

Constitutional and Criminal Guarantees of Personal Freedom

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Abstract

Among the personal constitutional rights of the individual, the right of personal freedom or personal security is occupied as one of the main rights along with other natural rights stipulated in national constitutions. Personal freedom cannot be absolute, but rather it must be restricted. States have interfered in the protection of personal freedoms, both from a constitutional and a criminal standpoint.

Keywords: freedom; personality; restrictions; guarantees.

1. Introduction

The personal constitutional rights and freedoms of citizens are the most important element in the entire system of rights and freedoms and determine to a large extent the degree of civilization of society and the state. Among the personal constitutional rights of the individual, the right to personal freedom or personal security is occupied as one of the main rights along with other natural rights stipulated in national constitutions. A person is born free, meaning that he has the opportunity to act according to his interests, needs, and desires. The individual who enters into various legal relations with society and the state must know that nothing threatens his freedom, provided that it does not conflict with the law.

The Importance of the Study

The importance of the study lies in the fact that freedom and personal security in the life of every person are the most important rights that he gains from birth. This means that any person, regardless of gender, nationality, religion, etc., has the right to do any actions that do not conflict with the law without being subjected to any coercion or restriction of rights by any person. For this reason, society has always sought to give the individual the opportunity to dispose freely of himself, his time, and his abilities, provided that these rights are properly enshrined in national legislation. The existence of the right to personal freedom should not be understood as the complete absence of restrictive influences on human behavior. Personal freedom cannot be absolute, but rather it must be restricted. The state must determine the basis and procedures for restricting it. Therefore, states have intervened in the protection of personal freedoms, whether from a constitutional or a criminal point of view. States considered violating this right in cases other than those specified in the law as a violation of the constitution and also considered a crime punishable by law.

The Problem of the Study

The problem of the study lies in setting a criterion for the balance between the right to personal freedom and the restrictions set by the legislative authority, especially regarding the state of emergency and wars that give the executive authority the right to violate the law and

arrest people on the pretext of protecting national security.

1.3 The Aims of the Study

The study aims at defining the concept of personal freedom, stating the restrictions imposed on personal freedom, analyzing the constitutional and criminal texts related to the protection of personal freedom, stating the constitutional and criminal guarantees of personal freedom and the restrictions imposed on them, and making recommendations to protect personal freedom.

1.4 The Methodology of the Study

This study follows comparative and deductive approaches by presenting the various legal texts related to personal freedom.

2. Defining Personal Freedom

In order to understand the issue of constitutional guarantees of personal freedom, it is necessary to know what is meant by personal freedom. Some have defined personal freedom as a basic right to do everything that society does not have the right to prevent or to exercise the legitimate will of every person within the limits of the necessities of the social system [1]. Others defined it from the angle of freedom of movement as a social relationship that guarantees a person's ability to move freely and determine his location [2]. Also, personal freedom can be defined as the right to travel back and forth, that is, the freedom to travel anywhere within or outside the borders of the state, and the freedom to return to the homeland without any restrictions [3]. Hence, the concept of personal freedom includes not only the possibility of freedom of movement and the choice of behavior according to the individual's discretion, but in addition to freedom of movement it also includes the right to privacy, honor, dignity, freedom of belief, and expression of opinion. Others defined it as what a person enjoys of guarantees against arrest, imprisonment or arbitrary punishments [4]. Through the previous definitions, personal freedom is operationally defined, in this study, as the freedom of man to move and express his opinion and religious belief, and it is not permissible to arrest or arrest him except within the limits specified by the law and by a reasoned judicial order.

3. Constitutional Guarantees of Personal Freedom

Constitutional guarantees are those methods enshrined in the constitution and laws that guarantee the individual's exercise of his right to personal freedom. Without these guarantees, the exercise of personal freedom remains ink on paper. Constitutional guarantees include constitutional text, judicial oversight, and the principle of legality.

3.1 Constitutional Text

The constitution is defined as a set of basic principles regulating the powers of the state, outlining the rights of both the rulers and those who are governed therein, and outlining the main principles regulating the relations between its various authorities [5]. Since the constitution is the supreme law in the state and it is difficult to amend it compared to the ordinary law, it is also not possible to issue any law that contradicts the provisions of the constitution. So, the text in the state constitution concerning the right to personal freedom is evidence that this right is one of the main and important rights of citizens. National constitutions stipulate personal freedom, including the constitution of the Russian federation, where it states in rule (22) that the individual has the right to freedom and security of his person and may not be arrested or detained except by a court decision. As for the constitution of the

Arab republic of Egypt for the year 2014, it was successful in ensuring the protection of personal freedom through the text of rule (99), where it considered that any attack on personal freedom is a crime that does not fall within the statute of limitations. The aggrieved party may file a criminal case by direct path, in addition to the state's guarantee to compensate the aggrieved person due to the violation of his freedom. This is what is called constitutional criminalization. As for the constitution of the republic of Iraq for the year 2005, it touched on personal freedom in rule (37) of it, and considered that personal freedom is safeguarded, as well as prohibiting the arrest or investigation of any person except on the basis of a judicial decision. Also, the text in the same legal rule, do not confess any information obtained under duress, threats, or torture. From the foregoing, it is clear that personal freedom, as a condition for the exercise of other freedoms, has no value for exercising freedom of movement, election, nomination, or expression of opinion if the individual does not have personal freedom. However, the constitutional text alone is not sufficient to guarantee personal freedom. Rather, there must be a practical application to address everyone who infringes on personal freedom, whether the aggressor is an ordinary individual or a state body.

3.2 The Principle of Legality

This principle means the supremacy of the rule of the legal rule, regardless of whether its source is constitutional, legislative, written or unwritten, as the provisions of the law prevail over both the state and individuals, i.e. the obligation of each of them not to violate the legal rules with the existence of a penalty for this violation [6]. Under this principle, the arbitral authority of the criminal judge, who retained the functions of legislation and the judiciary until the end of the eighteenth century, was eliminated [7]. The principle of legality represents a safety valve to protect personal freedom, but this principle, although it takes an expanded direction in the face of state authorities, it varies according to the circumstances surrounding the state. This principle decides on the executive authority to refrain from deviating from its actions beyond the limits set for it by law, and to base all its actions on the rule of law [8]. So, the application of the principle of legality is an important guarantee to protect the personal freedom of citizens. This principle leads to the dominance of law over state agencies and citizens alike, and the basis of this principle is the strict implementation by everyone of the laws in force, but at the same time these laws must be issued under a constitution. That is, in conformity with the provisions of the constitution and not in violation of them, commitment to the law does not mean giving absolute powers to the legislative authority to issue the law. Rather, this right is restricted by the laws not violating the constitutional rules. Thus, the legislative authority is not entitled to issue a law that leads to a violation of the right to personal freedom, except in exceptional cases.

3.3 Judicial Oversight

Judicial oversight is a means of monitoring legal acts of legislation or decisions and their compliance with the provisions of the constitution, and it is one of the functions of the constitutional court. Consequently, the constitutional court resorts to canceling any law that is issued by the legislative authority that is in violation of the constitutional rules. As it is known that the constitution is the supreme law in the state, so it is not permissible to issue a law or decision that contradicts the constitution. This control may be annulment control or it may be abstinence control, and under judicial annulment control. Some courts are allowed to annul the law that is proven to be in violation of the provisions of the constitution, and the ruling to invalidate the law results in its abolition for all authorities and individuals. As for the control of abstention, according to which the judge neglects the rule of the unconstitutional law, that is, he is prevented from applying it in the case before him [9]. Therefore, judicial oversight is an important guarantee of personal freedom. This importance is manifested in the necessity of

submitting laws and decisions issued by the legislative or executive authority and ensuring their compliance with the constitutional provisions related to the personal freedom of citizens.

4. Constitutional Restrictions on Personal Freedom

Whatever the text on personal freedom in the constitutions of states and the guarantees for this freedom, this freedom cannot be absolute, because such view is incompatible with the relativity that characterizes rights and freedom including personal freedom that must have a limit that cannot be exceeded. Otherwise, it will destroy the rights and freedoms of others and the public order in the country [10]. Therefore, personal freedom must be restricted. Constitutions differed in determining the quality of these restrictions. Some constitutions permit the restriction of personal freedom through justifications for that restriction, such as maintaining security, morals, morals, and public order, in addition to making that restriction within the limits of the law, including the constitution of the Arab republic of Egypt for the year 2014, and other constitutions leave the matter of restricting personal freedom to the ordinary legislator by setting legal controls for the enjoyment of personal freedom or personal security, and this is stated in certain phrases such as within the limits of the law. Accordingly, personal freedom can be subject to legally imposed restrictions or based on a law, in order to achieve social goals that are more important than the individual's interest [11].

5. Criminal Guarantees of Personal Freedom

Criminal law aims to protect multiple social interests and everything related to aspects of life. Thus, the text on personal freedom in the constitution is not sufficient to ensure its respect and implementation. Therefore, it is necessary to resort to criminal law to determine criminal protection for personal freedom by criminalizing a set of criminal acts or behavior that they are considered crimes in the eyes of the criminal legislator.

5.1 Crimes of Violation of Personal Freedom

The text of the criminal law on a set of behaviors considered as crimes targeting the personal freedom of the individual called crimes affecting human freedom and sanctity. Among these crimes are:

5.1.1 Unlawful Detention or Arrest

Arrest means holding a person by his body against his will and restricting his movement, that is, depriving him of the freedom of movement represented in coming and going, and it is characterized as a temporary crime [12]. As for detention, it means depriving the victim of his freedom for a period of time [13]. Therefore, the crime of assaulting personal freedom is realized by the behavior of arrest or detention if it is illegal, considering that the code of criminal procedure determines the legal mechanism and the persons who have the right to arrest or detain persons, and any other mechanism not specified in the law is considered a crime targeting personal freedom. Rule (448) of the law sanctions Iraq mentioned the phrase "without an order from a competent authority" meaning that the arrest or detention must be by a court order specifying the person who should be arrested and the reason for arrest.

5.1.2 Kidnapping

Kidnapping is one of the most serious crimes and its spread among crimes against personal freedom. Kidnapping can be defined as extorting a person from his place of residence or his usual place and forcibly moving him to a place unknown to relatives and authority. Thus, it becomes clear that the criminal behavior of the crime of kidnapping is as follows:

- Restricting the freedom of the kidnapped person.
- Transferring the kidnapped to an unknown location.
- The victim's lack of consent, i.e., without his will.

The Iraqi penal code stipulates in rule (421) that the kidnapper must be a juvenile under the age of majority, whether male or female, or that the kidnapper is a female who has completed eighteen years of age, but the kidnapping was carried out by force or deception. For the crime of kidnapping to be realized, the criminal intent of the offender is required, given that this crime is a premeditated crime that is not committed by mistake. Thus, it becomes clear to us that the crimes of arrest, detention or kidnapping, whenever they are without following legal methods or by authorized persons, are considered a crime of violating personal freedom because they lead to preventing the movement of the victim and his movement to another place. In addition to the foregoing, there are other crimes targeting personal freedom, including violating the sanctity of the home and violating religious belief or freedom of expression.

6. Objective Penal Guarantees of Personal Freedom

6.1 The Principle of Legality of Crimes and Penalties

One of the important and stable constitutional and criminal principles is the principle of legality of crimes and penalties, or the principle "no crime and no punishment without a text", all of which are expressions that have the same meaning. In order for people to know what they are allowed to do and what is forbidden to them [14]. Therefore, in order to achieve criminal protection for personal freedom, the legislator must stipulate in his law the crimes that are considered a violation of personal freedom. Without this text, we cannot say that there is criminal protection for personal freedom, as well as determining the appropriate penalties for this violation. The judge is obligated to abide by the crimes and penalties stipulated in the criminal law and he has no right to consider an act a crime without stipulating it.

6.2 Non-Retroactivity of Criminal Law

It means that facts and actions remain subject to the law in force at the time of their occurrence or commencement, and that every new law applies with a future effect to all facts and actions that occur or take place after its entry into force and its entry into force. Consequently, this law shall not be applied retroactively to facts and actions prior to its entry into force. The criminal rules related to criminalization and punishment are only applied to acts that occur after its entry into force, which is known as the immediate and direct effect, so it is prohibited to apply them to acts committed before its entry into force, unless they are more suitable for the accused. This principle is one of the constitutional and criminal principles stipulated in the constitution of the republic of Iraq for the year 2005 in rule Art (19-tenth) [15]. As well as the Iraqi penal code in rule (2), the penal law does not apply retroactively, unless this law is more suitable for the accused. Based on the foregoing, the violation of personal freedom is considered a crime from the date of its criminalization by law.

6.3 Principle of the Personality of Punishment

It means that the criminal responsibility can only be decided on the offender and no one else, because this responsibility is decided and is directed towards the criminal error issued by the offender [16]. Under this principle, it is necessary to determine the person who bears criminal responsibility for violating the personal freedom of the individual. Given the importance of the principle of personal criminal responsibility in ensuring the rights and freedoms of individuals, including personal freedom, it was decided that criminal responsibility for the act of others was unconstitutional and that the assumed responsibility, which is based on the assumption of the moral element in committing the crime, was not considered.

7. Formal Guarantees of Personal Freedom

In addition to the objective guarantees stipulated in the penal code for the protection of personal freedom, there are guarantees related to the formal procedures to guarantee this freedom, which are stipulated in the criminal procedure laws or the code of criminal procedure. It means texts that guarantee the course of criminal justice and relate to the procedures of the criminal case from the moment it was moved until the issuance of the final judgment, for example, the procedures of investigation and appeal of judgments [17]. The code of criminal procedure includes a set of principles that guarantee the protection of personal freedom, including the principle of presumption of innocence, causation of judicial rulings.

7.1 Presumption of Innocence

This principle is one of the principles explicitly stipulated in constitutions, so it is considered a constitutional principle before it is a legal principle, and it means dealing with the accused person as innocent, regardless of the gravity of the crime he is accused of committing, and at any stage of the case, whether in the stage of inference or Investigation or trial until a final court ruling is issued for his conviction, which cannot be appealed, with all legal guarantees provided for this person at all stages of the case [18]. This principle has great importance and a great role in protecting personal freedom, because with the existence of this principle, the accused is treated as an innocent human being and his freedom may not be deprived or his freedom violated, and his freedom must be protected and everything that falls within the elements of personal freedom including freedom of expression, freedom of movement, freedom of thought, freedom the integrity of his body. Therefore, based on the provision of the constitution, it is obligatory to appoint a lawyer to defend him if he does not have a lawyer.

7.2 Causing Judgments

One of the guarantees for the protection of personal freedom is that the judge issues his judgment on a specific person with an explanation of the reasons that called for issuing his judgment and its sufficiency. The judge is morally and professionally obligated to formulate premises that lead to the conclusion he concluded so that he does not issue his judgment motivated by a casual emotion or a temporary feeling, which enables the litigants to identify the reasons that called the judge or the court to take one point of view and not another. Thus, the judge cannot confiscate the personal freedom of the individual without mentioning the reasons that called him to do so. Thus, the individual can guarantee his personal freedom from the arbitrariness of the judicial authority or other state agencies. In addition to the principles mentioned, there are other principles that also contribute to ensuring the protection of personal freedom, including the independence of the judiciary, equality, and the non-use of torture during the investigation.

8. Conclusion

This study reviews the most important results and recommendations that it reached during the study of the topic entitled constitutional and criminal guarantees of personal freedom.

8.1 Results

1. Personal freedom is one of the constitutionally and criminally recognized principles, and it protects it from any violation by men of authority or other individuals.

2. Personal freedom is the basis of other freedoms, and without it, the individual cannot exercise any of the freedoms stipulated in the constitution.
3. Personal freedom is not absolute, but rather is restricted by constitutional and criminal restrictions, including that personal freedom does not lead to a breach of public order or morals, or inflicts health damages or breaches public security, meaning that it does not conflict with the law.
4. Kidnapping or unlawful detention is considered a crime of violating personal freedom stipulated in criminal laws.
5. The criminal law guarantees the protection of personal freedom through a set of principles, including the legality of crimes, the personality of the punishment, the presumption of innocence, the reasoning of judgments, the independence of the judiciary and others.

8.2 Recommendations

1. The necessity of including electronic crimes within the criminally punishable crimes in the Iraqi penal code, due to the great role these crimes play in violating personal freedom.
2. The necessity of giving the victim the right to claim compensation in the event of a violation of his freedom because of his illegal arrest by the authorities, or if his innocence became clear after he was sentenced for a crime he did not commit, which is what is called victims of justice.
3. Forming a committee headed by the prime minister to monitor prisons and review the condition of detainees without trial that has exceeded the constitutional period of twenty-four hours.

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