

An Analysis of the Nature of the Right to Liberty, Deprivation of Liberty, and Arguments Against the Validity of Deprivation of Liberty

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ABSTRACT:

The aim of this research is to analyze the nature of the right to liberty, deprivation of liberty, and arguments against the validity of deprivation of liberty. The research method is descriptive-analytical using library resources. The studies showed that liberty and freedom are addressed in the Civil Code, the Constitution, and the Universal Declaration of Human Rights. Liberty is considered an individual right and part of civil and public rights. Articles 959 and 960 of the Civil Code represent the civil legislator's most prominent attention to the right to liberty. In Article 960, the legislator has prohibited deprivation of liberty but has then stipulated that if deprivation of liberty is not against the law and ethical norms, it is possible. In Article 959, the legislator does not generally accept deprivation of rights, but from the opposite meaning of the article, one can understand that partial and limited deprivation of rights is possible. From the combination of Articles 959 and 960 of the Civil Code, one can understand that deprivation of liberty is possible in a limited manner and in limited cases. The arguments we stated for the invalidity of deprivation of liberty in general were: the principle of equality of human beings, the principle of sovereignty of Muslims, the principle of autonomy of will and lack of coercion, as well as jurisprudential arguments: the Book, the Quran, the Tradition, and in laws, the Civil Code and the Constitution pay special attention to this issue. Additionally, liberty and freedom are protected in international instruments.

Keywords: *Right to Liberty, Deprivation of Liberty, Arguments Against the Validity of Deprivation of Liberty, Civil Code*

INTRODUCTION:

Liberty, freedom, and being free have always been concepts that are admired in all societies. If in the past people were divided into two groups of free and enslaved, this division no longer exists in today's societies, and civilization and human rights consider slavery condemnable. Freedom and liberty are among the inherent rights of individuals in modern societies that have been addressed both in international covenants and conventions as well as in domestic laws. Individual freedom is essential for individual and social life, and without having it, a person is not considered among the living members of society and does not benefit from social advantages. As a being with free will, human beings have rights and duties, and they cherish the gift of freedom more than other living beings, to the extent that they are even willing to sacrifice their lives to attain it. The importance of human liberty and freedom is evident from the fact that the Universal Declaration of Human Rights emphasizes human freedom from various aspects in multiple articles, such as Articles 1-7 of the Declaration.

In Iranian positive law, there is also a great emphasis on the principle of freedom of will, including in Articles 13, 14, and 41 of the Constitution. Article 960 of the Civil Code also states, "No one can deprive themselves of liberty, nor can they refrain from exercising their freedom in ways that are contrary to the laws or ethical norms." Additionally, Article 959 of the Civil Code states, "No one can completely deprive themselves of the right to enjoy or exercise all or part of their civil rights," from which it can be inferred that this freedom can be partially limited in some cases. The scope of Article 960 is broader than Article 959 of the Civil Code, as Article 960 encompasses freedoms that are not part of civil rights, such as freedom of movement, freedom of expression and thought, and freedom of occupation (Safaei & Ghasemzadeh, 2011; 38).

There are other articles regarding liberty, such as clause (d) of Article 21 and the concept of Article 25 of the Labor Law, which states that a permanent employment contract is not binding, and either party has the right to terminate it. Furthermore, according to Article 1035 of the Civil Code, no contract can deprive a person of the freedom to choose a spouse, as well as

the freedom to choose an occupation, residence, access to the court, and appoint an attorney. Therefore, through Articles 957-958-959-960 and 961 of the Civil Code, the Iranian legislator, while emphasizing that all human beings enjoy the rights and freedoms related to human dignity, has declared its protection of these rights in the realm of private law in Iran by stating that these rights and freedoms are inalienable from individuals, except in partial cases with personal consent and agreement, provided that it does not conflict with public order and ethical norms.

The voluntary deprivation of civil rights, the subject of Article 959 of the Iranian Civil Code, is subject to personality rights. According to this article, no one can completely deprive themselves of the right to enjoy or exercise all or part of their civil rights. In other words, the complete deprivation of the right to enjoy or exercise civil rights is prohibited, void, and without effect. In Islamic law and Imami jurisprudence, "deprivation of rights" has been discussed under the title of "prohibition of the lawful" (tahrīm-e ḥalāl). Although no definition of "deprivation" has been provided in Iranian legal literature, considering the existing views on similar concepts, deprivation can be considered applicable in cases where the right holder directly and voluntarily relinquishes or extinguishes their right. Among civil law professors and writers, there are differing opinions regarding the wording of this article and whether, based on its opposite meaning, partial deprivation of rights can be excluded from the scope of this article and considered valid and effective. In this research, the nature of the right to liberty, deprivation of liberty, and arguments against the validity of deprivation of liberty are examined through a descriptive-analytical method using library resources.

Theoretical Foundations of the Research

The Nature of the Right to Liberty in Laws

1. The Principle of Enjoyment of Civil Rights for All in the Civil Code (Article 958)

Article 958 of the Civil Code stipulates: "Every human being shall enjoy civil rights; however, no one can exercise their rights unless they have the capacity to do so." Therefore, all human beings enjoy civil rights, including liberty, but the legislator has conditioned the exercise of rights on having the capacity. According to the Iranian Civil Code, although the principle is that everyone enjoys civil rights and freedom, this enjoyment is subject to certain conditions specified in the Civil Code and the Penal Code.

To enjoy civil rights and exercise freedom in society, an individual must have both the capacity to acquire rights and the capacity to exercise them. The capacity to acquire rights, or the aptitude by which a person benefits from private rights and can have rights and obligations, has been termed "competence to enjoy" by civil law writers, and the phrase "enjoyment of rights" has been frequently used in the Civil Code. However,

since "enjoyment" of rights is usually accompanied by their exercise and implementation, this term also encompasses the competence to exercise rights (Katouzian, 2012; Vol. 2; 8). An example of the capacity to enjoy is the competence of Iranian nationals to own all their existing properties inherited, in contrast to foreign nationals who, except for what the law permits them, cannot own land in Iran, even if they inherit more than what is permitted.

The capacity to exercise rights, or the competence that a person acquires by law concerning the exercise of their rights, is referred to as the "capacity to fulfill" (Katouzian, 2012; Vol. 2; 8).

Although in Article 958 of the Civil Code, the legislator has stipulated capacity as a condition for exercising civil rights, it also implies the absence of deprivation from civil rights. According to the provisions of the Iranian Civil Code, in principle, every human being has the absolute capacity to enjoy, or all general civil rights, except for some individuals who are deprived of some general civil rights. These individuals include foreign nationals and some Iranian nationals.

Some Iranian nationals are also deprived of certain civil rights according to the regulations. For instance, according to the law, a child born out of wedlock is deprived of some civil rights. According to Article 1167 of the Civil Code, which states, "A newborn child born out of wedlock is not attributed to the adulterer," a person born out of wedlock lacks legal kinship, and as a result, is deprived of some civil rights, such as the right to receive financial support from relatives and the right to inherit from biological relatives due to their illegitimate birth. This is also reflected in Article 884 of the Civil Code, which states, "A child born out of wedlock does not inherit from the father, mother, or their relatives" (Shahidi, 2010; 123). Similarly, a disowned child, after the performance of *li'an* (a traditional process of disowning a child), is deprived of legitimate paternal kinship and the right to inherit from the father and paternal relatives, as well as financial support from the father, like a child born out of wedlock.

2. The Principle of Not Allowing Complete Deprivation of Rights in the Civil Code (Article 959)

Article 959 of the Civil Code states: "No one can completely deprive themselves of the right to enjoy or exercise all or part of their civil rights." According to the apparent meaning of the article, no one can deprive themselves of liberty. However, as we will see, the intention here is the complete deprivation of rights, not partial deprivation.

In explanation, it should be said that unlike religious sources and jurisprudential discussions, where rights, rulings, effects, and specifications are discussed separately, which has prevented many problems, in law we do not encounter this separation and differentiation in legal cases. This is the reason for the ambiguity that arises in some cases, such as the right to liberty and the right to life, which are categorized as

rulings in jurisprudential classifications. However, in law, they are all referred to as rights. Of course, in examining the theories of jurists, we see that they, like religious scholars, have paid attention to this separation and distinction in their discussions, writings, and statements, and hold that in cases where a privilege (right) is established by a ruling, it is not subject to waiver. Or in cases where a right is accompanied by an obligation, it falls under the category of rulings and cannot be waived at the person's discretion (Shabani, 2016; 3).

Although there is much debate and discussion about identifying and distinguishing mandatory and supplementary rules, "the criterion that has become common for determining laws is that if the law pertains to public order, it is mandatory, and if the purpose of enacting the law is solely to protect the private interests of individuals, it is supplementary." Considering this criterion, which can also be inferred from Article 975 of the Iranian Civil Code, it is said that in financial matters, the principle is that the law is supplementary. The principle of authority in jurisprudence and Article 30 of the Civil Code also confirm this point. This article explicitly states that every owner has the right to dispose of and benefit from their property in any way, except in cases where the law has made an exception (Katouzian, 2013; 113). From the opposite meaning of Article 959 of the Civil Code, it can be understood that partial deprivation of rights is possible. As mentioned earlier, Article 959 of the Civil Code states: "No one can completely deprive themselves of the right to enjoy or exercise all or part of their civil rights." Therefore, the opposite meaning is that everyone can partially deprive themselves of the right to enjoy or exercise all or part of their civil rights.

According to the wording of Article 959, what is stated as beyond the individual's ability in this article is the complete deprivation of the right to enjoy and the right to exercise all or part of civil rights. The term "complete deprivation of the right to enjoy" refers to any civil right without its relation to a specific subject, whether its instances are general or specific. For example, the right to own property, which includes various types of ownership rights, such as the right to own immovable property or company shares, which itself is a general right, is a general right that includes other general rights as its instances. Consequently, for instance, not only can no one waive all general civil rights or the right to own property, but they also cannot deprive themselves of the right to own immovable property or even agricultural land (Shahidi, 2013; 107).

The term "right to exercise all or part of civil rights" refers to the right to exercise all or part of general civil rights, or the general right to exercise civil rights, which arises for a person when the legal conditions are met. This is because if the right to exercise a right is related to a general civil right, it will itself be general. Deprivation of the right to exercise all civil rights means deprivation of the right to dispose of all civil

rights, and deprivation of the right to exercise part of the rights, such as the right to grant permission. Therefore, for instance, just as no one can deprive themselves of the right and eligibility to become a partner in a partnership contract, no one can waive the competence to exercise this right, i.e., the right to engage in concluding a partnership contract with their property, if they possess the legal conditions for the emergence of this competence (Shahidi, 2013; 107).

3. The Principle of Not Allowing Deprivation of Liberty (Article 960)

Article 960 of the Civil Code explicitly states: "No one can deprive themselves of liberty..." Initially, it seems that this statement contradicts what we said about the possibility of partial deprivation of liberty. However, the article continues: "...or refrain from exercising their freedom to the extent that it is contrary to the laws and ethical norms."

By carefully considering the last part of the article, it can be concluded that the legislator has limited the deprivation of liberty and non-exercise of it to cases where it does not conflict with the laws and ethical norms. Jurists have said: According to the first part of the above article, no one can deprive themselves of freedom and acquire the status of a slave. The intention behind refraining from freedom in the second part of this article is that a person is obligated not to exercise their freedom to the extent that it is contrary to the laws or ethical norms; not merely deciding not to exercise freedom or not exercising it. Additionally, the purpose of the phrase "no one can" is to declare the invalidity and disregard of the aforementioned obligation from a legal perspective. This is because, on the one hand, in legal terminology, the apparent meaning of a ruling that deprives a person of the ability to perform an act is not a declaration of their actual and material inability, but rather, from a civil law perspective, it implies the inability to perform that act in the realm of legal validity, i.e., the legal invalidity of the act, and from a criminal law perspective, it implies the prohibition of that act. On the other hand, what can be declared invalid from a civil law perspective is a contract, commitment, or obligation to perform or refrain from an act, not the decision to perform or refrain from it. Therefore, the legislator's intention is to declare the invalidity of the commitment and obligation to refrain from exercising freedom to the extent that it is contrary to the laws or ethical norms, just as the inability to deprive oneself of liberty means the invalidity and nullity of this act (Shahidi, 2013; 130).

Article 960 of the Civil Code has mentioned a scope for the possibility of deprivation of liberty and non-exercise of it, which will be discussed. The legislator does not accept deprivation of liberty and non-exercise of it when it is contrary to the laws. It seems that in this case, the intention behind "contrary to the laws" is contrary to mandatory laws related to public order, which the parties cannot agree upon.

The Nature of Deprivation of Liberty

1. Unilateral Act (Iqaa')

It is possible that the nature of deprivation of liberty is a unilateral act (iqaa'). A unilateral legal act that is performed solely by the will of one person is called iqaa'. Unlike a contract or deal, iqaa' does not require the agreement of two or more parties. It is possible for an individual to deprive themselves of the right to transfer their property by their own will. The nature of deprivation of liberty may be discharge (ibra').

Discharge (ibra'), in jurisprudential and legal terminology, means the waiver of an established right against another person and the relinquishment of a right that a person has against another person, and its scope is more limited than waiver (Qibla'i Khoi, 2015; 175).

"Discharge" means that the creditor voluntarily relinquishes their right and absolves the debtor's liability, in which case the debtor's will and consent is not required. Discharge itself is a type of unilateral act (iqaa').

Or it is possible that the deprivation of liberty is in the form of abandonment (i'raad). In legal terminology, it refers to a state in which a person relinquishes their ownership of their properties, or in better words, turns away from their properties. In abandonment, the person who turns away from ownership of their properties does not intend to transfer ownership to other people; rather, they only want to no longer have ownership of that property after abandoning it (Katouzian, 2013; 345). For example, the right of ownership; just as the right of ownership arises through the existence of certain factors, it also ceases to exist through certain other factors. The termination of the right of ownership is sometimes intentional and sometimes unintentional. For instance, upon the death of a person, their properties are taken out of their ownership and transferred to their heirs. This has nothing to do with their will. However, sometimes a person intentionally deprives themselves of the right of ownership by selling their properties to others or endowing them. In these cases, their ownership ceases to exist. Another factor that can take properties out of a person's ownership based on their will is abandonment (i'raad) (Ja'fari Langarudi, 2007; 124).

2.Contract

It is possible that the nature of deprivation of liberty is a contract, in a way that an individual relinquishes their liberty through a contract they conclude with another party. For instance, a condition of deprivation of the right to pre-sell in a construction partnership contract; the inclusion and registration of such a condition is valid and in accordance with Article 10 of the Iranian Civil Code. The intention and purpose of the parties is not the permanent deprivation of the right to pre-sell, but rather a temporary prohibition until the specified date in the partnership contract. Otherwise, the complete and permanent deprivation of the right to pre-sell by one of the parties would be contrary to the nature of the partnership contract, and the parties

cannot permanently waive this right through a condition in the contract (Rezapour, 2017; 117).

Based on the contract, neither party, meaning the builder and the owner, has the right to sell or pre-sell their share of the apartment units until, for example, the plastering stage, or until the fifth floor is constructed, or until 90% of the physical progress, or until the end of the project and obtaining the completion certificate, etc. It is important to note that in some contracts, a penalty is stipulated for violating or breaching the condition, such as the right of termination for the other party (the beneficiary of the condition), or the invalidity of the pre-sale contract, or the provision of a specific amount of compensation. Sometimes, only the condition of deprivation of the right to pre-sell is included, but the consequence of non-compliance with the condition is met with silence, meaning it lacks an enforcement mechanism (Rezapour, 2017; 118).

Foundations for the Invalidity of Complete Deprivation of Liberty

1. Jurisprudential Foundations

The Holy Quran, as the heavenly scripture that has influenced all aspects of life and provided teachings on all dimensions of human life, regarding the impermissibility of deprivation of liberty and enslavement, states:

"And I did not create the jinn and mankind except to worship Me." (Adh-Dhariyat, 51:56)

"I have not created the jinn and mankind except to worship Me." (Gharaati, 2004; Vol. 3; 117)

Therefore, obedience to those whom God has commanded to obey, such as His Messenger and those in authority, as in the verse: "O you who have believed, obey Allah and obey the Messenger and those in authority among you." (An-Nisa, 4:59)

"O you who believe! obey Allah and obey the Messenger and those in authority from among you." (Gharaati, 2004; Vol. 3; 117)

is obligatory. Just as the principle for human beings in relation to one another is liberty, in relation to God Almighty, it is servitude and bondage. In these verses, God only accepts and considers permissible the deprivation of liberty in relation to Himself. Therefore, the deprivation of liberty in relation to other human beings is condemned by God.

The great religious figures have always emphasized the importance of liberty and the impermissibility of its deprivation in their advice and sayings, and the preservation of freedom and liberty has always been emphasized.

Imam Ali (peace be upon him) says: "Do not be a slave of others, for God has created you free" (Nahj al-Balaghah, 2015; 114).

By carefully examining the mentioned hadiths, it becomes clear that freedom and the preservation of liberty have been among the foundations of the religion of Islam and the cornerstone of all actions and thoughts of the religious leaders.

Reason refers to the faculty that perceives universal and abstract matters. Reason dictates that for human beings to attain sublimity and progress in society, they must be free and at liberty. Placing oneself in the unquestioning service of others turns a human being into a lifeless object, devoid of decision-making power or the possibility of success and advancement. No sound reason accepts the deprivation of liberty. Freedom in all societies is an indication of the intellectual sublimity of that society, while the deprivation of liberty and enslavement signify abasement.

From an Islamic perspective, the principle is the absence of human dominance over other humans, and everyone is the master of themselves, their actions, their possessions, and their nature. No one can consider themselves a slave and deprive themselves of liberty. The principle of human equality is not only observed in Islamic law and has jurisprudential roots, but it is also seen in human rights instruments.

In the Quranic view, society is composed of individuals, and each person alone is a manifestation of the values that society possesses. The Quran regards attention to the individual human as attention to all individuals, such that if someone kills one person, it is as if they have killed all people, and if someone facilitates the revival and life of one person, it is as if they have revived all people.

Another principle governing the relations of Muslims with others (non-believers) is the preservation of the freedom of Muslim people from non-believers, according to which God forbids Muslim people from being deprived of their freedom and liberty by non-believers and does not allow them to be slaves of non-believers. The principle of the sovereignty of Muslims is one of the general principles and rules that is applied in the relations of Muslims with non-believers in various domains.

The principle of the sovereignty and superiority of Muslims over non-Muslims and the impossibility of being deprived of liberty by them, as mentioned, is agreed upon by all Imami jurists and other Islamic schools of thought. The rule of "negation of subjugation" (nafy sabeel) is one of the important jurisprudential principles of Islam and one of the reliable sources for preserving the dignity and sovereignty of Muslims and rejecting the domination of foreigners. Based on the verse "And never will Allah give the disbelievers over the believers a way" (An-Nisa, 4:141), God has never given the disbelievers authority over the believers.

God has bestowed honor upon the believers, and they must preserve this honor and dignity: "But honor belongs to Allah and His Messenger, and to the believers" (Al-Munafiqun, 63:8).

Based on this, no non-Muslim can have guardianship or authority over an individual or community of Muslims, or enslave them. Additionally, Muslims have no right to consult with non-believers regarding matters related to their destiny or to deprive themselves of liberty (Zia Bakhsh, 2007; 12).

2. Legal and Juridical Foundations

Freedom has been one of the fundamental principles and main ideals and goals of the Islamic Revolution of Iran. This goal, which was manifested in the slogan "Independence, Freedom, Islamic Republic," was embodied in the Constitution after the victory of the revolution. In fact, it can be said that the great uprising and revolution of the Iranian people was in the direction of seeking freedom and "negating all forms of oppression and oppressing and submission to domination" (Article 2, paragraph 6) (Lakzayi, 2015; 115). One of the progressive criteria for the fundamental rights of any country is the value given to freedom, freedom of belief, freedom of expression, freedom of choice of occupation, freedom of residence, and other aspects of freedom. Protecting life, property, and honor are among the subjects that have been recognized as the most important source of fundamental rights in most countries' constitutions (Madani, 2007; 23).

Paragraph 6 of Article 2 and paragraph 4 of Article 43 of the Constitution refer to this type of freedom. Jurists' intention with this term is that individuals are free from any form of ownership and exploitation, and any physical or intellectual slavery of individuals is prohibited. Based on the Law on Prohibition of Purchase and Sale of Slaves ratified in Bahman 1307 (February 1929), no one is considered a slave, and any slave will be freed upon entering Iranian territory or coastal waters (Namadini, 2007: 187).

Furthermore, as mentioned, the Civil Code, as the mother law, has prohibited the deprivation of liberty and limited the deprivation of liberty to observing the laws and good morals. Article 960 of the Civil Code states: "No one can deprive themselves of liberty or refrain from using their liberty to the extent that it is contrary to the laws or good morals."

The Universal Declaration of Human Rights, as the most important international document in which liberty and the principle of freedom are given more attention than any other subject, is addressed in this section regarding the articles of the Universal Declaration of Human Rights that are in accordance with the principle of liberty and individual rights.

Article 12 of this document states: "No one shall be subjected to arbitrary interference with their privacy, family, home or correspondence, nor to attacks upon their honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Article 13 states: "Everyone has the right to freedom of movement and residence within the borders of each state."

CONCLUSION

The purpose of the present study was to analyze the nature of the right to liberty, deprivation of liberty, and the arguments against the validity of deprivation of liberty. The research showed that Article 959 of the Civil Code is more specific than Article 960. No article

similar to Article 960 of the Iranian Civil Code can be found in French law. This article appears to have been adapted from the second paragraph of Article 27 of the Swiss Civil Code, which states: "No one can relinquish their freedom or refrain from using it to the extent that it is contrary to the laws or good morals."

According to the first part of Article 960 of the Civil Code, no one can deprive themselves of liberty and acquire the status of a slave. As this article makes clear, not only has the law prohibited the deprivation of liberty, but even without someone depriving themselves of liberty, they cannot refrain from using their liberty to the extent that it is contrary to the laws of the country or good morals. Based on the second part of Article 960 of the Civil Code, a person can commit to not using their liberty as long as it is not contrary to the laws or good morals, such as committing to not using the freedom to file a lawsuit against a specific contracting party. The provisions of Article 975 of the Civil Code also convey this meaning, although this article has a broader scope and includes any contract contrary to public order and good morals, even if it does not involve the deprivation of liberty.

It can be said that Article 960 of the Civil Code has not been well translated, and the difference between the first and second parts is not clear. However, considering the second paragraph of Article 27 of the Swiss Civil Code, it can be said that the intention of the first sentence is that no one can transfer their freedom to another because transferring freedom to another is equivalent to slavery. Therefore, if a merchant, by virtue of a contract they make with a competitor, commits to giving up trade and taking up another occupation, their contract is void and null. It is noteworthy that the deprivation of a right, if it is

general, is invalid and lacks legal value, and for this reason, there is a unity of criterion and basis between Articles 959 and 960 of the Civil Code. As can be inferred from the text of these two articles, this freedom can be partially limited in some cases.

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