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Temporary Detention Order and Civic Rights

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-Introduction

a. Definition and Purposes of Temporary Detention

1. Definition
2. Purposes

b. Criteria for The Issuance of Temporary Detention Order

1. Before temporary detention order is rendered
   1-1. The Necessity for the Stipulation of the Law-maker
       1-1-1. Compulsory Temporary Detention
       1-1-2. Voluntary Temporary Detention
   1-2. Judicial Authority Issuing Temporary Detention Order

2. At the time of temporary detention order is rendered

3. After the temporary detention order is rendered
   3-1 – Serving Temporary Detention Order
   3-2- Controlling Temporary Detention Order
   3-3- Automatic Interruption of Temporary Detention Order
   3-4- The Necessity for Considering the Days of Temporary Detention

c. Compensations for the damages incurred due to Temporary Detention of the Innocents:

-Conclusion and Suggestions

-References:
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Introduction:

One of the most important decisions made by judicial authorities is to obtain securities from the defendant in the process of proceeding of criminal actions; among the security orders, detention order of defendant is of great significance, because on one hand this order deprives people of one of their most important civic rights, namely of their liberty, and is in contradiction with the Presumption of Innocence, the doctrine which, under Article 37 of the Constitution of I.R. of Iran, has been recognized; and on the other hand, this order may set the defendant at large while his delinquency has not been proved yet, and may create disorder in the process of prosecution, research and proceedings and ultimately the complaint's and petitioners' right is infringed. Undoubtedly, creating a balance between the powers of judicial authority and the complaint's right, and the necessity for research on one side, protection and safeguarding the defendant's rights on the other, enjoy a particular delicacy with which the law-maker should deal displaying his virtuosity.

a. Definition and Purposes of Temporary Detention:

1. Definition: Temporary detention of defendant, also refereed to as "Preventing Detention" in Iranian Criminal Law means "Divesting the defendant of his liberty, imprisoning him/her by competent judicial authority during all or part of the preliminary inquiries" 1

To this definition, the phrase "detention of the defendant during the proceedings at the court" should be added, too, because, under Article 35 of the Criminal Procedure Code, temporary detention order will continue until the court of first instance renders the judgment.

2. Purposes: Individuals' rights and freedoms necessitate that all the citizens of the community, even the defendants committing an offense, are privileged from any detention and arrest before the final judgment is rendered. Under Article 37 of the Constitution of I.R. of Iran, people are doomed to be innocent and acquitted; and under Paragraph 3 of Article 9 of Pact of League of Nations of Civil and Political rights, 1966 enacted by United Nations Organization and approved by Consultative Assembly of Iran in 1975, and under Article 9 of Civil Code of Iran, this Pact is regarded as the domestic law, temporary detention order must be rarely employed. And the judicial authorities should try to use other alternatives for temporary detention as much as possible. In fact, it should be used by judicial authorities as the last resort, particularly in criminal actions, at the time of rendering punishment order and its enforcement, the dignity of the delinquent is taken into consideration, and all the more so, considering the dignity of the defendant before detention order is issued and the final judgment is rendered is of great significance. 2

In spite of all these, in cases like dispensing justice, preventing from the defendant's flight, prohibiting from making danger again for the community by the defendant, saving the defendant's life from the complaint' retaliation, preventing from suppressing evidence relating to offense, preventing from suppressing proofs relating to offense, collusion defendant's collusion with the witnesses or other defendants, or exerting pressure on the witnesses and the informed people, and finally the importance of the offense committed (for instance, intentional murder and terroristic attacks) materialized through the severity of punishments by the lawmaker in legal articles (for instance articles 32 and 35 of Criminal Procedure Code of Iran), resorting to Temporary Detention Order become justifiable and lawful.
b. Criteria for the Issuance of Temporary Detention:

1. Before temporary detention order is rendered:

As it was said before, since temporary detention order is in contradiction with the Presumption of Innocence (Principle of Acquaintance), the doctrine which states that the defendant is doomed innocent, it must be rarely employed. Furthermore, experience has shown us that the defendants who have been arrested do not benefit from the leniency of judicial authorities that much nor do they enjoy useful criminal mechanisms like mitigation of punishment, suspension of a sentence, and particularly aquittal.3

Before temporary detention order is rendered for the defendant, it is necessary to pay attention to the following points:

1-1. The Necessity for the Stipulation of the Law-maker; as it has been provided in Paragraph 3 of Article 9 of Pact of League of Nations of Civil and Political rights, temporary detention order is rarely employed for the defendant, whose committing crime has not been proved yet. Nevertheless, in all cases, the clear letter of the law shall determine employing temporary detention order. In Iranian Law, temporary detention order is rendered in two ways: Compulsory and Voluntary.

1-1-1- Compulsory Temporary Detention Order:

Under Article 35 of the Criminal Procedure Code of Iran, and some of the other laws, if a person is accused of the charges mentioned in those laws, and sufficient evidence is available, the issuance of temporary detention order will be compulsory. Therefore, in other legally stipulated cases and cases of temporary detention, it is not possible to detain the accused person temporarily in Criminal Procedure Code of Iran; Article 35 of the Criminal Procedure Code prescribes:

"In the following cases, with the observance of provisions of article 32 of the present enactment and the related notes, where circumstantial evidence indicate the culpability of the defendant, the issuance of temporary detention order becomes obligatory. Detention order is issued as such remains in force up to the time a judgment is awarded by the court of first instance provided that the duration of the detention does not exceed the minimum period of statutory punishment imposed for the perpetration of crime in question"

a. In murder, kidnapping (abduction), throwing acids at people, rebellion and moral vandalism. (corruption on earth)

b. In crimes and offences carrying the statutory punishment of death penalty and or life imprisonment;

c. In crimes of heft, swindling (fraud), embezzlement, bribery, breach of trust, forgery and using of false documents, provided that the defendant has previously had a final conviction or two or more records of non-finalized convictions for perpetration of any one of the crimes or offences herein mentioned;

d. In cases where the defendant's remaining at large results in corruption; and

e. In every crime for which detention has been prescribed by provisions of special enactment.

Cases of special enactment for which the issuance of temporary detention order becomes obligatory are as follows:

1. Note 4 under Article 4, and note 5 under Article 5 of the law for aggravation of punishment of the those commit bribery, embezzlement, swindling (fraud);
2. Note 3 under Article 18 of the provisions for Medical & Pharmaceutical affairs, Food Stuffs and Drinks;
3. Note 3 under Article 690 of Islamic Penal Law concerning forcible entry
As we observed above, in a large number of many laws, the issuance of temporary detention order by the prosecuting judge is obligatory; due to the expansiveness of the abovementioned laws, it seems that the omission of many cases of temporary detention order being obligatory by the lawmaker is necessary; for instance in note 4 under Article 3 and note under 5 under Article 5 of the Law for aggravation of punishment of the those commit bribery, embezzlement and swindling (fraud), if there is sufficient evidence for proof of a crime, and the defendant, too, confesses committing the crime, it is unclear why should he be detained temporarily for one month? In addition, in committing embezzlement, when the defendant returns the embezzled property, by virtue of the same law, it is obligatory to issue the order of suspending the execution of punishment of imprisonment. Thus, temporary detention order of the said defendant whose imprisonment must be obligatorily suspended at the end appears unjustifiable.

In Paragraph "d" of Article 35 of Criminal Procedure Code, the word "Corruption" is too vague and is a very concise and ambiguous expression which can be a pretext to detain the defendant; therefore, it is necessary to omit it, or the applicability of corruption be mentioned in a limitative way.4

1-1-2- Voluntary Temporary Detention;

Article 32 of the Criminal Procedure Code prescribes:

"In the following cases, where there exist circumstantial evidences indicating the culpability of the defendant, the issuance of temporary detention order is permissible"

a. In offences carrying the statutory punishment of hanging, stoning to death, crucifixion, and amputation of limbs or extremities;

b. In intentional crimes carrying the minimum punishment of three years of imprisonment;

c. In the offences that are subject-matter of Islamic Penal law- book five, chapter one;

d. In cases and circumstances where the defendant's being at large results in the obliteration of traces and evidences of the crime, the defendant's collusion with witnesses and other defendants or those informed of the incidents, and/or where his/her being at large causes the witnesses to refrain from testimony. The detention of the defendant is also permissible where there is the risk of flight and hiding of the defendant.

e. In case of murder, the defendant may be kept in the custody of a maximum period of six days if requested by the next of kin , avenger(s), of the blood, to introduce their witness with required qualifications.

Note 1: In crimes against public decency, where there is no private complainant, detention of defendant is permissible only when his/her being at large may cause corruption.

Note 2: The observance of provisions stated in paragraph "d" is obligatory in relation to provisions of paragraphs a, b, and c mentioned herein above.

It seems that this article is under criticism in many aspects; firstly, by mentioning the phrase "the issuance of temporary detention order is permissible", the article has made the judge free in detaining or non-detaining the defendant; secondly, the scope of application of the article is vast and includes a wide range of the offences; thirdly; the word "Corruption" under Note 1 is ambiguous, and the applicability of moral vandalization (corruption on earth) has not been mentioned; paragraph "d" is so vast that the judge can resort to it for any offences, for any person and at any time in issuing temporary detention order. 5
1-2. The Judicial Authority Issuing Temporary Detention Order:

According to the present Iranian laws, the authorities who are entitled to issue temporary detention order include public prosecutor, assistant to the public prosecutor, interrogator, president or the alternate judge of court of first instance, and finally the members of the Provincial Criminal Court, (one of the chambers the court of appeal is held with the presence of five judges). Owing to the fact that the aforementioned judges are the same judges who prosecute, examine and make the trial of the defendant, it is necessary that the lawmaker appoints judges independent of the judges joinder of the defendant charges for issuing temporary detention order or at least controlling the orders issued by them.

1-3. The Necessity for Equality of Weapons of the Parties to the Disputes and Observance of Defendants Rights:

The components and elements for fair trial in criminal examinations are numerous some of which are the independence of the judges and the courts, the presumption of innocence (doctrine of innocence), principle of impartiality of the judge, the trials being public,…and the principle of equality of weapon, the investigation of which is beyond the scope of the present article; but it is of praiseworthy significance to pay attention to the defendants’ rights and to the principle of equality of weapon in the stage before the issuance of temporary detention order. In International Conventions, Article 6 of European Convention of Human Rights, Paragraph 1 of Article 14 of International Pact for Civil and Political rights, Article 8 of American Convention of Human Rights, and Article 19 of Declaration of Islamic Countries Human Rights, fair proceeding has been stressed.

In Iranian Municipal (Internal) Law, too, and in Article 39 of the Criminal Procedure Code, it has been stressed to observe the principle of impartiality of the judge, and obliging them to collect evidence for or against the defendant; however, with regard to the equality of the parties to the disputes, there is absence of required laws (legal gap). Undoubtedly, the broad discretions of the prosecuting authority and even the courts in issuing temporary detention order has put the defendant in an unequal situation in relation to the opposing party and his main opponent, namely the public prosecutor has endangered his defensive rights, because basically, the opposing party should not be permitted to personally detain the other party being prosecuted, and there is no control over his detention.

The importance of the issue becomes clear when the defendant is detained and he has no access to the charged case filing and to the indications and circumstances; under Article 128 of the Criminal Procedure Code, his attorney has the right of attending in the investigation stage only, and cannot have access to the case filing. Therefore, it is obvious that the public prosecutor is free to collect evidence for or against the defendant and the detained defendant is deprived of this right, and hence, he is in an unequal situation with the public prosecutor. Thus, the lawmaker has to interfere in this respect and makes a reasonable balance between the public prosecutor, one of the two parties to the case filing enjoying all the facilities, powers, the police, site inspection order, entry upon to houses, and the hiding places, confiscation of properties, eavesdropping telephone conversations, examination of the witnesses and the informed persons, coroner and experts; and even he is free to detain the defendant temporality, and the other party (the defendant) who is the other party and is deprived of all these powers and capabilities; in order to observe the principle of equality of weapon and the defendant's rights, delegate the detention of the defendant to an impartial authority outside the court.

2. Criteria for the Issuance of Temporary Detention at the time of issuing the temporary detention order:

Since temporary detention order deprives the defendant of his right of freedom is of praiseworthy significance, therefore, the Iranian lawmaker has enumerated important criteria for it in this stage. Firstly, under Article 36 of the Criminal Procedure Code of Iran, in offences that the subject-matter of Hoquq-al-nas the complainant's request is required for issuance of detention order. Secondly, under Article 37 of the same Code, all the temporary detention orders should be well reasoned, and justifiable, and the statutory provisions which have been applied to the issuance of detention order, as
well as the reasons to the effect, and whether or not the defendant may have the right to object should be mentioned in the context of the order. Thirdly, under the Single Article of the Law for Respect of lawful freedoms and protecting the civic rights approved in 1383 (2004), as soon as the persons are arrested (including the temporary detention order of the defendant), his family should be informed of the arrest. With regard to delivering a copy of the temporary detention order to the defendant, the Criminal Procedure Code has remained mute. Thus, because of the importance of this order, it seems that this defect be considered in the subsequent amendments; it also seems that at the time of issuing the temporary detention order, the attorney's interference be obligatory so that at least in this stage, the equality of weapons of the parties to the disputes be relative protected; in this connection, the Law has not stated any order; therefore, it is vital to recognize this right for the defendant.

3. Criteria for the Issuance of Temporary Detention before issuing the temporary detention order:

1-3 The service of temporary detention order: Under Paragraphs H, and T of Article 3 of Law for Establishment of Courts of General Jurisdiction & Courts of Revolution, temporary detention order, whether issued by the public prosecutor or by the interrogator or by the assistant to the public prosecutor's general, must be serviced on the defendant; the time-limit for making appeal is ten days. In spite of the fact that the majority of cases referred to the Provincial Criminal Court, which from the very beginning, investigate the cases exactly like the court of first instance; and in some offences like rape, beggary, it begins to investigate the case directly and without bill of indictment, which legally requires issuing the temporary detention order; unfortunately, the said temporary detention order has not been recognized and in this case, too, the Criminal Procedure Code has remained mute. Therefore, it is vital to recognize the right of appealing the orders issued by the Provincial Criminal Court and stipulating the authority investigating the appeal; at the moment, the right of appealing has been given to the defendant and his attorney; however, this right should be recognized not only for the defendants' family and friends but also for dispensing justice.

2-3; Controlling Temporary Detention Order: Under Paragraphs H, and T of Article 3 of Law for Establishment of Courts of General Jurisdiction & Courts of Revolution, the local court in which the public prosecutor's office is located, is the authority responsible for the truth or falsity of temporary detention orders rendered. As it was said, it seems that the authority issuing the order and the authority controlling temporary detention orders must be independent and impartial judges; thus, criminal court of first instance is not a suitable alternative for controlling the order, because first of all some the offenses because of which the defendant is detained, are not within the inherent jurisdiction of these kind of courts (like willful murder); and it is obvious that in this respect, such courts should not have the power to evaluate and control temporary detention orders issued; secondly, since these cases are later referred to the same criminal court of first instance for trial (of course except for the Provincial Criminal Court), in fact, a kind of prejudgment has been make and if an order has been confirmed by that court, it can be guessed that the conviction of the defendant is almost definitive. Therefore, in Criminal Procedure system of Iran, it is most suitable to anticipate an independent and impartial judicial authority outside the court and public prosecutor's office in order to control temporary detention orders, and this authority should be certainly managed by system of plurality of judges so that the percentage of errors become minimized, and this authority will be formed of the 2nd degree; the primary competent authority should be responsible for issuing temporary detention order, the appellate authority be responsible for controlling the orders issued by the primary authority; and these two authorities be responsible for issuing and controlling all the orders issued by the public prosecutor's office, courts of first instance, appellate courts and provincial criminal courts.

3-3-Automatic Interruption of Temporary Detention Order:

If the defendant has objected to the temporary detention order within the time limit, but the prosecuting authority does not pay attention to his request, or if he refrains from forwarding the case to the appellate authority, or the appellate authority refrains from hearing the appeal within the time limit, no sanctions have been predicted in the current laws concerning the order itself (not the
violating authority), and if the defendant is detained for more than the minimum possible penalty provided by law.  

Therefore, it seems that the law should interrupt the temporary detention order in this respect, and oblige the authority of prisons to free the defendant; furthermore, in all the temporary detention orders, the minimum possible penalty provided by law should be mentioned so that at least, after the elapse of the time, the defendant be freed from the prison automatically.

3-4- The Necessity for Considering the Days of Temporary Detention:

It sometimes happens that the defendant is detained temporarily for a long period of time; eventually, if the court finds him misdemeanant, will attempt to sentence him; under Article 18 of Islamic Penal Law, if his sentence is imprisonment or pecuniary penalty, detention period will be deduced from the determined punishment; however, if the determined punishment is whipping, dismissal from service, etc., the Law has not anticipated any judgment in these cases; thus, it is necessary that the Law attempts to compensate the detention period and makes clear for deducing the convicted person's punishment.

C. Compensations for the damages incurred due to Temporary Detention of the Innocents:

Those who are accused of an offence, and detention order is issued for them, may be acquitted from the accusation attributed to them by virtue of the definitive judgment of the court, or the public prosecutor's office issues the order of non suit or nolle prosequi for them. It is obvious that a defendant who has been detained for months and even for years, has sustained losses and damages and he may even lose his job and his family become disintegrated.

Concerning the judge's mistake or fault which results in material or non-material losses and damages, principle 171 of the Constitution of I.R. of Iran prescribes that the judge himself and otherwise the government shall compensate the damages; however, when the subject-matter is not within the scope of this principle, the authority who should compensate the damages and the manner in which it should be done has remained unclear. Therefore, it is necessary that in the subsequent amendments to Criminal Procedure Code, the lawmaker clarify the way of compensating for the damages sustained by those who have been detained innocently, and also no negligence has been observed in their trials. This is feasible through organizing a special commission and with an accurate organization, and special provisions; therefore, violation of law is quite clear and manifest in this respect which must be eliminated.
Conclusion and Suggestions:

1. Cases of issuance of temporary detention in criminal procedure code and other laws in Iran are many; thus, it is necessary to minimized this "cup of hemlock" meaning bad but necessary to be used".

2. The words "moral vandalizaton and corruption" mentioned in note under Article 32 and paragraph "d" of Article 35 of the Criminal Procedure Code are ambiguous; thus, it is necessary to omit them, or the applicability of moral vandalizaton and corruption be determined in a limitative way so that the defendant's rights are not infringed.

3. Paragraph "d" of Article 32 of the Criminal Procedure Code is so vast that the judge can issue a temporary detention order for each offense; thus, it is necessary to restrict the cases of applicability of the said paragraph, and in general of the article itself.

4. The authorities who are entitled to issue the temporary detention order include public prosecutor, assistant to the public prosecutor, interrogator, and the judges of court; since the above authorities are also the examining authorities, and specially, since the authorities of public prosecutor office are also one of the parties to the case, and are considered to be complainants, and also have the right of protest to the judgment, it is necessary that the authority issuing and controlling temporary detention orders be an authority independent of the judges of court and public prosecutor office; and because of the importance of temporary detention order the system of plurality of judges be employed for this kind of authority so that the equality of parties to the dispute and a reasonable balance is created between them.

5. With regard to delivering a copy of the temporary detention order to the defendant, or to his legal attorney, the law has remained mute. Thus, the lawmaker must identify this right for the defendant.

6. The authority examining the temporary detention order issued by Provincial Criminal Court is not known; these orders are considered definitive; therefore, it is necessary to recognize it as appealable and determine the examining authority.

7. With regard to considering the previous days of detention, when the court determines punishments other than imprisonment or pecuniary penalty, for instance, whipping, and dismissal from service, the Criminal Procedure Code has remained mute. It is suggested that a fixed and clear formula be specified in order to make up for this effect.

8. Compensating the damages and losses incurred due to temporary detention of the innocents, the forum, the examining authority, and the manner of payment, and the amount of payment of the damages have not been specified in Criminal Procedure Code. Thus, since this issue happens frequently, the necessity of lawmaking is undeniable.

9. In current laws of Iran, objection to temporary detention order is permissible only by the defendant or his attorney; it seems that granting this right to close friends to at least to his family members is reasonable.
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