

Comparative Study of Rules on Preliminary Investigation Stage in Criminal Procedure Law Enacted in 2014 with International Standards of Fair Hearing

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Abstract: The right of fair hearing is known as a human rights international norm to protect people from denying or limiting the individuals from their freedom and human rights illegally and arbitrarily and is applicable in determining the individual rights and obligations and criminal charges against individuals. One of the fundamental rights of human nature is his right to defend in order to preserve his individual rights, justice and judicial security. This right is originated from the presumption of innocence and is one of the most basic rights expected in a government. But, recognizing the rights of the accused by the domestic law of the state and using legal mechanisms are necessary to support it but are not sufficient. Legal aspects are one aspect and the more important aspects are the personal and social benefits aspects and operational and administrative aspects. In other words, providing human rights and legitimate freedoms has its own provisions and supplies. Thus, the defense right of the accused in preliminary investigation stage is one of the important elements of the judicial security and respecting it will make the citizens relax and comfort and will cause the political, economic and cultural development.

Key words: Preliminary investigation, fair hearing, Criminal Procedure Law, the rights of the accused, cultural development

INTRODUCTION

In the constitution of the Islamic Republic of Iran, articles 32, 34, 36 to 39, 164, 165, 166 and 168 refer to cases of fair hearing without explicitly mentioning the term fair hearing. According to these articles, a fair hearing is achieved when the principles and rules of hearing system are governing the procedure and the accused will be placed on trial when he/she has all the guarantees of defense. This right is mentioned in international instruments, including Article 10 of the Universal Declaration of Human Rights, Article 14 of the Covenant on Civil and Political Rights, paragraph B of Article 19 of the Islamic Declaration. In general, the fair hearing standards in preliminary investigation stage can be mentioned in the following cases.

THE PRINCIPLE OF LEGALITY OF CRIMES AND PUNISHMENTS AND THE EMPHASIS ON THE PRESUMPTION OF INNOCENCE

The main purpose of the principle of legality of crimes and punishments is to avoid prosecution and punishment

of people who reasonably believed the legality of their actions. The need for clarification and transparency in the rules, banning the ambiguity in criminal justice, non-retroactive criminal laws and the prohibition of comparing in criminal law are the components of this principle. This principle explicitly focuses on the principle of legality of crimes and punishments in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights to which Iran has joined (Universal Declaration of Human Rights).

In this regard, the assassin of heinousness of castigation without statement which is used in all fields of Islamic Law and criminal justice means that punishment is bad without expressing the crime and punishment and since bad action is impossible to be attributed to God, so God will not punish someone without specifying the law of crime and punishment. Because such a punishment is castigation without statement (Salimi, 1997).

In this regard, the constitution of the Islamic Republic of Iran considered the principle to comply with the Islamic rules (constitution of the Islamic Republic of Iran, Article 36).

But in the new law of fair hearing of the Islamic Republic of Iran enacted in 2014 while expressing the Criminal Procedure Law in Article 1, 4 and 2 also focused on the principle of legality of crimes and punishments. The article states: criminal procedure should be based on law, guarantee the rights of the parties and its rules must be applied in the same way to people who are prosecuted for committing similar crimes on equal terms.

On the other hand, the amendment of Article 30 of the same law on the legality of the proceedings and even the powers of the court authorities stated: attorney is required to continuously hold in-service training courses to acquire skills and perform legal duties for justice agents. So in addition to the law and constitution of the Islamic Republic of Iran, the new Islamic penal code has also emphasized on this issue.

But in keeping with the principle of legality of crimes and punishments, the presumption of innocence arises. The presumption of innocence is one of progressive principles have a long history and has been accepted today by all systems of the Criminal Procedure Law. Although, there are still opponents and members of the positive school have criticized the absolute acceptance of the presumption of innocence. They believe that the principle of the presumption of innocence should not be regarded on congenital dangerous criminals or criminals who are arrested while committing the crime (Zeraat, 2003). In this regard, Articles 19 and 11 of the Universal Declaration of Human Rights emphasized it and its different aspects have been discussed in the sixth international meeting of criminal law in 1953. Participants at this conference agreed over the importance of the presumption of innocence as follows:

An individual should be considered innocent until he/she has not received the final and valid decision. Every defendant has the right to defend himself/herself and discuss all the reasons evidence presented against himself/herself.

Providing evidence is the duty of the researcher and the restrictive interpretation should be done in criminal matters and the doubt should be interpreted in favor of the accused (Ashuri, 2006). But, this principle has a long history in Islamic jurisprudence and principles. Islam released the principle of presumption of innocence for the first time through rule of *dara* and the assassin of heinousness of castigation without statement. Under the principle, people enjoyed adequate social security and for the first time the rights of individuals in the community were protected and guaranteed by the government and the public forces. This principle is not only effective and practical in normal defenses but also where there is the

field of Allah's rights so that conducting divine verdict, namely *Hudud* becomes closed with the realization of doubt (Mohaghegh-Damad, 2001).

In this regard, Article 37 of the constitution of the Islamic Republic of Iran has emphasized the presumption of innocence and Article 4 of the new criminal procedure law stated that: It is the presumption of innocence. Any restrictive attempt that deprives freedom from people and entering into the privacy of people is not allowed except in accordance with the law and regulations and under the supervision of a judicial authority and in any case these measures should not be applied in such a way to hurt the integrity and dignity of people.

THE ISOLATION OF PRELIMINARY INVESTIGATION STAGE FROM THE HEARING STAGE (INDEPENDENCE OF INVESTIGATION AUTHORITY FROM PROSECUTION AUTHORITY AND OBSERVING THE PRINCIPLE OF NEUTRALITY)

Prosecution authority, prosecutor and the investigation authority are the same investigator who is independent of each other in the Criminal Procedure Law. A philosophy that has been stated for the separation between the prosecution authority and investigation authority is that the prosecution authority or prosecutor prosecute the accused on behalf of the public and government. Thus, it is impossible that an individual is neutral and the judge collects and evaluates the evidence and the involvement of prosecution authority would undermine the principle (Zeraat, 2003). Obviously, the investigating judge or prosecutor will be able to collect evidence when he has sufficient independence.

The international documents, especially Articles 10 and 19 of the Universal Declaration of Human Rights, paragraph 1 of Article 14 in the Covenant on Civil and Political Rights, paragraph 1 of Article 6 of the European Convention on Human Rights have focused on the need for a fair and impartial trial that observing impartiality in collecting evidence is the administration of criminal justice.

However in the new articles of the Criminal Procedure Law based on the international evidence and principles of fair hearing, the hearing stages are separated from preliminary investigation and on the preliminary investigation, the prosecutor is responsible to study on the issue. The first part of Article 92 of the new Criminal Procedure Law states that "the prosecutor is responsible for the preliminary investigation of all crimes". But, then the same article stated that: in the absence of investigator, prosecutor has all the powers and responsibilities

specified for the investigator. In this case, if the prosecutor refers the preliminary investigation to the assistant prosecutor, the final arrangements of the assistant prosecutor and the arrest of the accused must be issued to the prosecutor on the same day and Prosecutor will be required to tell his opinions within 24 h. Certainly, entrusting the authority of the investigator to the prosecutor is one of the weaknesses of the new law because in the fair hearing, the emphasis on the independence of preliminary investigation and delegation of these authorities to the prosecutor as public prosecutor is contrary to principle. Thus, being under the supervision of the prosecutor or the need to comply with other judicial authority can make the impartial investigating judge to be faced with the difficult. As the principle of impartiality has been emphasized in Article 93 of the Criminal Procedure Law enacted in 2014 on preliminary hearing, this article states that: the investigator must do his investigations impartially and within jurisdictions and should not differentiate in discovering the circumstances which are (or are not) in favor of the accused. On the other hand, paragraph E of Article 3 that states the prosecutors, right on the investigator is one of the issues that must be criticized and even this article in the new law is more broadly referred to in Article 75: monitoring the investigation is the task of the prosecutor who works on the scope of the investigation, though it may be about something that happens out of that scope.

EXPEDITING THE PRELIMINARY INVESTIGATION AND GAINING THE EVIDENCE IN A LEGAL WAY

According to international standard such as the paragraphs 1 and 3 of Article 6 of the European Convention on Human Rights, expediting the preliminary investigation is one of the fundamental rights of the accused. Paragraph 1 of the above article states that: everyone has the right to claim in a reasonable period and paragraph 3 notes that: any person arrested or detained has the right to be tried within a reasonable time and also has the right to be free during the trial.

European Court of Human Rights (Strasbourg) on August 26, 1992 in the case of Tomasi, condemned the French government to compensate the loss (paying 1 million (Mark) for the long and unreasonable trial duration 10. Thus, each arrested person has the right to be tried within a reasonable time or be free until the trial time (Stefani *et al.*, 1996).

Paragraph 3 of Article 9 of the Covenant on Civil and Political Rights also provides: everyone who is charged with a criminal offense or is arrested or detained should be promptly present before a judge or other officials who are

legally competent to exercise judicial power and has the right to be tried or free within a reasonable time. However, other international documents have mentioned this principle of human rights such as section c of paragraph 2 in the Resolution of the African Commission and paragraph 4 of Article 6 in statute of the International criminal court emphasized the expedition of trial of the accused. In this regard, Article 94 of the new law of Criminal Procedure enacted in 2014 stated: preliminary investigations should be done quickly and consistently and holidays should not stop it. Article 95 of this law stated: The investigator is obliged to provide immediate actions to stop the destruction of crime marks and should not delay to study and collect evidence of the crime (Taha and Eshraghi, 2007).

Thus, it can be deduced that expediting preliminary investigations in the international documents and new Criminal Procedure Law of Iran is considered, so in this sense we are not faced with a legal vacuum but the important issue is that firstly the enforcement was not predicted for non-compliance with the expedition, secondly legislators should consider the reasonable time to protect individual rights and freedoms and thirdly the practical approach is largely different from the law because in many cases, especially in crimes related to the events of 1388, preliminary investigation stage lasted a long time.

But, the necessity of sufficient evidence arises alongside the preliminary investigation stage. With regard to the need to respect the presumption of innocence in criminal justice systems some special requirements were regarded at all stages of the proceedings in order to support the a for e mentioned principle. Including the requirements is proving the accusation by the prosecution authority and private plaintiffs through gaining and presenting legal and legitimate evidence consistent with the fair hearing standards for the judicial authorities. Thus, the investigation issue which is one of the critical measures of preliminary investigation stage is based on gaining and presenting sufficient evidence on the charge of the accused by prosecution authorities and private plaintiffs.

Paragraph 3 of Article 66 of the statute of the International Criminal Court has ruled: to convict the accused, the court must ensure the guilt of the accused beyond a reasonable suspicion. Although, the standard of proof is not explicitly specified in other standards but the Human Rights Committee commented that the proof of accusation is on the prosecutor due to the presumption of innocence and the accused is presumed innocent for lack of sufficient evidence that he is guilty and no one can be assumed guilty until the charges against him go beyond a reasonable suspicion (Ardabili, 2007).

Evoking or arresting the accused in the case is the necessary introduction of investigating the accused so the investigation of the accused must be preceded by adequate reasons. On the other hand, according to Article 129 of the Criminal Procedure Law in public and revolutionary courts the explanation of the charge should be along with the reasons and since, the explanation of the charge is one of the decisions before charging, the existence of enough evidence would be necessary to begin charging.

In Articles 168 and 116 of the new Criminal Procedure Law, the sufficient reasons to investigate and summon the accused are affirmed. Article 168 states that: the investigator should not summon a person as the accused without enough evidence. The same article refers to its implementation and said that: violation of this article will result in disciplinary conviction to four degrees.

On the other hand, the legislator in Article 116 of the law has expressed the requirement for beginning a preliminary investigation for the investigator.

It should be noted that although the principle of freedom for gaining evidence made the facts clear for the criminal justice system but it does not mean that the authorities are permitted to reach the fact in any way because they are bound to comply with relevant laws and regulations. For example, according to Article 5 of the Universal Declaration of Human Rights, Article 7 of the Covenant on Civil and Political Rights and Article 6 of the Set of principles, Article 5 of the African Charter and Article 5 of the American Convention no one should be subjected to torture, degrading treatment or punishment, inhuman and cruel treatment. In this regard, Article 23 of the constitution of the Islamic Republic of Iran has noted that inquisition is absolutely prohibited and Article 38 has focused on the absolute prohibition of torture to extort confessions.

The new Criminal Procedure Law emphasized the materials and techniques in various articles to adhere to the rules and regulations of gaining the evidence. For example Article 36 stated that: the reports of authorities are valid when it is not unlike the circumstances of the case and is prepared in accordance with legal regulations. Article 60 also states that: in the interrogation of the accused, the use of derogatory words, empathic questions or off-topic questions are forbidden. And statements of the accused to answer such questions and remarks from coercion or duress are not valid. Date, time and duration of interrogation should be mentioned in securities and be signed by the accused.

Articles 124 and 125 of the new Criminal Procedure Law, noted that the examination of the place and local investigation is necessary to be done on day. Examination

of the place and local investigation is done by the investigator and the court bailiffs. During the examination of the place, those who are involved in a criminal matter may be present but their absence does not preclude the examination and is emphasized in Article 138. A warrant of investigation and examination of the house and workplace must be approved by the Chief Justice of the province and be done with the presence of judicial authorities.

NON-PUBLIC, CONFIDENTIAL AND WRITTEN PRELIMINARY INVESTIGATION

Preliminary investigation is a series of legal actions that are done by investigator or other judicial authorities to preserve the works and signs and collect evidence of the crime, identify, locate and prevent the accused from escaping or hiding out (Article 90 of the Criminal Procedure, 2014).

So, what is certain is that the accused person is not still guilty and certain principles must be adhered to about him. One of the principles is non-public preliminary investigation.

Non-public preliminary investigation is one of the features of inquisitorial system that has been accepted as one of the fundamental principles of preliminary investigation. Among the advantages of this principle is that since the accused at this stage is only subject to the charge and his offense has not been proved yet if the judge orders the non-prosecution his honor will be kept. The judge also will not be influenced by public opinion, unfair influence and hasty judgments and makes the investigation with more comfort (Zeraat, 2003).

But in the international documents the International criminal court statute can be me referred to as the court has the duty to take appropriate measures to protect the safety, physical and mental health, dignity and the sanctity of private life of the accused considering all relevant factors, particularly age, sex and the nature of the offense. These measures should be based on the rights of the accused and the requirements of a fair and impartial hearing. The court can exceptionally order the principle of openness of hearing and hold part of an investigation as non-public (Ardabili, 2007).

In this regard, Article 192 of the new Criminal Procedure Law enacted in 1393 stated that: Investigation of the complainant and the accused is non-public and private except for compensable offenses that are treated in court as contentious and the investigator is required to make peace and reconciliation or refer the matter to mediation. And more emphasis is also on Article 206 that: investigation and interrogation of witnesses before the court is non-public.

But one of the principles that is in line with the principle of non-public preliminary investigation is secret preliminary investigation.

According to many scholars the preliminary investigation made by judicial authorities is non-public and secret and ordinary people do not have the right to attend preliminary investigation and any official who participates in preliminary investigation is required to keep its secrets (Taha and Eshraghi, 2007).

But, it should be noted that although the lack of awareness of the accused from the judge's actions and prevention of the accused with witnesses and crime associates and assistants, especially in the first hours and days of research helps but in today's world since the need for equality of arms between the parties is emphasized and the purpose of criminal justice is to achieve the fact. Gradually, the confidentiality of preliminary investigations against the accused and his attorney has decreased in the laws of many countries and the ultimate goal is to consider the defensive aspect at this stage of the criminal proceedings (Ashuri, 2006).

Article 14 of the International Covenant on Civil and Political Rights states that: The decision on the confidentiality of meetings in whole or part of the proceedings, whether due to the public order, good morals and public safety in a democratic society or deemed appropriate for the private life of parties or the public meetings are harmful to the interests of justice is possible but the verdict in criminal or civil matters will be made public, unless the audience want it in other way or proceedings are related to marital discords or children's guardianship. Therefore, the confidentiality of investigations is accepted in international documents.

In this regard, Article 91 of the new Criminal Procedure Law enacted in 1393 provided that: Preliminary investigations are carried as confidential unless the law provides it in other way. All persons who are present at preliminary investigations are required to maintain the secrets and in case of violation they will be convicted for exposing job secrets.

On the other hand, Article 146 of the new law states that: from papers, manuscripts and other objects belonging to the accused, only the materials about the offense are gained and presented only if necessary. The investigator is responsible for behaving carefully about other writings and objects of the accused and disclosing the content unrelated to the offense, otherwise he will be condemned for revealing secrets.

Article 96 of this law states: revealing the picture and other information relating to the identity of the accused at all stages of the preliminary investigation by the police

and judicial authorities is banned, unless for the following parties that is allowed only by the investigator and prosecutor of the city.

The accused individuals who committed intentional offenses mentioned in paragraphs a-d of Article 302 of this law who have escaped and there is enough evidence for charging them and when there is no other means of achieving them. In order to identify them or complete the evidence, the original image and the image obtained through their portraits will be published.

The accused individuals who have confessed before the investigator for committing multiple offenses against unknown people and their image will be published to inform victims and file a complaint or a private lawsuit by them.

Article 100 of the Criminal Procedure Act Law enacted in 1393 states that: Plaintiff can introduce his witnesses, explain his reasoning, attend in the investigation, study the minutes of the preliminary investigation or other securities that do not contradict discovering the truth or make copies of them with his own expense. In its three clauses that are mentioned below the legislator considered some restrictions.

Clause 1: At the request of the plaintiff if the investigator considers the access to all or some of the securities inconsistent with the need to know the truth, he will issue the refusal to the request. Therefore, this issue will be notified to the plaintiff and can be protested in the court within three days. The court is required to hear and decide the protest in extra time. The court's decision is final.

Clause 2: Presenting classified documents related to the investigation of crimes and offenses against internal and external security to the plaintiff is prohibited.

Clause 3: Plaintiff should refuse publishing documents that are prohibited to be published except as defending himself to the competent authorities.

Article 101 on the protection of the victim stated that: the investigator is required to take the appropriate measures to prevent access to this information when the access to personal information of the victim such as name, address and telephone number has a potential threat against the victim's physical integrity and dignity. This is applied at the court by the judge and in keeping with the interests of the victim.

But, this confidentiality demands another principle that is the written preliminary investigations. The minutes and preliminary investigation securities are the actions and performance of judge and tells the crime to others. Written investigations are the memorial of the inquisition

period. In those days, most of the people were illiterate but today the written investigations are in favor of the accused, since the lawyer of the accused can find the file content and be informed of the details of the charges and the measures of authorities, especially the prosecutor. In other words, written investigations are done to prevent the destruction of evidence and expediting the preliminary investigations good expression of criminal affairs (Ashuri, 2006).

In connection with the written investigations the international documents emphasized that the minutes of all investigations should be retained and be available to the person arrested and his lawyer. Article 23 of the Human Rights Committee has also stated that the time and place of all interrogations should be included in minutes and judicial and non-judicial hearing should be available (Taha and Eshraghi, 2007).

However, Article 11 of the convention against Torture stated: governments should regularly review the rules, methods and procedures of interrogations.

Remarkably oral or written statement of claims and defenses are included in Article 19 of the transnational civil procedure rules (Ghamami and Mohseni, 2007).

The principle of written preliminary investigations is well considered by the legislator in the new Criminal Procedure Law enacted in 1393 for example the Articles 105, 115, 193, 195, 197 and 201.

Article 115 of this law stated that: writing between the lines, alteration and scraping words in securities investigations is prohibited. If one or more words are added, a thin line must be drawn on it and the investigator and accused must sign it. Also if one or more words are missing or written in the margin, the above parties should sign below it. If this is not adhered to, the words and the lines are not acceptable. Observing the provisions of this Article is required by the judicial authorities and agents of justice at all hearing stages. In the case of detail alteration, the issue must be explained at the bottom of the paper and be signed by the parties.

Article 105 stated that: investigator during the investigation mentions the legal demand of the prosecutor and when he is faced with the mistakes, he will announce it to the prosecutor.

Article 210 focuses on protecting the rights of deaf people and states that: prosecutor chooses a trusted person who has the ability to express meaning through gesture or other technical means as the interpreter for the plaintiff, private plaintiff, accused, witness and the deaf person. The interpreter must take an oath to uphold honesty and trust. If these people are capable of writing, branch secretary writes the questions for them to respond in writing.

Finally, Article 197 of this law mentioned the questions from the accused while the written questions are not mentioned explicitly. However, according to Article 115, it can be said that even questions of the investigator and interrogator must be written in the minute.

CONCLUSION

Given the developments related to the expansion of the concepts and issues of human rights, particularly in the past few decades, the criminal laws, especially the Criminal Procedure Law were reviewed in various countries including Iran. In the meantime, considering the fair hearing according to international standards especially the documents such as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights have been more emphasized. In comparison to such standards and laws of Iran such as the Criminal Procedure Law enacted in 2014, it can be concluded that the legislator has tried to reach the standards of fair hearing and was able to provide cases, such as confidentiality of preliminary investigation being written, non-public, gaining the evidence in a legal way and the principle of legality of crimes and punishments and the presumption of innocence; although, there are criticisms on expediting the preliminary investigation and discussion of monitoring and intervention of prosecutor in the works of investigator and undermining the independence of the investigation authority.

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