

Incompetency and Interdiction

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ABSTRACT

Competency and interdiction, especially in civil code, are the most important legal and fiqh issues, so that according to the article 90 of Iranian civil code, competence is an essential condition for deal truth and in the article 211 of the civil code it is appeared that:

“The dealers are competent if they were mature, sane.” Also the article 1212 said that the same deal with insane and immature ones is void because they lack competency. On the other hand, in the article 1207 of the Iranian civil code minors, insane, and immature persons are considered as interdicted persons about handling and possession of properties and financial rights. Defining competency, incompetency and interdiction, here the common points and the differences of these items will be discussed according to experts’ opinions and laws. Meanwhile these questions will be answered: is competency opposed to incompetency? Is incompetency included only financial rights? Is incompetency included enjoyment also? Can we regard interdiction as equal with incompetency?

KEYWORDS: Competency, Incompetency, Interdiction, Enjoyment Capacity, Competency to Take Possession

INTRODUCTION

There is no definition for competency in the Iranian civil code and this says nothing in this regard, but we can define competency according to other texts. About such definition there is no disagreement and our jurists almost all have accepted the definition of competency.

Literally the word competency means “deserving, merit, and capability” [1]. Accepting the literal meaning of competency as deserving and merit Mohammad Ja’fari Langeroodi defines competency as following: “competency in law science is legal qualification to have a right (entitlement competency) or implementation right (competency to take possession or competency to implement the right)” [2]. Accepting literal meaning of competency as merit and capability, Hossein Safa’i and Morteza Ghasemzadeh have defined competency as follows: “in general sense competency is one’s capability and merit to have and implement the right and this will be provided in its perfect way if person is reasonable and mature” [3].

We differentiate two kinds of competency according to the definitions by Iranian jurists and others: enjoyment competency, and competency to take possession.

Defining each of above kinds and preferring entitlement instead of enjoyment when he defines entitlement competency, Ja’fari Langeroodi said that: “entitlement means that a person has this ability to have some rights (or certain rights). A real person, as an example, have the marriage right, but a legal person hasn’t competency to such right” [4]. About enjoyment competency also he maintained that: “enjoyment competency (entitlement competency) means that a person has this chance to have a right or rights adducing national law. Foreigner persons, for examples, haven’t right to publish newspaper and can’t vote in national municipal elections, but they have residence right and have possession right about estates in Iran.”

The writers of the civil Rights of Persons and Interdicted Ones have used the term “competency to have right” and they maintained that other terms aren’t sufficient and comprehensive.

Enjoyment word is appeared several times in the civil code (articles 957 to 960). The late Nasser Katoozian has suggested the term “competency to possession” against enjoyment term. Enjoyment competency or having civil rights and freedom is starting with birth and ending with death. According to the article 957 of the civil code, fetus also is enjoying civil rights provided that it comes to the world alive. Also the article 958 stated that “every human enjoying civil rights and nobody can implement his/her rights unless he/she has legal competency to do so.”

According to this definition, principally, everyone has enjoyment competency and can have rights, even minors and insane ones can be rightful, and for example they can be owners and creditors. These rights are based on being a human. All obtain the ability to have rights when they were born, however competency to have rights or competency to possession, or entitlement and enjoyment, all of these mean that a person has qualification and ability about

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having rights, and such competency depends on different states of person's life. Human being's stages of life are: periods of fetal period, childhood, discretion, mature, and developed. In fact human being's competency is starting from birth incompletely and it gradually developing.

Ja'far Langeroodi about competency to take possession or competency to implement the right writes: "the competency to take possession means that a person has the capacity to obtain a right and to realize it." In definition of the competency to implement right he maintained that: "it means that a real or legal person has the legal qualification to apply a right it has without any legal representative such as parents, guardian, and executor. Those sections in the civil code which are discussed about interdiction are related to such kind of competency, so when this competency is absence then interdiction will be occurred." Definitely according to Ja'fari the competency to apply a right also is equal with the competency to entitlement or the competency to implement a right.

The writers of *The Civil Rights of Persons and Interdicted Ones* also about the competency to implement right maintained that: "the competency to have rights always isn't with the competency to implement right, because this is possible that a person has a right but he/she can't implement it. A person who has a right or undertakes a task can implement this right or task if he/she has ability and merit to do it. This is the competency to take possession according to the Iranian civil code" [5].

According above, the competency to take possession or the competency to implement right is the person's merit to do legal actions. Enjoyment is a necessary thing for the competency to take possession; because at first one must have a right then he/she can implement it. Opposite to enjoyment competency, some persons haven't the competency to take the possession. The legislator enacted some limitations to such kind of competency so that it isn't considered as absolute competency. It is appeared in the article 958 and limitations of enjoyment competency are described here as following: "everybody enjoying civil rights but nobody can implement his/her rights unless he/she have legal competency to do so." Therefore in opposition to some writers, enjoyment usually isn't accompanying with implementation of right, for example the competency to deal isn't necessarily doing this deal and implementing this right, rather if the owner of right decides to implement the right and other needed legal conditions to be realized then the deal may be performed.

It seems that competency in the Iranian civil code is the legal competency or the competency to take possession which needs some conditions according to the article 1211 including: mature age, healthy mind, and development age.

Interdiction is also one of important subject matters in fiqh and law. Some have considered interdiction rulings under one section with same name, also the rulings about bankrupt; but some others have considered two separate sections for interdiction and bankruptcy.

Interdiction in *Dehkhoda* dictionary means preventing somebody from possession of his/her property. In *Detail Terminology of Law* has defined the interdiction as following: "interdiction means lack of proper conditions to possess and to implement a right which a person has, whether it is because of mental defects (for example interdiction of minor or insane ones) or not, for example interdiction of bankrupt and drunken ones about implementing their rights" [6]. He mentioned that interdiction is not specific to private rights and it is the case in general and international law. Ghasemzaden and Safai also maintained that interdiction means preventing and about its legal term they stated that: "interdiction means lacking the competency to take possession" [7]. Then they define it as follows: "interdiction is preventing somebody according law ruling from handling his/her things and legal things independently and personally without other one's intervention, and also his/her legal incapability about implementing and enforcing rights." These writers maintained that interdiction in the contemporary law has extensive meaning and we can't limit it to financial issues although faqihs and jurists and legislator paid their attention more to financial issues in this regard. Also there are specific questions and rulings about interdiction in nonfinancial issues, for example: divorce as a nonfinancial matter is the case about interdicted ones. Therefore interdiction isn't exclusive to financial matters in Iranian law and in the section of legal nonfinancial matters also interdiction is considered. For example there is a full interdiction about insane person, so such persons are prevented to do legal actions including financial and nonfinancial ones.

According to above definitions, is incompetency included enjoyment also?

As mentioned earlier about enjoyment competency these rights start from birth alive. The article 956 says: "competency of having rights starts from birth alive and ends by death." And according to the article 957 fetus also enjoying the civil provided its birthing alive. Therefore enjoyment incompetency seems impossible rationally and legally unless person is born dead, thus it hasn't necessary competency to have rights and tasks. The only exception to this general rule is its right about funeral. So parents are obligated to do this for dead fetus; also this is right about persons who will die. This means that human being after death will lose their enjoyment and implementation competency, but only some exceptional rights remain for dead ones including funeral by heirs and will.

Therefore about rights we can't speak of incompetency, but incompetency here is applying about implementation and legal actions. Also the only case that we can refer to it as an instance of natural and enjoyment

incompetency is legal person's incompetency. This is about some affairs which aren't in their professional field and also aren't as primary aims of their legal institute. For example things about marriage, divorce, death, and dead ones are among human's natural and intrinsic rights, they aren't transferable to others. Also this is right about commercial activity by noncommercial institutes. So, legal persons haven't competency to do above items.

In *Persons and Properties*, Safai wrote that: "it is a principle that everybody has enjoyment competency" [8]. He also with Ghasemzadeh wrote another place that: "about enjoyment competency, competency is the rule and the article 956 of civil code also confirm this matter; and about the competency to take possession, incompetency is suggested" [9]. The incompetency to take possession or the legal and implementing incompetency may be divided into two kinds: "general incompetency and relative incompetency" [10]. Persons, in general incompetency, are deprived of all deals and possessions about their properties and financial rights. For example permanent insane ones are deprived of implementing all of their rights and possessions, so that they even confirmation and validation of their natural guardian or executor can't remove the annulment from their actions, because they are deprived of implementing personally and only natural guardian or executor can make deals and financial possessions in their behalf. But some persons have legal competency totally and only in some specific cases they are deprived of their competency, for example sane, mature and developed persons have this right to make various deals and possessions unless when they are deprived of such right. For example a bankrupt businessman in time of bankruptcy has no right about his/her properties and financial rights and is in blocked list, here this incompetency is a limited one. Therefore a bankrupt trader can make a deal and apply a possession right about others' properties as a legal representative and to sign a contract and make a deal. But why despite emphasis by the article 956 of the civil code about enjoyment competency for human being from birth even from pregnancy, the article 957 of same civil code says that implementing such rights is provided to legal competency and when this competency is absent then real and legal persons haven't competency. For example according to the article 1207, minors, insane and undeveloped persons are deprived of their rights about their properties and financial rights, or according to the article 1982 those who acquired or will acquire Iranian nationality will be deprived of some political, security, martial posts which are mentioned in the article such as parliament membership. As mentioned before, definitely the base for enjoyment competency is being a human one, and human have social, economic, political ... rights naturally and intrinsically, and these are defined by constitutions in agreement with any country's political system. It is necessary to say that incompetency referred here is the incompetency to take possession not enjoyment incompetency, because enjoyment incompetency isn't accepted. On the other hand, incompetency isn't only about financial issues in the field of personal rights, rather it is also about nonfinancial issues and even collective and international rights, so the base of incompetency in financial issues can't be considered identical with the base of incompetency in nonfinancial issues and personal and collective rights. Although for all the base is law, but the legislator's aim about definition of incompetency is different for each of them. For example according to the clause 2 in the article 190 of the civil code, both parties' competency is one of essential conditions for a deal, and in the article 211 it is emphasized that: "dealers will be considered with competency if they were mature, sane, and developed", and then immediately it is mentioned in the article 212 that: "deal with persons who weren't mature or sane or developed is void because of incompetency."

With attention to above points the base of legislation about such competency is discrimination and understanding, in the other words, if a person's discrimination is whole then it can be said that he/she has full competency and can understand profit and loss in a deal. But some persons haven't competency in the view of legislator, for example an irresponsible one who has defect discrimination and he/she can't discriminate between some things. Making some limitations, jurists and faqihs don't want to destroy the rights of such persons, rather by considering such incompetency they aim to protect irresponsible, insane, and minor ones from swindling by cheaters who want to use this defect discrimination for their advantages.

This legislator's emphasis on financial issues not only is for protection of interdicted persons, but also is for protection of third party's rights. The legislator tries to identify weakness points which may be misused then to block such ways aiming to protect the rights of persons whether interdicted or third party ones. For example in this regard we can refer to the incompetency of a bankrupt trader about his existing properties. The article 418 of trade law says: "a bankrupt trader is forbidden from intervention in his/her properties at the moment of verdict even about those properties which may be obtained during bankruptcy." The legislator here aims to protect creditor's rights and preventing a bankrupt trader to make financial actions against creditors." Such protection is called suspicious interdiction. On the other hand, as mentioned before incompetency isn't limited to financial issues. The legislator pursuing further aims by incompetency, for example the aim for regarding incompetency of those who obtain Iranian nationality to be president or parliament representative according to the article 982 is to protect society and preserving public order. Public order is a general matter and can be attributed to social security, protection of

individual's life and freedom, country totality, and also preventing foreigner forces from penetrating in the country. Referring to public order, in all aspects, the aim is to prevent a thing which is against public and social interests.

According to above and because rules about competency and incompetency are related to social interests and because they have special importance, then these imperative rules are related to public order, so an agreement in opposition to such rules isn't acceptable. As an instance, a person who hasn't competency can't do a legal action with concealing his incompetency and cheating others if legal competency has been considered as one of main conditions for such actions to be valid. About the significance of society's interests the article 975 stated that: "the court can't enforce outside laws or private contracts which are in opposite to ethics or are against public order because they lacerate society's feelings, even if such laws to be allowed principally."

There are two opinions about the relation between incompetency and interdiction and whether both are equal or not: "rejecting enjoyment competency, some believed that incompetency is only about taking possession, in this case they maintained that: "interdiction means incompetency to take possession" [11]. In his view interdiction, same as incompetency, has an extensive realm and includes nonfinancial things also. If we consider the article 211 and 212 besides the article 1207 then we will find that lack of sane, mature, and development as incompetency's parameters are similar to the parameters of interdiction mentioned in the article 1207. The most of jurists maintained that interdiction is exclusive to financial matters, but Safai and Ghasemzadeh have written in the mentioned work that: "it seems that interdiction in nowadays law has a vast meaning and we can't limit it to financial matters, although interdiction has been under attention more by jurists and faqihs and legislator. There are specific rulings also about nonfinancial matters for interdiction for example about divorce, as a nonfinancial issue, and also about confession by minors or irresponsible ones ... in confirmation of this we can refer to full interdiction of insane one so that he/she is forbidden about all of his/her legal actions including financial and nonfinancial matters." In such opinion also interdiction is incompetency to take possession; same as incompetency only doesn't included financial matters rather includes other legal actions. Although this group believed that jurists and faqihs have shown more attention to interdiction for financial matters, some others against some faqihs believed that incompetency is difference from interdiction, this means that prohibited possession about minors, irresponsible, and insane persons is called incompetency and about other cases is interdiction. This is why the article 212 says: deal with persons who aren't mature or sane is void because of incompetency and the article 213 also emphasizes that deal with interdicted persons isn't enforceable. In the third volume of civil code, the legislator after some changes stated that minor, irresponsible, and insane persons are the subject of interdiction as the article 1207 says: "below persons are interdicted about their properties and financial rights. 1- Minors. 2- Immature persons. 3- Insane persons."

Conclusion

According to above it seems that law experts haven't remarkable disagreement about definition of competency, and while there is no definition for competency in the Iranian civil code, but based on introduced definitions by experts it may be said that competency is qualification and merit of a person to have rights and tasks, and to implement and to enforce them, and based on above point the competency of enjoyment and to take possession is defined as one of most important kinds of distinguishable competencies. Although some jurists used other terms including entitlement, competency to have right, competency to implement right and task ... instead of enjoyment and to take possession, but after taking a look at each of them we won't reach significance and serious differences between them and almost they are similar about their concepts. On the other hand, many jurists believed that the main intention from competency in law is competency to take possession or legal competency, and this is what the legislator has meant. This is because enjoyment is a necessary condition of to take possession, in other words, a person must have a right to be able to implement it. In contrast with enjoyment competency, some persons haven't the competency to take possession. On the other hand, for majority of jurists and experts, incompetency doesn't include enjoyment competency, rather what is meant from incompetency is incompetency to take possession. Therefore we can't place incompetency against enjoyment competency, because according to the article 956 in the civil code, every person will receive competency to have rights from the moment of birth, but as stated by the article 958 he/she must have legal competency. It is also found that incompetency doesn't include financial matters only, although there is emphasis on financial matters, but some jurists and faqihs maintained that incompetency is exclusive to financial matters and some others recognized that the realm of incompetency is extended in the field of nonfinancial matters also.

Also incompetency for some experts isn't exclusive to personal rights, but this is present in the public and international law too. According to the discussions about interdiction this is found that interdiction is lack of merit to apply rights because of mental or non-mental defects, also this seems that interdiction also similar to incompetency isn't exclusive to financial matters and it includes nonfinancial matters too, though financial interdiction is more under attention of faqihs. The legal base of incompetency and interdiction was another point discussed here. It seems

that common legal base between incompetency and interdiction is protection of interdicted ones, third parties and society, and also preservation of public order. Another question discussed here was whether interdiction may stand against incompetency, or can we consider interdiction as synonym of incompetency? Studies shown that there are two opinions in this regard: some jurists believed that interdiction is different from incompetency, and some others regarded it as a synonym for incompetency.

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