

Limitation of Individuals' Rights and Freedoms and Its Principles in the Constitution of the Islamic Republic of Iran

Homa Mahdavi Pour¹ & Seyed Mohammad Sadegh Ahmadi¹

¹ Department of law, Isfahan (Khorasgan) Branch, Islamic Azad University, Isfahan, Iran

Correspondence: Seyed Mohammad Sadegh Ahmadi, Department of law, Isfahan (Khorasgan) Branch, Islamic Azad University, Isfahan, Iran. E-mail: sms_ahmadi@yahoo.com

Received: March 5, 2016 Accepted: March 27, 2016 Online Published: March 31, 2016

doi:10.5539/jpl.v9n2p246

URL: <http://dx.doi.org/10.5539/jpl.v9n2p246>

Abstract

Constitution as the highest legal and political document in any political community is the regulator of all matters and affairs and specifies moderate relations between authorities. Commitment to the implementation of this important law closes the doors and possibilities of dictatorship and guarantees human dignity and individuals' sanctity and freedom and facilitates attempting to achieve political and social justice.

Without any doubt the majority of rights and freedoms are not absolute; even there is no relation between fundamentality of rights and its absoluteness. In general view, we can specify that in the constitution of Islamic Republic of Iran, freedom has never become an absolute and non-disciplined issue; but the legislator has decreed some of its restrictions and conditions with respect to the objectives and ideals of humanity and by studying positive and negative achievements of other nations and thereby it has provided necessary internal cohesion and coordination among its components.

This study investigates limitation of individuals' rights and freedoms and its principles in the constitution of Iran.

Keywords: individual rights, constitution, restrictions, rule of law

1. Introduction

When we talk about rights, this question arises that what is the extent of these rights? We cannot talk about the right, without specifying the scope of its authority. Therefore, with assuming of realization of main examples of these rights, the question about its scope remains. Regarding rights and freedoms, there is always this concern that what is their extent and should they be limited or not and if we believe in the need to restrict these rights and freedoms, what criteria exist or should exist for this purpose?

Some communities, because of possessing religious aspects base the general principles of their constitution on religion and "ideological governments" are the result of such an approach (Bashirieh, 2002: p. 18). Constitution of Islamic Republic formally brought the Islamic rights into the scene of life and applied other legal institutions to serve this purpose. Such a consideration led to the prediction of Islamic rights as the main criterion of expected order in the general principles of this law and their effective as an important feature on the totality of this law. In fact, legislation in the Islamic Republic of Iran is bounded to two basic issues of religion (principle 4) and constitution (principle 71).

2. Concepts

Right is a concept that has been used for a long time, but today people's perception of right is very different than in the past. The concept of right, has passed a long path from "being right" to "having right". We cannot overlook historical development of the concept of right, when we try to explain this concept and propose a theory for it and when we are analyzing it and historical record of human rights is especially being used in the area of exercising and guaranteeing it and it is sometimes a pretext for violating it. In analyzing the concept of right, it seems necessary to differentiate between two concepts of "being right" and "having right". Although the first concept of right, has a great position in the area of issues associated with value (good and bad); but it should be noted, in human rights issues the second meaning of right which refers to "having right" is being utilized. This separation places the issue in a close connection with the distinction between the concept of "good, well" and "right" (Ghari Sayed Fatemi, 2014).

In the explanation of the concept of right, something that is very fundamental is that right belongs to human merely because of his humanity and not any other feature and the most important criterion in this regard is innate dignity of human. Innate dignity of human is another interpretation of this issue that human is the purpose. According to this principle "Every human being must be seen as the purpose of himself and nobody can be used a means for another human to get to his destination". The result of this issue and prohibiting of instrumental use of human is the equality of values of all human beings (Rasekh, 2009). In general term when we talk about the "having right", it means that the right holder is in a special position. For example, when the law recognizes a person to have a right, this means that the legal system has put the person in a special position (Movahhed, 2002).

Finally, we can say that human rights and freedoms include a set of privileges belonging to the members of a society (individual rights) specified in the rules and regulations (typical law) which individuals enjoy, in their relations with other people and with the regime, with necessary guarantees and supports and this is all because of being human (Tabatabai Motameni, *ibid* p. 58).

3. Limitation and Its Principles

Supporting the rights and freedoms is among the duties of governments. Democratic governments perform this support through legislation. Because in contemporary societies, rights and freedoms are very vulnerable, such a support is absolutely necessary. Threatening rights and freedoms is not being performed only by government but it is from individuals, as well. The provision of legal system for rights and freedoms is being conducted in the first step by recognizing them in the constitution and then through enacting specific regulations in ordinary laws (Rivero, 1997, pp. 23-22).

Living in a human society inevitably creates some restrictions for individuals' freedom. All the texts and legal tools associated with human rights emphasize on the necessity of limiting freedoms. By studying these texts, including the Universal Declaration of Human Rights, the citizen declaration of the French Revolution and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ratified in 1950) we can obtain some conclusions:

Restriction of freedom will be intensified in emergencies, such as wars, curfews and similar conditions; although in accordance with the mentioned European Convention (Article 15, paragraph 2), even under these conditions countries cannot disrespect some fundamental rights of individuals.

In normal conditions the basis of a democratic society is freedom. But in this kind of society, rights, freedoms and dignity of others, on the one hand and national security, public order, health and morality on the other hand are important as well. So, necessarily the law considers some restrictions on rights and freedom of individuals in order to support the rights of others and to support the society. In addition, each person must bear in mind that every society, even a democratic society is based on a set of values, including order, morality and etc. (Rivero, *ibid*, p. 25).

4. The Principle of Freedom and Its Guarantee in the Constitution

The principle of freedom is one of the main axes of the constitution for individuals and maintaining it is the necessity of society, government's duty and the right of people. This freedom of order and security which must be provided by the government is being predicted appropriately in the constitution. Reasonable exercise of power of country and freedom of individuals will increase stability of country and security of society. On the contrary, failure to observe this reasonability will result in unpleasant situation and instability of country; because, unquestioned exercise of authority, without freedom will to the dictatorship, freedom without order and chaos in the society. Therefore, the constitution insists on maintaining both of principles. Principle 9 of constitution of our country is somehow relevant to these two principles and in the expression of inseparability of independence and freedom, in addition to specifying that their preservation is the duty of the government and citizens, stipulates that:

"No individual, group, or authority has the right to blemish the independence of Iran, in the name of freedom and no one is allowed to deprive the others from their legitimate freedoms-even through enacting laws and regulations- in the name of preserving the independence and territorial integrity of the country"(Hashemi, 2013).

We can observe that the emphasis on freedom in the constitution is to such extent that even the legislator has no right to deprive people from their legal freedoms which are natural and God-given rights. Therefore, the exercise of power of country is justifiable only within the limits of levels of individuals' legitimate freedom.

5. Exceptional Condition and Necessary Restrictions

Mutual expansion and contraction of "power" and "freedom" is subjected to the conditions and circumstances of the society. Under normal conditions, enjoying legal and legitimate rights and freedoms seems to be reasonable as an inalienable and stable right. But this fact cannot be ignored that some factors, such as wars and military occupations, civil riots, crises and other emergencies, may affect the condition and circumstance of the country so that some public some sacrifices may become inevitable in order to overcome them.

In this case, in order to cope with existing difficult conditions and to overcome the crisis, the levers of power will be used more severely, until perfect establishment of order and security and restricts the domain of rights and freedoms. In this case, citizens will be forced to accept certain unpleasant restrictions which result from critical situation (Hashemi, 2005).

Relating the emergency condition and essential restrictions, paragraph 1 of Article 1 of International Covenant on Civil and Political Rights, addresses the Member countries and stipulates: "If an exceptional (extraordinary) public danger threatens the existence of a nation and this danger be announced officially, countries which have accepted the Covenant can adopt some measures beyond the obligations of this Covenant to the extent that is certainly necessary due to the situation; but these measures should not be inconsistent with other obligations of international law and they should not lead to a discrimination merely on the basis of race, color, sex, language and religious or social origins".

The issue of exceptional condition has been discussed in the constitution of Islamic Republic of Iran; especially in the seventy-ninth principle:

"Conducting curfew is prohibited. In times of war or in emergency conditions, the government has the right to establish necessary temporarily restrictions with the approval of the Islamic Consultative Assembly; however its duration cannot exceed thirty days and if that is still necessary, the government must obtain permission from the Assembly again".

In addition to the above principle, in the revision of constitution some authorities have been predicted for the Supreme National Security Council (principle 71 and 6 of constitution) which can create exceptional condition restricting rights and freedoms. Here we discuss these issues:

5.1 Prohibition of conducting Curfew

Curfew is an exceptional practice that is particular only for time of crisis, in which political regime will become a military one and administrative and disciplinary duties and even in some cases judiciary duties will be assigned to armed forces in order to administrate the country, through an exceptional method with exceptional powers and authorities, until removal of the crisis (Rivero, *ibid*, p. 443).

Although the principle 79 of the constitution has not ignored exceptional and extraordinary condition, however, by expressing the phrase "conducting curfew is prohibited", it has denied the style of governing the country through curfew. Absolute prohibition of curfew can be inferred from this principle because we can't see any clear exception for this principle.

What confirms this issue is emphasis of experts of constitution on the rejection of curfew under any situation because of unpleasant memories of the past regime. In these negotiations it has been stated that: "declaration of curfew in the country is absolutely forbidden" and "the government cannot declare curfew under any conditions" and "restrictions that the government establish in emergencies, can never be in the form of curfew; because curfew is not acceptable in any conditions. So, the restrictions must be something other than curfew"(published by Islamic Consultative Assembly, 1985, pp. 885 and 884).

Thus, the government, instead of curfew in times of crisis will apply its exceptional authorities, through nonmilitary method and will handle affairs of the country and finally, in the Islamic Republic of Iran, curfew has no legal basis.

5.2 Time of War and Temporality of Restriction

Time of war is when a country is involved in an armed conflict or when it is wholly or in part occupied by foreign military forces. In this condition, the government must take extraordinarily high initiative in applying maximum power and national forces to defend the country. The first impact of establishing such a condition is tangible and intangible restriction of rights and freedoms of citizens. Overnight curfews, banning strikes and gatherings and compulsory dispatching people to war are some restrictions which encounter citizens with exceptional situation; however, these restrictions are justifiable when it comes to rescue the country (Hashemi, 2005).

There is no doubt that the initiative of conducting necessary restrictions is the duty of government. In a democratic regime that the government is usually appointed directly or indirectly by the nation, trusteeship of the rulers on one hand and public trust on the other hand justifies such an initiative for the government; but it should be noted that, in democratic nations, absolute authority of government is a very dangerous issue. Experience has also shown that governments have resorted to extraordinary tactics and have invaded legitimate freedoms of people, in the order to increase their power and authority (Dashti, 2011).

Because of possibility of this assumption, Constitution of our country has provided that the establishment of necessary restrictions is possible only with the approval of Islamic Consultative Assembly, as the symbol of sovereignty of the people. In this supervision, the Islamic Consultative Assembly investigates the issue and after recognition of the necessity declares its opinions about restrictions, according to different conditions and circumstances.

Shortness of imposing necessary restrictions in wartime and in emergencies (thirty days) can be considered as an indication of exceptionality of restrictions and primacy of freedom. However, in critical situations, such as wartime, the necessity of imposing restrictions for any longer time can be quite sensible. However, the constitution has specified a limited time that is "thirty days" and by understanding the issue it has added: "if that is still necessary, the government must obtain permission from the Assembly again". This legal strategy can be considered as a reasonable emphasized on the primacy of freedom and exceptionality of restrictions and thereby, it reduces the negative effects of the continuation of the restriction period.

As it can be derived from the phraseology of constitution, establishing long-term restrictions can create destructive political and social impacts; because, beside this issue that the government may misuse this principle, there is another risk as well; meaning that the establishment of an exceptional condition in the long run can become a common issue and freedom of people may be ignored even after the crisis. These frequent permissions by Assembly will have a useful social effect and that is they will remind the government, the Assembly and people primacy of freedom and exceptionality and temporality of necessary restrictions in any condition (Hashemi, 2005).

6. Principles of Limitation

What is clear from legal perspective is that governments cannot only resort to exhortations and religious and moral educations in order to establish order and justice in the society and to maintain a minimum civil rights and freedoms; but in must specify some limits for freedom within the framework of legal norms and because of some basic reasons we cannot a constraint for exercising the rights and freedoms, because sometimes the rights of individuals are different and applying a special right may violate another right. Also some general issues such as public interest and the requirements of social life and public order are some considerations which must be considered in this regard. Therefore, considering the accompaniment of individual freedom and the others freedom, if the rights and freedoms affect the rights or reputations of the others or if they contradict with public order or public morality, then those rights should not be exercised.

So the government cannot prevent the exercise of rights and freedoms. Because providing human rights and public freedoms is a fundamental task of any government. As described above, as in private rights contracts between two parties can be cancelled by a powerful power, in public rights and in relations between government and public, emergency situations such as war or foreign invasion can subdue the determination and justify restrictions. In special situations, individuals' rights and freedoms will be influenced by public interests and restrictions will be imposed on individuals' rights (Elham, 2011: p. 41).

The obligation to respect these rights in each country's national legal system are being frequently monitored by international community defending human rights and each country must necessarily ensure the implementation of these rights, within the framework of its domestic legal system. However these individuals' rights and freedoms are being violated in cases where the government's entity is at risk and this issue reinforces this legal opinion that: "restrictions on individual freedoms are legitimate in the cases that the government's entity is threatened and even the most democratic governments recognize these restrictions"(Elham , *ibid*, p. 42).

But we can mention some factors as some bases for limiting the rights and freedoms which include:

A. Disruption of ideological foundations of society: in ideology-based systems (such as Iran) one of the clear boundaries of restrictions on individuals' rights is disruption of ideological foundations of society. However, in most of these societies having an opinion against the governmental system doesn't justify applying legal punishment and the conflict will only begin when the person intends to promote his opinion by resorting to illegal methods or when he promotes something that is contrary to the public interests. For example, if a person

intends to violate the religious foundations of most of people or if he attack the ideological foundations of a society; obviously, in such cases that act will be considered contrary to the public order and as a result the government will confront it. For example, in Islam religion, disruption of ideological foundations of society is being considered as the legal sentence of apostasy and it will be applicable when the apostate tries to disrupt the thoughts and ideas of believers. In this case, the investigation will be accompanied with certain formalities (Vaezi, 2006: p. 12).

B. Disruption of public rights: Disruption of public rights is another boundary for restrictions on individual rights. Here the first question is that what are the public rights and in which conditions they will be violated? We can briefly say that the public rights are "a set of rules and regulations that sets the relationship between regime agents and people and organizes governmental organizations" and disruption is: "emergence of any practical instability in the pillars of social system" (Hashemi, 2007: p. 48). So if this practice disrupts the integrity of relations of government and its agents with people; then the public order has been infringed and in this case, the limits of action will be controlled by the government.

Since the government is the highest legal entity in the society and it does not accept disrupting public rights; so as the guardian of public order, it can exercise punishments which have been specified in the law in order to establish public order and peace in the society. Because ruling is a basic element in the establishment of governments and there is an authority in any government which its power is legally over all individuals and communities which are located within its territory (Ezzati, 1996). On the other hand, although the duty of the government in managing the society is providing order and security and ensuring fundamental rights and freedoms for people; but it should be noted that the authority of the government under titles such as public order or public security may extremely restrict civil rights and freedoms.

C. Disruption or negation of private rights of the others: Another aspect that is limited by some constraints in this regard in most legal systems and is among the boundaries of restrictions on individuals' rights is disruption or negation of private rights of the others. For example, in the context of private rights, individuals' honor and dignity is very important and no one has the right to violate it (Nouri, 2010); so if someone attributes any accusation, defamation, insulting, profanity and etc. to the others than he will be responsible for that.

In this regard, legal regulations have also restricted this principle to some provisions and in case of violation; they have predicted some measures to enforce it. In this respect, the law of civil liability, stipulates: "Everyone who -without legal permission, intentionally or as a result of recklessness-violates life, health, property, freedom, dignity, business reputation or any right of the others which has been specified by law for individuals; he is liable to compensate the damages caused by his actions; whether this action imposes material or spiritual damage to the other person (Article 1, the law of civil liability, 1960).

D. Public order: Public order is another factor which limits rights and freedoms. Public order is a current and continuous process which is being recognized based on law and includes the basic and public needs of society (Madanian, same). It should be noted that public order is not a phenomenon separated from society and we cannot create hardware order in a factory in an abstract way or analyze its possibility. Obviously, public order has a stable and solid relationship with the values and accepted social norms. In this regard, the conscience of society accepts the credibility of public order and its necessary components and confirms all of individuals who move in its path and denies those who move in the opposite path. On the other hand, the existence of public monitoring can be as an insuring umbrella for it (Ghamami and Javid, 2008).

Constitution of the Islamic Republic of Iran has imposed restrictions on rights and freedoms, in several principles. We can say that principle fortieth of the law has predicted the possibility of restricting rights in the best expression. Under this principle: "No one can exercise his rights through harming the others or violating public interests". As it is clear, according to this principle, a right can be restricted only if the exercise of that right could harm the others or if it may violate public interests. In fact, principle 40 of constitution of Islamic Republic has been based on a relativist thought and in designing the system of restriction of rights and freedoms, refers to two restrictions accepted in modern fundamental rights and the custom of other democratic countries. According to 40th principle only in two cases of "violating public interests" and "harming the others" a right can be restricted. So, we can say that this principle is sufficient to adjust the red lines of freedom. But the experts of constitution, in cases such as principle 24 of the constitution believe that the issue of violation of the fundamental principles of Islam is also considered as one of the red lines of rights and freedoms. With regard to the set of principles of the constitution, it becomes clear that in the constitution of Iran, we cannot find specific and unique criteria to illustrate the boundaries of rights and freedoms. This law has recognized a set of delimitating elements. However, in general we can specify the red lines of rights and freedoms in the constitution

as follows:

Responsibility to God (paragraph 6 of Principle 2), violating the principles of Islam (Principle 24), Disrupting public rights (Principle 24), violating public interests (Principle 40), harming the rights of the others (Principle 40), public interests (Principle 28), violating the principle of independence of the country (Principle 26), violating the principle of national unity (Principle 26), Violation of foundation of Islamic Republic (Principle 26), disrupting economic development of the country (Principle 44), damaging the society (Principle 44), war and emergency conditions as a factor to establish temporary necessary restrictions, with the approval of the Islamic Consultative Assembly (Principle 79), Public chastity, public order and calling both of parties in a private lawsuits which is an element for limiting vindication of the right and enjoying a fair trial and one of its undisputable principles is openness of trials (Principle 165), in some cases the constitution has assigned the task of determining fundamental rights and freedoms to the ordinary law (paragraph 7 of Principle 3) (Gorji, 2004).

In this regard, the most important theoretical and practical challenge is excessive extension of restrictions resulting from interpretation of Islamic norms by the government or the legislator or severe restriction of rights and freedoms in the name of Islamic norms; because these discussions create many controversies among Islamic scholars and they have many pros and cons, so that the scope of the discussion can change easily and even with citing a single hadith or a certain fatwa. However, as much as the government is committed to respect the rights and freedoms of individuals, fighting against criminals in order to maintain social order is important as well; but in the integration of individuals' dignity and social order, it should be noted that freedom as a natural right is common and prevalent and violation of public order is an exceptional issue and in this case, the pursuit and arrest of violators must be logical, justifiable and in accordance with legal regulations (Hashemi, 2003: p. 188).

Although the duty of the government in managing the society is providing order and security and ensuring fundamental rights and freedoms for people; but it should be noted that the authority of the government under titles such as public order or public security may extremely restrict civil rights and freedoms. In this case, logical and organized movements and reflections, which include public participation, can in turn provide necessary grounds for demanding the rights of people and supporting human rights (Hashemi, 2007: p. 92). In such cases, titles such as public order and security are being applied as the instruments of government to restrict the right of citizens. So compliance of these rights with Islamic norms and international rules which have been accepted by the government of Iran must be evaluated.

7. Conclusion

In a macro perspective we can argue that in the constitution of Iran, the legislator has tried to examine the realization of public demands in normative and structural areas; thus, although we can see serious attention to this matter in the overall atmosphere of the constitution and in the volition of the legislator and although freedoms of individuals has been raised in the discussion of rights of the nation and throughout the constitution; but some elements and general exceptions have affected it under the title of fundamental Islamic rights and public rights and these exceptions have basically paralyzed the principle and they have somehow preferred restrictions over freedoms, by accepting a freedom conditional on religion and Law. Although Principle 9 of the constitution is somehow general and absolute, but it has been allocated to the generalities of Principle 4 (basing laws and freedoms on religion).

In this discussion, a very important objection which has been raised on the constitution of Iran is that instead of public interests, it defends something that is called the interests of the regime, as its fundamental doctrine in order to delimit the rights and freedoms. Therefore we can see that when we review the constitution of Iran in every aspect, we observe that major and non-restrictive examples, under the titles of fundamental principles of Islam and interests of the regime have been raised and Principle 4 and other similar Principles are examples in this regard; while factors which discipline the society and the foundations of delimiting rights and freedoms should be established based on proper and accurate definitions with crystal-clear interpretations. So, it seems that in the conflict between public interest or the interests of citizens and governmental rules, we should not merely observe the interests of government and its organizations.

One of the major challenges of red lines of rights and freedoms in Iran is using multilateral criteria and in that regard two basic objections have been raised on Iran's legal system; Firstly, by indicating application of Principle 4 of the constitution, the legislator of constitution has specified a very important issue in preventing contradiction between ordinary law and the rules and regulations of Islam; but the legislator instead of appropriate development of law and considering the compatibility of laws with Islamic criteria, has tried to copy and translate Islamic law in the legislative arena. This is while there are many conflicts and controversies between the Islamic jurists and scholars about religious laws.

Another problem is that in some cases, even the legislator in the Principle 167 of the constitution has obliged the judges to refer to valid religious fatwa, in cases in which the law has not exactly interpreted the issue. While in these cases, instead of such references, the legislator should scrutinize in legislative system and must try to strengthen the rule of law; rather than having structural weaknesses and relegating them to the religion or to jurist's conflicting fatwa.

Therefore, in the discussion of the principles of limitation of rights and freedoms, we believe that these principles must be limited to the rule of law as much as possible and we must direct the power of other resources in such a way to contribute to completion of the law and improving the process of development of legislation. In other words, custom, judicial procedures and legal doctrine should remind the legislator to attempt to amend the law, but they should not directly specify restrictions. Therefore the rights of citizens force the legislator to carefully specify rules which restrict the rights and freedoms, in a disciplined method and also any reference of rules restricting the rights and freedoms of citizens must merely be in accordance with law and within the framework of law and in compliance with all aspects of human rights and natural rights.

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