Foundations of Conducting Government Authority in Public Services Privatization Program in Iran

Ali Nazari Montazer *
PhD in Private Law, Department of Law and political Science, Science and Research Branch, Islamic Azad University, Tehran, Iran
a_nazari1387@yahoo.com

Hossein Simaei Sarraf
Department of Law, Department of Law and political Science, University of Shahid Beheshti, Iran

Abstract

With approval of implementation law of general policies of Article 44 of constitution in 2008 and the division of economic activities in three groups, the government was obliged to transfer activities, institutions and companies to non-governmental sector other than those that will remain at government disposal (group III), such as parent telecommunication network, postal exchanges core network, core networks of power transmission and dams and large-scale irrigation networks and also maximum 20% of economic activities mentioned in Article 44 of the constitution (group II). As a result, the government has to give up a large part of public services such as production and distribution of water and electricity and telecommunications. Since beforehand the government either by direct ownership or through preferred stock administered and managed these services and applied authority by this way, the government will lose the means to exercise its sovereignty with transfer of ownership and implementing public services privatization; so, in order to compensate this gap of authority, a new legal system was considered to impose ruling on public services private institutions that in this article, its bases, frameworks and options are addressed.

Keywords: Public Services Privatization, Authority, Competition Council, Regulatory Board, Regulatory.
Introduction
In legal system of those countries that take step in the course of public services privatization, due to the nature of public services and principles governing on it, private companies of public services areas are obliged to accept commitments in addition to general regulations governing private companies, so that access to minimum standards and access of all people to public services are considered among commitments of private companies with public services. (Hermann & Flecker, 2012, 22)

Accordingly, the role of public services even by assuming privatization, will remain essential for all societies, economies and policies, not only for the functionality of the state, but also for private institutions, because the private sector cannot function effectively without law making and application of public sector governance. (Shamsul Haque, 1996, 9), and "it is a necessary precondition for the realization of a free market and freedom that is contingent for private sector in order to operate based on strong state legislation" Massey (1993, 126).

However, public services yet play a significant role to overcome the conditions of poverty, malnutrition, illiteracy, inequality, and dependence of developing countries and conditions of corruption, crime, violence, homelessness, untreatable diseases, and other serious conditions of developed societies, because these problems are rarely followed and resolved by private institutions. (Smith 1991, Carchedi, 1994)

With regard to the above, public services privatization always have been accompanied by major changes in the regulatory systems and of course this will not realized in different legal systems in the same way, although, legislation mainly shift from high concentration of governance on public services process toward proportional control and setting special legislation on services in supply chain (Majone, 1994). And because general tendencies are toward establishing official independent regulatory bodies with varying degrees of autonomy and discipline power or harmonization of market participants, granting of licenses and signing contracts are developed. (Coen and Thatcher, 2005, Gilardi, 2008)

So, the government cannot be indifferent about how to manage public services privatization. Accordingly, government authority after privatization is predicted in different articles of implementation general policies of Article 44 of the constitution and even establishing and new institutions are considered in mentioned law.

So, in this article, legal capacities of legal system of the country in the exercise of sovereignty over public services of private institutions will be studied.

First speech: delegation board and privatization organization
A: delegation board:
According to Article 39 of the General Policies implementation law of Article 44 approved 2008 and in order to coordinate implementation of the law, delegation board headed by Minister of Economy and Finance consists of Minister of Economic Affairs and Finance, Minister of Justice, Chairman of the Management and Planning Organization of the country without right to vote, Minister of Concerned Ministry without right of voting and two members of the Assembly as an observer whose tasks that can be associated with the authority under Article 40 are as follows:
1. To implement general programs and policies and to determine transfer divested businesses,  
2. To prepare companies pricing methods regulation and how to apply mentioned methods in this context,  
3. To prepare funding system, support and encourage buyers in association to determine contexts of buyers and sellers obligations,  
4. To prepare criteria for reforming companies structure in necessary cases to ensure in terms of preserving and protecting personnel,  
5. To prepare cultural- advertising activities for strengthening, improvement and transparency of the transfer,

According to notes 1 and 2 Article 40 of implementation law of General Policies of Article 44, abovementioned must be approved by the Supreme Council for implementation of general policies of principle 44 of the constitution and after approval, mentioned legislation will be sent to the President of the Islamic Consultative Assembly in order to implement the principles of the eighty-fifth and one hundred and thirty-eighth of the constitution of the Islamic Republic of Iran and in case of declaring contradiction by President of the Islamic Consultative Assembly, the Council is required to amend or abolish its own legislations.

Supreme Council of the implementation of the general policies of Principle 44 also issued various resolutions in this connection, including the transfer installment system regulation, approving management qualification and monitoring capacity in transferring company and shares, executive regulations of transferring preferred shares, regulation of advertising-cultural in transfer activities, etc, which is a part of privatization regulations system.

Also in accordance with paragraph "b" of Article 40 of the law above all other powers of the Assignment Board are as follows:  
1. Approving regulations for how to insure presenters of assignment affairs,  
2. Approving a list of every item that are able to sell, liquidation, integration, analysis, rent and management pact and necessary timing with the amount and method of transfer them in each year.  
3. Approving assignment items price,  
4. Approving instructions of how to regulate agreements and assignment including determination options and commitments of contracts parties, records and guarantees, circumstances of termination or annulment, how to apply discounts and fines in the framework of legal regulations,  
5. Approving instructions related to features necessary and the way of selecting managers and specialists in assignment items of through negotiation with observance of this law contents.

Above paragraph 4 can be considered as the most important powers of the Assignment Board in the exercise of sovereignty over public services private institutions that instruction "monitoring mode after transferring", adopted number: 89/2/143/H, dated: 08/08/2010 by assignment board has been issued for that and it will be addressed in the next section by privatization organization subject.
B. Privatization organization:
Privatization organization in accordance with Article 15 of the Economic, Social and Cultural Third Development Plan of Islamic Republic of Iran (approved 2000) was formed with change of articles of association of former production ownership development finance organization and articles of association of this organization was approved in 2001 by Cabinet and Guardian Council and it was amended by respectable Cabinet in 2009 and 2013.

Privatization organization is a public stock company depended on the Ministry of Economic Affairs and Finance and has a legal personality and financial autonomy whose head is Deputy Minister of Economic Affairs and Finance. Currently, the organization's center is in Tehran and has no office or representative in other provinces of the country.

Implementing enforcement law of general policies of Article 44 in 2008 and according to Article 27 of mentioned law based on that articles of association of privatization organization should be approved due to new missions assigned by cabinet, the duties and powers of the organization experienced a fundamental change. Representation of the Ministry of Economic Affairs and Finance on transfers, the supply of any stock, share partnership, the priority resulted from shares and ownership rights belong to the state and government companies, implementation of justice stock distribution plan to increase wealth and creating permanent income for households in need to protect and respect human personality and making them self-reliant households, and doing duties of assignment board and other duties related to shares transfer are among tasks that are the responsibility of the organization.

According to Article 4 of the articles of association of the organization, functions and powers of privatization organization are as follows:
1. To prepare guidelines for access facility to public participation development in order to increase productivity of material and human resources and developing capacities of private and cooperation sector and presenting it to the Cabinet for approval.
2. Companies shares transfer plan including conditions and the of transferring shares within the framework of related laws and regulations after the approval of delegation board and anticipating necessary measures in line with regulating the market, providing goods and services, public interests preservation and management and supervision of government in compliance with laws and regulations
3. Supplying any share, partnership share, preference resulted from shares and partnership shares and the rights of ownership, after the approval of the delegation board.

As it was stated among approvals of assignment board of privatization organization is guideline of monitoring mode after transferring approved by the board based on which some duties are imposed on the private sector public services on the topic of exercising authority that from which monitoring items mentioned in article 4 in order to prevent violation of the obligations of buyers that are included observing:

---

1 Production units ownership development finance organization is determined as a privatization organization in cultural, social and economic development third plan of Islamic republic of Iran, it was established in 1975 as a government company affiliated to Ministry of Economic Affairs and Finance due to section (4) law article of expanding production units ownership and it started its activity mainly with the aim of sharing workers in factories ownership with granting credit and facilities and doing any activity lead to expand production units ownership across the country.
1- To change combination of shareholders, to change members of the board of managers, to change articles of association, capital changes, company activity in context of articles of association, purchase and sale of fixed assets, lease or transfer of the usufruct property of company, selecting auditor and law inspector

2- Financial statements and auditor and law inspector reports

3- Minutes of board of managers and public assemblies and also reports of board of managers public assemblies

4- Attending in public assemblies of companies as observer without the right of vote in order to monitor detailed negotiations

5- Supervising company approved budget realization and checking its deviation causes, transactions with related people, non- conventional trades, other things due to privatization organization recognize

Also according to Article 9 of the mentioned directive, doing any of the following activities by purchasers and/or managers of granted companies are considered violation and will be subject to damage and punishment measures such as the following order:

A. Violations:

1- Reduction of the company's activities so that its activity will be threaten in the future
2 - Any change in the articles of association of the company without the written permission of privatization organization
3 – Obtaining loan and other facilities without written permission of the privatization organization
4 - Carrying out unconventional activities outside of the company context
5 - Non-cooperation of companies with privatization inspectors

B- Losses and punishment measures:
1- Fine to 5% of the transaction price in delegation contracts
2- Increasing installment sale revenues about remaining installments up to installment sale interest of country bank system
3 - Non-payment of other discounts even in case of entitlement until a determined time (discounts detention)
4 - Limitation or ban on shares purchase of privatization organization (buyer qualification rejection)

Above-mentioned conditions of privatization organization are attached as integral element of the shares sale contract.
Second speech: Competition council and its powers

One of the main goals of privatization is to create competitive market structures where many suppliers compete with each other in an integrated and available market and competitive market structures are also should prevent the concentration in the market. Therefore, suppliers of goods and services should not be a barrier to entry of new competitors in the market through the manipulation of the prices and quality of services. (McAfee, et.al, 2004)

Thus, expanding privatization plan and economic liberalization for encouraging competition and prohibiting monopoly became a subject of new emerging field in law as competition law and in recent years, particularly since the early 1990s it has grown substantially and its importance was visible for all more and more. This growth and development occurred in several dimensions so that although in the early twentieth century, America was the only country having laws protecting competition but now at least 100 countries have adopted these laws. (Ghaffari Farsani 2014, 22)

Currently, the scope of competition law encompasses all economic activities, even activities that were considered natural monopolies, such as telecommunications, energy, transportation, and postal services that were considered only in the sovereignty of states. (Whish, 2009, 1)

This indicates that politicians and legislators of countries - although with different time intervals - all found inefficiency and shortcomings of the state economy on the one hand, and the superiority of the market economy on the other hand, and they tend to this kind of economic system for promoting and development of its citizens welfare. In today's world, free market-based economic system is accepted by all nations. Economists are almost unanimous about the virtues of the market system. (Bagheri, 2006, 9)

In other words, laws protecting competition are considered complement element and perhaps an integral part of privatization plan or economy liberalization of countries. (Ghaffari Farsani 2014, 23)

Competition law reflection in domestic law is associated with anticipation of competition council and its authorities in the implementation of the general policies of Article 44 whose main goal was to create competition and prevent any activity that leads to disruption in competition, and its most important powers and tasks in markets intervention are «diagnosis of examples of anti-competitive procedures», "assessment of situation and determining the scope of market of goods and services" and approval of "guideline" for setting the price, amount and access conditions to monopoly goods and services market.

It is worth noting that before approval and running the implementation law of the general policies of Article 44 of the Constitution and the establishment of Competition council, the most important cross-section reference of market regulation in Iran economy was consumers and producers support organization. The most important market intervention areas of this organization is also summarized in inspecting and monitoring price and distribution of import and produced goods and services involved in all sectors including the government, cooperation, private and institutions, to monitor the implementation the prices and investigating violations based on reprimand law, supporting domestic products and consumers against unusual prices fluctuations.
As mentioned legislator predicted establishing competition council and powers for the council in order to facilitate competition and prohibiting monopoly in the ninth chapter\(^2\) of implementation law of general policies of Article 44, which in this study we will examine the legal capacities: According to Article 43 of the law, all natural and legal persons are subject to the provisions of Chapter IX. Among requirements that should be observed in this chapter is as follows:

1. Prohibiting any collusion by contract, agreement or understanding between parties in a way that results in a disruption in the competition\(^3\), and its examples are mentioned in implementation law of the general policies of Article 44 such as to determine prices for buying or selling goods or services and how to determine it in the market, directly or indirectly (paragraph 1 Article 44)
2. Limiting or controlling the amount of production, purchase or sale of goods or services on the market (paragraph 2 Article 44)
3. Imposition discriminatory conditions in equivalent transactions for trade partners (paragraph 3 Article 44)
4. Situations such as requiring parties to concluding contracts with third parties or accepting unrelated supplementary obligations, dividing goods market between two or more persons and limiting access of people outside of the contract to the market.... (Paragraphs 4, 5, 6 and 7; Article 44)

Also, in article 45 of implementation law of general policies of Article 44 of the acts that led to the disruption of competition are enumerated and are banned including hoarding and refusing transaction, aggressive pricing\(^4\), illusory statements\(^5\), compulsory sale or purchase, the supply of non-standard goods or services, intervention in the internal affairs or business transactions or competitor, abuse of dominant economic position, etc.

In Article 53 of Implementation law of general policies of Article 44, a council as competition council is formed to attain the objectives of Chapter IX that some of them were mentioned above that according to the provisions of this chapter the general performance of competition council includes monitoring on all competition activities that are done by government, private, public and cooperative sectors through which it prevents the creation of a monopoly in the economy

---

\(^2\) Articles 43-84

\(^3\) Paragraph 20 article 1 of implementation law of general policies of Article 44: disruption in competition: “things that cause monopoly, hoarding, corruption in economy, harm for public, leading to concentration and usage of wealth in hand of special people and groups, reducing skill and innovation in society and/or foreign economic domination over the country.”

\(^4\) The purpose of aggressive pricing is offering goods or services at a lower price than its cost or offering gifts, prizes, discounts and the like so that it make serious harm for others or to prevent new people to enter the market. Recognizing the serious harm is responsibility of competition council. (Paragraph d Article 45 of implementation law of general policies of Article 44 and its amendments)

\(^5\) Including something like introduction of product or service will be unrealistic with quality, quantity, grade, and description and a particular standard or lower expression of the goods or services of competitors, introduction of second-hand goods or repair ones as new, after-sales service or warranty commitment for replacement or repairing goods, while there are no such possibilities and … (Paragraph H Article 45 of implementation law of general policies of Article 44)
market in fact, the council is not only created to control competition in the private sector and activities of competition council include all country economy sectors. For example, if an economic firm conducts invasion pricing i.e. it reduces its goods or services price at a time in order to remove its competitors in the market and then acting as a monopoly or exercise price discrimination i.e. it delivers its products in a place with one price and another place with another price, competition council will prevent this firm activity. Competition council membership consists of three MPs from the Commissions of Economy, Planning and Budget and Calculations and Industries and Mines, two Supreme Court justicesjudges, elected Chamber of Commerce, Industries and Mines of Iran and the Islamic Republic of Iran Central Chamber of Cooperatives and a number of economic, legal, trade, industry and services experts as described in Article 53 of the implementation law of general policies of Article 44.

Third speech: regulation setting institution
A: definition and range of the Regulatory institution
With the approval of implementation law of general policies of Article 44 of the constitution, competition council that itself is a new institution in mentioned law have authority in a particular good or service in the relevant market that is a natural monopoly like public services of water, electricity and gas proposed the formation of regulatory institution to the Cabinet for approval and delegate a part of its duties and powers to the mentioned institution.6 Accordingly, the regulatory board as a regulatory institution is predicted in the private sector. The result is that in Iran legal regulatory institutions in section of natural monopolies and by approval of Cabinet and in the framework of delegated powers the competition council is established and made regulations.

The purpose of the regulatory institutions is the key players who have the real power of regulator these institutions are ministries, independent regulatory agencies, and competition authorities. (Crew, 2006, 231)

The establishment of the regulation setting institutions is important because with the transfer of ownership and trust of the public sector to the private sector in the supply of goods and services even in the public services such as water, electricity and telecommunications forms of government regulation to protect the consumer are required. Even when the market is competitive government regulation to prevent abuse of dominant position, the creation of the cartel and to develop effective competition policy is essential (Hadi Far 2010, 30). This necessity is important to the extent that even at the international level some forms of regulation in areas such as labor market, products quality, environment, health, security and the like are established. (Verheyb & Zwart, 2003)

The main role that is mentioned for these institutions is to prevent abuse of monopoly power of government and growth and developing competitive market in industries that are under supervision of these institutions ... this role is considered the most important reason for the creation of independent regulatory institutions." (Shams 2009, 19 and 20)

---

6 Article 59 of implementation law of general policies of Article 44
B: the principles governing regulation

1. Law establishment principle:
   Regulatory organizations should be created based on law. This is because passed laws by the legislature are more than other rules and regulations are criterion of will and policy consensus based on creation and survival of independent regulatory agency. In addition to this, primary laws are more stable and more permanent than other government provisions. Although these laws are changeable, but their change without a full legal process is not possible in the legislature branch, but issued laws by the executive branch has some shortcomings than legislature branch. One disadvantage is that change of government orders is relatively easy. By issuance of these orders government will have more ability to interfere in the work of regulatory organization and in this way the independence of these regulatory agencies will be at risk. On the other hand, every time that the government will change it is likely to change these orders. Thus, "principles, procedures, processes and policies of the regulatory should be clear in law that it is preferable that this law will be primary law. Field supervision of the regulatory, general policies and procedures that this institution should follow, tasks and responsibilities which should take the responsibility, and powers and authorities that have, need to clearly and carefully defined in the Act." (Hadi Far 2010, 92)

2. The principle of the independence and freedom of action
   The regulatory organization should have decision making power within its scope of law with no need to take confirmation of any government agency or institution for its decision. This power of decision-making, both in terms of operation and theory, is the most important of regulatory institution independence pillar; regulator institution should be able to define and formulate required rules, regulations, criteria and the standards and monitoring their implementation. "These institutions are considered as expertise institutions and technical experts that make their decisions based on mainly complicated economic considerations. Recognizing independency of these institutions, political interference in the process of their decision will be minimized, because their power is limited to the economic analyses and accordingly their freedom of action and power is limited to law economic analyses"(Cosmo 2000, 24)
   Legislator predicted necessary mechanisms for their independence, for example, in accordance with paragraph 1 of Article 56 of implementation law of general policies of Article 44 of the Constitution, no member of competition council can be conveniently removed from membership in the council except in cases in which it stipulated including the inability to perform the functions assigned by detection of two-thirds of its members, prison sentences referred to in the law, the loss of capacity and unauthorized absence. Also, paragraphs 3 and 4 of Article 56 of implementation law of general policies of the Article 44 of the Constitution is also in line with the guarantee of the independence of competition council are required:
   "3. Competition council members cannot be prosecuted because of decisions within the framework of law tasks or statements that are made based on the law.
   4. Competition council in the proceedings and decision-making has full independence in accordance with the provisions of this chapter.”
3. The principle of dispassionate and non-beneficiary
What is very important is independence and non-beneficiary of regulatory institution in transactions of market. The term of regulation refer to laws and criteria about economic activities that based on which the organization that approve and declare these criteria never contribute in that economic activity" (Hodavand 2008, 60)
"Interrupting the relationship between effective members in regulator institutions with related markets interests is another approach that is accepted in most successful experiences in the world i.e. managers and staff of regulatory institutions (and even their first-degree relatives) should not have any post, receiving money or having share in institutions under their adjustment until they are a member of council"(Khandozy 2011, 76)

4. The principle of having improvement capacity
"Customers should allow to easy access to regulatory organizations in order to follow their complaints. Companies should be obliged to make regulatory organization available for customers and regulatory organization should also have, in turn, necessary human power in order to handle customers complaints and it should have clear and published instruction for these handlings" (Hadi Far 2010, 103)
Article 62 of the implementation law of general policies of the Article 44 consider competition council the only reference to handle anti-competitive procedures and it stipulated that council "...shall individually or on the basis of the complaint of any whether real or legal person including public prosecutor or local prosecutor, Supreme Audit Court, the General Inspectorate of the country, part regulators, organizations and institutions related to the government, professional organizations, consumers rights support associations and other non-governmental organizations will start to investigate and review about anti-competitive procedures and it should make decision. The council is required to set time for investigation in order to address the subject of complaints, and communicate to the parties. The parties can attend in the meeting in person or introduce representative, or submit defense bill to the council."
In this regard, Article 60 of implementation law of article 44 grants competition council to inspect and research. Although note 1 of this Article the exercise of these powers is subject to judge rule. Anyway, paragraph A of Article 60 of implementation law of general policies of article 44 about competition council inspection power prescribed that:
"Competition council has power to inspect firms and companies for the implementation of tasks and missions designed to handle the cases and files, and it can issue allowance for entering the premises, warehouses, vehicles, computers and searching them and also permit of inspection of economic activities, property, computers, books and other securities. Participation in public assemblies meetings and required data collection including approvals of the board of directors is also subject to its inspection authority."
Also paragraph B of Article 60 of Article 44 general policies implementation law prescribed about competition council search authority that: "The council has authority in the implementation of its tasks and missions, with the use of one or more of the following strategies, dealing with issues related to the law and complaints:

1. Summoning defendant to attend in the council or the center in order to investigate him.
2. Summoning witnesses, or any other person whose presence is recognized necessary to resolve the complaints.
3. Requesting report, information, evidences, documents and records (whether paper or electronic) related to anticompetitive practices of natural and legal persons.
4. Inviting experts and specialized institutions and getting their opinion on the process of investigation and inspection."
5. The principle of accountability (judicial control)
One of indicators of rule of law in the realm of administrative law is existence of judicial supervision over the actions, measures and decisions of administration's officials. Accordingly it is necessary that regulatory should be done under control of the judicial authority through which citizens rights are guaranteed. Modern administrative rights by theorizing general principles of administrative laws-including the principle of proportionality, the principle of economy and good for the economy, the principle of legitimate expectations and ...- give suitable standards to judicial institutions to control decisions and activities of administrative institution by measuring observance amount or failure to observe them, but unfortunately administrative rights in Iran is yet in the whole principle of classic legality, and judiciary institution do nothing but study the legality of decision or administrative action, and it is not able to assess the fitness of the decision or administrative action in other directions.
"Thus, it is better that regulatory organization is independent and make its decisions without interference of government or the private sector, but, however, this institution should be designed as to be held accountable. In case of management issues, regulator should not have many differences with other institutions of government." (Hadi Far, 2010, 116)
Therefore, since government regulatory will result in interference risk and limiting public freedoms, regulatory process should be completely democratic and governments should intervene in market in the framework of law authority principle, by observing fundamental rights of citizens and in the context of good ruling. (Hadavand 2008, 50)

Fourth speech: the regulatory
After reviewing the status and jurisdiction of regulatory bodies, as a result of their activities they engage in the regulatory process it is necessary to study the concept of regulatory and its methods and goals. However, the authors consider providing a clear definition of the regulatory difficult. (Ogus 2004, 1)
However, regulatory can be defined in two concepts of extension and in its technical meaning. Regulatory in its extension definition consists of any regulatory from legal references and setting regulation by competent references based on which law system regulatory and country regulations will be stable and regulatory in its own definition and what is required by this research is setting regulation by regulatory institutions in managing private sector. With this approach, regulatory definition, method and its goals will be studied.

A- Description of the regulatory:
Regulatory literally means control and handling a case in accordance with the rules, principles or laws and also adjusting a mechanism to correct function. The meaning of regulatory in its term

7 www.thefreedictionary.com/regulatory
definition is "the use of legal and law tools in order to achieve economic or social objectives" (Hertog 1999, 223)

Also, regulatory is generally defined as some forms of intervention in any activity and ranging from strict legal control to informal control related to government or independent of it (Uche, 2001 67). Therefore, "generally the regulatory can be defined as all methods by which government intervene in economy with the tools of administration or legislation (in particular by administrative regulation, directives and standards of administrative organizations and public institutions) in order to control and adjust players behavior"(Hadavand, 2008: 56)

"In parallel with the expansion of public services privatization around the world, the regulatory of public services is also expanding so that at the moment, many countries are developing public services in particular, they have regulatory institutions" (Majlis Research Center 2012, 12413). And even some believed that, "the regulatory of energy area has become a world phenomenon in the beginning of twenty first century"(Majlis Research Center 2012, 12413).

Among main approaches for regulatory in monopoly market including public services impossibility of managing these services are related to market mechanism that is interpreted as failure phenomenon with market failure.

The importance of market failure is so high in necessity of regulatory so that some say: "Establishing regulator institutions is only when is acceptable in terms of economy that one cause of market failure occurs..." (Khandozies 2011, 64) and in economic terms, due to repeated problems of market failure in capitalist developed countries and growing protectionism of domestic products, the role of government bureaucracy is necessary for private companies. (Farazmand 1989, Hart and Wasden 1990, ILO, 1995) they are needed to revive the market and facilitate good trade.

"In fact, if an industry or a sector of the industry have specific characteristics like the presence of increasing returns to scale, lack of possibility (or weak possible) storing product, need for higher capital for the start of the activities and something like them, creating a competitive will be reduced or impossible. Thus, although presence of these characteristics even in case of forming markets the possibility of market failure phenomenon is existed"(Ziba 2008: 34).

The phenomenon of market failure is likely in important sector of public services i.e. energy like electricity and gas that regulatory is trying to prevent it. And only interaction between producers and consumers in energy markets may lead to consequences that are adverse to the public interests. (Robinson 2000 and 2004)

Firstly, because these markets are not investing enough on security of energy supply and "in literature of the economy main reason for failure market in infrastructure industries is cost of these types of industries that causes natural monopoly (such as water, electricity, gas, telecommunications) and the issue of high primary costs of entering to market of these kinds of industries lead to remove threat of entering competitors" (Hadi Far 2010, 52), while the security of energy supply due to that fact that is a public good is necessary and "... if we consider the high cost of the transaction as the main cause of market failure or not creating market, the regulatory is an approach that allow government to reduce transaction costs and as a result, it strengthens the functioning of the market." (Arrow 1969: 1), and secondly, these markets think
about their short-term interests and they are not able to predict future price trends. And they will harm in investment program. Therefore, the regulatory, through setting and approving anti-monopoly laws, strengthens market practices through monitoring the economic power and restricting competition limitation agreements or punishing the abuse of that. (Hertog, 1999 226)

In Iran economy the regulatory literature more and more was developed through approving general policies of Article 44 of the constitution. Because due to this policy, government should reduce its authority and it should only regulate and observe. One of goals of general policies of article 44 is mentioning this issue:"reducing finance load and managing of government in managing economic activities” so it can be said that: “critical message of article 44 general policies is to change the way of government interaction with Iran economy from position of train diver into laying the track and switchman…” (Khandozies 2011, 64)

The importance of regulatory is to the extent that some economists introduced the regulatory alongside managing and duty of taxation (or subside) as one of the triple tasks of government in the economy. (Grand 1991, 423)

Due to the above content it should be said that the purpose of the regulatory is to control private sector function in the economy in order to prevent abuse from special economic status like natural monopoly or market failure and of course, with a better look, dealing with anti-competitive practices and non-exclusivity, it tries to make real competition between the actors engaged in the service sector and therefore it provide public interest more suitable.

B: Current capacities of the legal system in regulatory

The regulatory framework is mainly referred to the issue of government restrictions on business decisions by means of price, value and how to enter and exit from the market. Therefore, although regulatory may be included a broad group of restrictions on the decision of firms but "price", "value" and "number of firms" can be called as three controlling tools in the regulatory of regulatory agencies after public services privatization. (Viscusi, et.al. 2005)

Mentioned tools in the regulatory can be seen in constitution Article 44 general policies implementation law. As it is explained earlier in regulations governing competition council and regulatory board, regulatory boards are formed in accordance with Article 59 of Article 44 general policies implementation law with proposal of competition council and approving by the Cabinet and it can take a part of competition council duties and powers. Also with a review on provisions ninth chapter of mentioned law in facilitating competition and removing monopoly, law powers limitation that competing council can benefit is cleared that are studies in the following:

1. Price system and tariff :

The most important and critical reason of creating a regulatory organization is setting tariff for infrastructure services that their supply is monopoly. Determining the tariffs is the most important process that protects consumers against possible abuses of power monopoly. On the other hand, in absence of competition, these tariffs provide incentives for investment and increasing efficiency for firms under the supervision.
"Price regulatory forces a firm to buy or sell a commodity at a "special price", or in a determined time. If the government is concerned about this issue that monopoly determines high prices, it can determine can price ceiling (the maximum sale price) for monopoly. On the other hand, if the state concerned about dominant pricing of the firms, it can determine the minimum price (floor price). Also regulator not only can determine a specific price, but also it can define a price system and structure.”

Prices are final determiners of producers supply amount and also the amount of consumers demand and it should reflect covered costs in order to maximize society welfare and it should cover direct costs in addition to indirect costs of producing commodity (like pollution, etc) (Hadi Far 2010, 69)

Pricing and tariff determination for services are principally considered legal instruments of regulatory and regulatory boards competence. In paragraph 5 of Article 58 of Article 44 general policies implementation law, the adoption of guidelines for regulating the market price of monopoly goods and services in each case is in accordance with the regulations of the jurisdiction of competition council and market natural monopolies (such as public services of electricity, gas, water and wastewater and ..).

2. Quality standard making (quality control)
Regulatory institution may adopt minimum standards to ensure the quality of a product or service. For a company that violates adopted standards a fine will be considered. The amount of this fine should be appropriate with error that company committed, but the point that should be considered in determining the amount of fine is that considered fine should always include compensate damage and offering indemnity to customers that have damage because of common standards violation… in case that there is a pattern of standard offence behaviors and company commit mistake frequently or cheat officials, regulatory organization should be able to revoke company’s license.

"After determining the tariffs, the most important duty of the regulatory organization is to determine minimum quality of services of those firms that are active under the supervision of the regulatory organization. If these firms have license in the discussed field, service quality standards can be mentioned in the issued license" (Hadi Far 2010, 97)

According to Article 33 of Constitution article 44 general policies implementation law “Iran industry researches and standard institution is obliged to match quality evaluation systems with international standards and gradual applying and making it legal in all economic firms. Executive directive of this article includes applying standards during 3 months by proposal of Iran industry researches and standard institution that Cabinet will approve.”

3. Determining the amount of production and supply (quantity control)
In this regard, Article 25 of Constitution article 44 general policies implementation law could be referred, this article appoint that:"privatization organization make condition before transferring shares control of state-owned enterprises, according to the circumstances including new investment in the company, higher effectiveness and company productivity, production continuity and its promotion, the promotion of technology and increasing or maintaining the level of employment in the firm. If the buyer accepts the conditions in the proposal of privatization organization, the delegation board is authorized to reduce installment sale interest
or extend installment sales period or make a discount in price itself. Shares definitive transfer or release purchaser guarantees would be proportional to carry out these obligations. The way of obtaining commitments and inserting these provisions by the parties will be in accordance with a directive that will be approved by delegation board by observing criteria and legal regulation by proposal of privatization organization within three months of law submission.”

Also paragraph 5 of Article 58 of Constitution Article 44 general policies implementation law introduce one of tasks of competition council as approving instructions for adjusting the amount and conditions for access to monopoly services and commodities market.

4. Monitoring the entry and exit of firms
One of the key activities in economic regulatory is regulatory for entry and exit of firms in a market which will be done by license issuance. (Hadavand 87: 56)

Also, in Article 44 general policies implementation law, limiting or controlling the amount of production, purchase or sale of goods or services on the market is considered responsibility of competition council. Also the council can monitor their entry and exit by forming regulatory institutions in goods related to natural monopolies in public services.

Summary and conclusions
1. According to the principles of the constitution in Iran legal, the state shall guarantee to provide public services according to principles such as the principle of equality, continuity, compliance and priority, and doing authority tasks which means what will realize the sovereignty of the country and its benefits without limitation will include all segments of society and benefit from this type of service will not limits others are responsibilities of the state.

2. According to articles 2 and 3 of implementation law of general policies of Article 44 of the constitution only the authoritative interpreter in group 3 of article 2, including the main electricity grids, telecommunication networks, gas extraction and production, large-scale irrigation networks, core network mail will remain a government monopoly, and therefore a large part of public services such as power (electricity production and distribution), water distribution, post, telecommunications and wastewater management will be transferred to the non-governmental sector.

3. The implementation law of general policies of Article 44, with special attention to the main objective of privatization that is to facilitate competition and preventing monopoly, some actions including collusion in setting prices, creating discriminatory manner, violation methods of the competition including speculation, owning shares of other companies, and company mergers, etc are explicitly banned from all persons and to achieve these goals competition council is formed. Also, the council, in particular good or service that offers true natural monopoly, can delegate proposal of part regulatory agency to the Cabinet for approval. This institution cannot decide in contrary to mentioned law or competition council legislation in terms of facilitating competition.

4. In order to enforce good governance on the part of public services privatization in the Iranian legal system, all legal capacities, including the requirements and obligations of delegation board, authority of privatization organization and competition council and regulatory institutions and
their role in the regulatory process should be used so government can guarantees public services for people.
References


Hasanvand, M., (2009), general economic rights, state monopolies in Iran, publication strategy, No. 50, 18.


Hertog, J. (1999), General Theories of Regulation, Economic Institute/CLAV, Utrecht University.


Khandouzi, S.E. (2011). If the requirements of government regulation of the economy. House and Research, 17, No. 64.


Verheyb, L. & Zwart, T. (2003), Agencies in European and Comparative Perspective. Published by Intersentia NV.

