45 of the law “cession of national and government land to construct industrial, agriculture estates, tourism services and special economic zones are approved and the government plans are exceptions in accordance to the environmental rules from the note 2, article 9 of the law of the increase of productivity of agriculture and natural resources.

It is worth to mention that based on the law on abolish of the dead land ownership and the quality of their civil nature approved on 1358/4/5 and the law on urban land approved on 1366/6/22 to remove the problems of housing of people, cession of some urban dead land with the required area are predicted.

#### ***The evaluation of the method of cession based on the relevant basics***

The evaluation of the legislative evolution of the transfer of public land and taking contradictory approaches by the legislator as it was said before show the lack of coherent and purposeful policy in transfer of public land by the Iranian legislator and this has caused the illegal occupation despite the public benefit. The transfer of land by permanent or temporary method is the issue by which the law maker can not decide and takes some policies in this regard. Before

the revolution, the transfer was as rent or temporary. At the beginning of revolution, the temporary and rent cession was emphasized and later they were turned into the permanent transfer. Based on the considerable occupation of public land, regarding the increase of exploitation of agriculture sector, the prohibition of the permanent transfer is ordered and less than 5 years, with the ratification of the law on removal of the barriers of competitive production and improving the financial system of Iran, this policy is violated. The increase of population and the need of people to land for residing and employment and the necessity of establishing industrial, service utilities, tourism, agriculture development have made the cession of public land as unavoidable but the law maker should have definite policies in the method of transfer to make the exploitation of the public wealth based on the fair distribution and avoiding exclusiveness. The current condition of law making regarding the cession of public land, if not being based on the political and election procedures show the lack of the strategic view of the legislator regarding the public land. The non-cession of public land is not a principle and the parliament representatives can transfer public land on behalf of the nation and there is no religious barrier to prescribe the transfer of permanent ownership but the term "public benefits" as explicated in the article 45 of constitution should be considered by the legislator.

It seems that in cession of public land as the wealth of people, based on land monitoring, law should be enforced. The spatial planning is balancing three elements of human, space and activity and to distribute economic, social, population activities and latent and explicit capacities, the required changes can be considered. The spatial planning is based on a long-term view based on the optimal exploitation of its facilities and showing the special responsibility of each region based on the capabilities as coordinated with other regions (Khanifer, 2010:6-7).

Based on considering economic, social, cultural, political and environmental conditions of the different regions, the public land use can be determined and in the framework of the monitoring, the type of method of cessions can be defined. For example, based on the land monitoring, if a region is not ceded based on environmental and forest nature, there should be a mechanism not to cede it even with law making. Now, Islamic council parliament is responsible to transfer any type of land. This power is also true about the restrictions of current law. In different rules, there are some restrictions to cede public land (Salari, 2012:167-175) and these restrictions can be changed also by the law maker. It is required to design a mechanism to avoid such transfer.

As it was said, based on the power of the parliament by the legislator and based on the lack of contradiction of land

cession, the guardian council in most cases<sup>10</sup> can not consider the transfer of land illegitimate in religion or constitution.

It seems that the solution is in determining the general policies of the government. We can formulate general policies of land based on the monitoring or the legislator is obliged to observe the spatial planning based on these policies. The guardian council can state some rules in contradiction to the general policies based on the note 1, article 110 and avoids the ratification of the rules in contradiction to the definite regulations of land transfer.

## CONCLUSION

The public land should be used and exploited as the public wealth belonging to the people and even the next generation in accordance to the public benefits. The necessity of protection of the public wealth on one hand and the necessity of correct exploitation of them in accordance to the public benefit require exact regulations based on definite basics. The evaluation of different rules in Iran regarding the cession of public land show the lack of coherent and purposeful policy by the legislator and this leads to the illegal or unfair occupations of land. The evaluation of the basics of public land occupation shows the extension of power of the Islamic council parliament regarding the type and method of cession of the land and based on the politic confusion of the law maker, it is required to design a mechanism for the coherence of the relevant rules in an orderly framework. Regarding the determination of the general policies of land, we can consider the policies of cession of public land based on spatial planning and avoid the legal confusions leading to the illegal occupation of the public land.

## ENDNOTES

- 1 Public land includes non-private land owned by the government as it is exploited directly by the governmental systems or these systems guard them. Different types of the land is the Anfal, Mobahat, public areas, dead land, public land, unknown owner, no benefit and national benefit. For more details refer to Tavakolpour, Mohammad Hadi, 2017, criminal policy making of Islamic Republic of Iran regarding the illegal possession of public land, Phd thesis of penal law and criminology of Qom University, Second discussion of the first chapter.
- 2 These researches are mentioned in the text.
- 3 Some jurists as Shahid Sadr consider the difference between the property of Imam (government) and the property of the Muslim (public). For more information in this regard, refer to Sadr, SeyedMohamamdBagher, Our economy, Translated by Abolghasem Hosseini Zharfa, Qom. Darolsadr, 2000, Vol. 2, p. 88-112.

- 4 These rules are narrated from TayebiTavakol, Hassan, 2015, legal system and the frameworks of transfer of immovable property of government, Tehran: Jungle, Javedane, p.20.
- 5 The draft of selling products approved on 1334/09/20:article 1-The agriculture ministry is obliged to sell all products in accordance to the rules of this law including Ghara, farms and land, unused land and estate and buildings belonging to government except the natural forests and pastures and buildings and estates required by the government institutes and the list should be given to the parliament commissions.
- 6 “The forest protection organization is required to be responsible for the exploitation of the above resources or cede it to the people by the conclusion of the contracts”.
- 7 The law of adding two notes to article 32 of executive code of the legal draft of cession and renovation of land in the administration of Islamic Republic of Iran approved on 1359/2/31 of revolution council approved on 1389/11/08 of Islamic council parliament: unique article-.....note 1-from the ratification of this law, the building of industrial and production workshops as exploited and its exploitation permission is issued by the relevant ministry, in case of the desire of the workshop owner, the ceded land is as permanent rent with the current price.
- 8 To observe the statistics and information of ceded land until 1994, based on the law and relevant criticism regarding the cessions, see research of parliament regarding the cession of national resources to people, report of research of parliament about the method of transfer of national resources land to make house, 1995, the journal of parliament and research, NO. 17, p. 155-167.
- 9 To see the details of the type of cession contract, its goals, its use type and the reference of the cession of these legal articles, see Salari, Mostafa, 2012, acquirement and ownership of land by government, Tehran, Dadgostar publications, p. 149-166.
- 10 In some cases, the cessions are in contradiction to the justice or lead into the illegal discrimination and the guardian council can state the contradiction.
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**How to cite this article:** Ghiyasi J, HadiTavakolpour M. Pathology of Iran's Legislative Criminal Policy Regarding the cession of Public Lands. *Int J Sci Stud* 2017;5(8):412-418.

**Source of Support:** Nil, **Conflict of Interest:** None declared.