



The Comparative Study of Right to Defend in Iran Law and International Criminal Courts

Meysam Behdel Khalifelu* and Mohammad Reza Marandi
Department of Law, Islamic Azad University, Ghermi Branch, Iran.

ARTICLE INFO

Article history:

Received: 18 March 2017;

Received in revised form:
2 May 2017;

Accepted: 14 May 2017;

Keywords

The accused,
The right to defense,
Criminal justice system in Iran,
The international criminal
court.

ABSTRACT

The right to defend is one of the most sacred rights of human which guarantees rights and freedoms of individuals. In fact, recognition of the right to defend for society members against infringing their rights and freedoms is very necessary. Because the right to defend in its deep and expanded concept means "applying the reasoning ability and power of words by using legal instruments to eliminate attributed accusation in the presence of the judicial authorities". Maintaining social order and defending the society rights is limited and balanced with protecting the rights of the accused, so the defense of the interests of society shouldn't be led to ignorance of the rights of the accused. When a person is charged with a crime, he is in danger of being deprived of freedom and he may sustain other prohibitions. Nowadays the defense rights of accused are one of the important principles of fair trial, as well as, in international and regional documents the rules and regulations of the country are considered and supported. This right has also been taken into consideration in Iranian laws and the charter of International Criminal Court. Therefore, this study includes studying the defense right of the accused in system of criminal justice in Iran and the International Criminal Court. In this study the needed data is collected by using documentary processes and scientific resources. The results of this study show that in criminal justice system and criminal courts in Iran, the cases of right to compensate the losses of illegal arrestment, right to enjoy adequate time and facilities to prepare the defense, right to be informed the charges, the right to have interpreter, the presumption of innocence, the right to defend personally or through an attorney, investigator's avoidance of compulsory confessions have been considered.

© 2017 Elixir All rights reserved.

Introduction

In any regular society based on the values and principles of democracy, protecting the people's basic rights and their freedoms represents improvement in its general culture, the rule of law and the attention of governing board to the development of judicial security of society since the government's comprehensive protection of individual's right not only stimulates their interest and support for the system of government governing the community but also stabilizes domestic comfort and mobilization against the aggressions toward the values and internal borders. The right of defense of human rights is one of the most sacred rights of human beings that guarantees undeniable rights. The rights of the accused under supervision have a special sophistication and elegance. In fact, protection of the right to defense in criminal judgment ensures the natural rights and freedoms of persons, especially the right to life. The above rights are along with the individual's characters, irrespective of cultural, ideological, racial differences. Existential philosophy of the right of accused is relying on his freedom "Freedom is a premier value. In most modern philosophical works, freedom is the principal of life. It is the most desirable human aspirations. According to Rousseau, man is born free and should live freely. The best means of ensuring the prosperity of society is the respect for individual's freedom and his willing (Katouzian, 1386).

Preserving the rights of the accused under interrogation are closely linked together, in criminal justice, social rights and international law because preserving the stated rights of accused is along with the ensuring his munificence, personality, and his positions in law and society and preventing the destruction of the accused's personality and statues. All over the world, a healthy social relationship is based on protecting the individual's prestige.

But it began to worry when some of the negative values in society and international community are beginning to spread by Justice officers and as a result, it endangers not only the dignity of people but also the dignity of the government (Abdi, 1391). Since the Universal Declaration of Human Rights, the right to a fair trial has been accepted as a universal principal by governments. And Consequently countries consider it as an international norm. The right to a fair trial consists of a set of rules that determines the way of behavior toward a person before the court in its different stages. So the qualitative and quantitate assessment of the observance of the individual's rights in the judiciary can be helpful. Today, the accused's right to defense which is as an integral part of a fair trial in international and regional human rights is supported in laws and rules of the countries. And it is a set of facilities that are needed so that the accused in a fair trial will be able to defend himself against the claim that is mentioned against his presumption of innocence in a free condition (Omidi, 1383).

Historically it might be possible to study some of the theoretical considerations of these plans and measures in the past and some of the evidences of their existence can be acquired. But public approval to formal acceptance of these precedence can ultimately be witness in the country since the second half of the eighteenth century (Declaration of Human Rights in 1789) and at the international level in 1945 with the adoption of UN Charter. From the second half of the eighteenth century until the second half of the twentieth century some declarations and domestic laws of some countries had recognized some rights of the accused and standards of fair trial and emphasized observing them such as the US Bill of Rights (1774), Constitutional Law (1776) of this country, Declaration of Human Rights and French Citizens in 1789, the Constitutional Law (1795), the rules of Criminal Procedures (1808) (Zlmm,15,1379). Major change in the rights of defense occurred when the international community considered itself as the heir to the massive violations of human rights during World War II. The UN Charter opened the way to the large amount of national documents and declarations by bringing persons to the realm of the international laws and placing them in the global spotlight. The basic rights of individuals that guarantee the protection of individual and social rights and have a significant impact on the security of society is the accused right to defense and to reject the right or false allegations and defend before disciplinary and judicial authorities. Therefore, since the observance of the accused rights to defense can have an important role in satisfaction of public opinions, human right improvement and observance of human rights in the international community. So in this article the right to defend in criminal justice system and international criminal court are studied comparatively to answer this main question: "what assignments do the judicial systems have on the defense of the accused and what aspects have been predicted by the legislator in this regard?"

1.Right to Defense in Criminal Justice in Iran and the International Criminal Court

1.1. Right to Compensate for Unlawful Arrestment or Detention

Despite the presumption of innocence and in order to maintain social order and imposing criminal justice, the judiciary is attempting to arrest many accused people that their crimes are not certain. When these defendants are condemned on trial for a longer period of time or equal to what they have spent in custody, it might be accepted as a suitable action and somehow, the action of justice system can be admired. So the problem occurs when a person after spending weeks, months and sometimes years in prison, was finally sentenced to a fine or even to less than the period that he was in detention or he may be completely exonerated. Nevertheless, when we study these stated detentions from the point of protection of human rights, a question arises that "what is the duty of the society for the periods of time that the defendants have served in jail? and " should the years which the accused has spent in prison be considered as commonplace or vice versa the judicial system should look for reasonable and logical solution?". Despite the above items the issue of compensation of innocence was held in silence in most countries in nineteenth century and the first half of the twentieth century. In the statute book of many countries, the related regulations have not been established.

The reason is that according to oppositions, the compensation of the accused who have been acquitted or the

defendants who their prosecutions have been issued on one hand contradicts with some of the rules of law and on the other hand raises the issue of government responsibility (Assyrian,1376). Anyone who has been the victim of unlawful arrestments or detentions has an enforceable right to be compensated including fine payment.

Comparative and Analytic Study

Paragraph 1 of Article 58 of the International Criminal Court statute has determined that: "Every time after the starting the investigations and attaching the attorney general request, the trial chamber issues detention orders by studying the request of accused or other information provided by the authorities. The right to compensate people's rights that their arrestments have violated domestic law or international standards bindings is very necessary. In other words, the Investigation and administrative procedures to administer the rights of accused is not clear. Furthermore, where the lack of justice is due to the violation of human rights, Amnesty International believes that in addition to compensating the right of accused, the defendants have the right to benefit from other forms of compensation, including enjoying the guarantees of non-repetition, rehabilitation, satisfaction and the restoration of his first situation. (Ashrafi,1386)

In Iranian law, before and after the Islamic Revolution, compensation procedures of illegal detention leading to the acquittal or prosecution of accused were not predicted prior to the adoption of the Code of Procedure adopted in 1392. , but the provisions of Article 171 Criminal allows to predict the loss payment mechanism and restoration of the dignity of innocent accused .The possibility of loss compensation during the arrestment is accomplished in the case of issuing the acquittal or the prosecution of the accused according to Article 260 of the Criminal Procedure Code adopted in 1392. Accordingly, the Article 255 of this law assigns that "persons who are detained for any reason during the preliminary investigation and their acquittals and prosecutions are issued by the judicial authorities, can claim damages from the government during the detention days by complying with Article 14 of this law. Despite the clarity of the law, unfortunately the legislator, under Article 256 of the same law has limited the scope of its inclusion "according to the following cases, detained person will not be entitled to compensation if:

- arresting the person is the result of refusing to provide documents and evidence of his innocence,
- the person suspects himself in order to vindicate the real accused,
- the accused provides backgrounds for his own detention unjustly
- he might be arrested at the same time due to other legal reasons

In accordance with Article 259 of the above Article, " the act of compensation which is referred to in Article (255) is the responsibility of government and if the arrestment is due to the biased declaration of crime, perjury, or the mistakes of judicial authorities, the government must study the issue after the compensation. Although in Iranian law system, the Article 11 of civil liability has considered limitations for civil liability of the government, it has limited its scope.

Because of this, in the next steps the legislator should try to correct this Article to get the government accept its own civil responsibilities.

If the unnecessary arrestment and detention of accused is the result of the bad intention of judge, the government will have the right to probate the offending judge after compensating the loss to innocent person. Today's, this right in the form of "the principle of compensation of innocents" is accepted in the laws of many countries in the second half of the twentieth century. Although the provisions of this Article are predicted in Iran, unfortunately in article 171 of the constitution, the legal procedures for the implementation of this principle have not been approved by the legislators except the Code of Criminal Procedure (1392) which its implementation mired in doubt with the demand of judiciary and representatives of the Islamic Consultative Assembly

2. The Right to Enjoy Adequate Time and Facility to Prepare Defense

The basic and necessary issue in a fair trial is that all the accused of criminal offenses should have the right to enjoy facilities and have enough time to defend themselves in order to ensure the targeted guarantee of the right to defend and this right is the most important aspect of the basic principle of "equality of tools and possibilities". The defense and prosecution must be done in such a way that guarantee the right of two sides in enjoying the equal opportunity in order to get ready to present complaint during the investigation processes. The right of accused to enjoy adequate time and facilities to prepare the defenses in all stages, including at the Court and the different stages of revision, is dispensable. By virtue of this right, the accused must have the right to be in contact with his lawyer confidentially, this right is especially related to those who are in detention. Having enough time to prepare the defense depends on the actual situation of each judicial file and the nature of inquiry processes. These factors help the defendants get access to evidences and documents, his own lawyer and legal time constraints. In addition, the right of accused to be judged in a reasonable time should be paralleled with his right to enjoy the adequate time for preparing his defense. In this regard, subparagraph (b) of paragraph one in the Article 67 of the Statute of International Criminal Court also decrees that "enough time and necessary facilities should be given to him (accused) to prepare his own defense and to be in contact with the lawyer who(m) he has chosen" (Taha, 1386). Thus, in order to prepare a defense and also to enjoy facilities the accused should get access to the following:

2.1. Right to be Informed of the Charge

Everyone who is arrested should be informed of the reasons causing his deprivation of liberty. The main purpose of the necessity of informing is that, in terms of legislation, the detained person can complain to the credit of arrestment processes, so the stated reasons must be specified and should include clear explanations of the legal basis of detention. In other words, the accused right to inform of the charges and its roots is the respect for his right of defense, and establishing a balance between the accused and the claimant because the accused's ignorance of the charges and their reasons leads to the violation of his right to defend and deprivation of his personal liberties (Rajabi, 1386). The subparagraph (a) of paragraph one in Article 67 of the Statute of the International Criminal Court decreed that "the accused should be informed with the nature, reason and the content of his charges in a language which he fully understands and speaks it. The right to defend is a basic human right in the criminal justice system that is considered in Article 32 of the constitution of the Islamic Republic of Iran 129, 124, 192

Code of Civil Criminal Procedure law and Article 46 of new criminal procedure law. If necessary, the accused should be informed with his charges and this must be done in writing form before the detention so that the accused gets aware of the reasons of his detention and his charges. It may be possible that after the getting his charges, some reasons and defenses suggesting his innocence are presented by the accused. Therefore, there is no need to the prosecution of the accused (Zeraat et al., 1387). The meaning of "realization of charges" is that the accused is informed of the crime or alleged crimes, all the reasons, and its documentations so that he would be able to consciously defend himself. We cannot expect a person to be accountable for his vague charges and then he can defend himself. (Akhondi, 1392). The realization of charges is the starting point of criminal procedures and defending. It is the basic right of the accused. It is a basic right because the defense of accused against accusation or the defense of accused against the considered charges and denying them depends on accused awareness of these accusations (Sandyani, 1392).

2.2 The Right to Have an Interpreter

If the accused of a criminal offense doesn't understand the language of the court, he can have the right to get access to the assistance of a qualified translator and his documents will be translated. If the accused has difficulties in understanding or reading the language of the court, the right to have a translator can guarantee a fair trial. These items are needed to guarantee the accused right to enjoy the adequate facilities in order to prepare a defense, the principle of equal equipment and fair trial. However, if the defendant speaks and understands the language of the court appropriately but prefers to speak another language, there will be no need to provide free interpreter service for accused (Taha and Ashrafi, 1386). Article 202 of the Code of Criminal Procedure 1378 in Iran's judicial system says that "if the plaintiff and private claims or the accused or witnesses do not know Persian the court will determine two translators. The court interpreter must be reliable and be fully committed to translate all the statements correctly and without any changes". The above Article believes in getting access to an interpreter in courts, if necessary, it can be applied in preliminary investigation stage which is the basis of a court filing processes. In Article 31 of the Criminal Law approved in 1337, the translator should be committed and sworn that he is translating the content correctly and without any changes (Bahramy pour, 1392). But the Article 200 of new criminal procedure law approved in 1392 says that "the right of an accused to a translator in preliminary inquiry stage is the responsibility of the magistrates".

The Presumption of Innocence

The concept of presumption of innocence represents the public power. It is one of the most important principle and guideline in the criminal law. Today's in modern systems of justices, by developing of the concept of presumption of innocence we can expect this concept to function as the guarantor of the people's security and liberty. In other words, the aim of the presumption of innocence concept is to protect ordinary people against aggressions, especially those in power and the representatives of public powers.

In New systems of justice, a concept that has of primary importance is applying the presumption of innocence in all stages of the trial procedures, especially observing the equality of individuals before the law and having access to the means of defending.

So we can call the presumption of innocence concept as "the mother of principles". Because it would prevent judges and police arbitrariness in arresting the accused and provide the individual's freedom.

Comparative Study

The constitution of Iran, which is based on Islamic law, has added the "presumption of innocence" into its basic principles, and prescribed in Article 37 of the constitution that "the principle is on the base of the presumption of innocence concept and from the perspective of law, no one is guilty. This principle of constitution defends the most basic fundamental right of accused and dominates all criminal laws. Following the constitution of the Islamic Republic of Iran, in paragraph A of Article 177 of the Code of Criminal Procedure approved in 1378, the lawmaker has prescribed that, "in the case of the absence of charges against accused or if the charges assigned to him is not guilt, the court can issue the acquittal verdict. And paragraph 2 of the Single Article of the Law Concerning respect for Legitimate Freedoms and Protecting Citizens' Rights has emphasized on the implementation of these principles. Until a crime has not been approved by competent courts or it has not been confirmed according to the reasonable rates and authoritative legal sources, the vote on the innocence of accused of innocence of accused can will be issued. As well as paragraph 2 of Article of Respecting Legitimate Freedoms and Protecting Citizens' Rights emphasizes the implementation of these principles. Article 4 of The new criminal procedure law proved in 1392 which is about presumption of innocence says that "any restrictive measures that deprive the person of his liberty and get into his privacy aren't allowed except in the case of

The rule of law and under the provision of judicial authorities. Anyway, these actions shouldn't be taken in a way that harm the individual's dignity.

The Right to Defend Personally or Through a Lawyer

Each accused of crime has the right to have a lawyer or to defend himself personally. Also he has the right to enjoy the legal assistance of his lawyer. The right to a lawyer is one of the accused's main rights. The right to a lawyer in the preliminary investigation and the necessity of his presence to defend the rights of his client especially during interrogation is very fundamental guarantee of individual rights and freedoms, especially as the legal issues get complex. An accused in a self-defense position in which he needs knowledge of laws and judicial affairs can use the presence of a lawyer (Moazzen and Zadegan 1373). The presence of Lawyer causes to eliminate the fear while answering the questions of competent judicial authorities. Presence of Lawyer makes the accused feel more relaxed while answering the questions raised by the competent judicial authorities. Guaranteeing the rights of the accused under the criminal procedural process in accordance with the principles of fair trial, necessitates the right of the accused to get access the legal aid and lawyer. Fortunately, the right to a lawyer has been well anticipated at all stages in new criminal procedure law approved in 1392 in which the right to access an attorney is considered as the main right of the accused.

The new criminal procedure law has anticipated the defendant's right to counsel a lawyer by moving toward the justice system charges from the early Stages of judicial process. Also in Article 190 of new Code of Criminal Procedure approved in 1392, the principle of equality of arms has been considered and has clearly been implied so it can be

said that it is one of the essential innovation of new code of criminal procedure. Even in Note Article 190 of the new code of criminal procedure approved in 1392, the lack of accused's access to a lawyer makes the investigations invalid. So the police as a sovereignty should respect the right of accused to counsel and provide the context of the realization of his right. Alternatively, paragraph 1 of Article 67 of the Statute of International Criminal Court provides that: "With respect to paragraph 2 of Article 63, the accused should attend in trial personally or through the legal counsel of his choice in order to conduct the affairs of defense processes and in the case of not getting access a lawyer and even if he does not have the financial ability to pay for, he has the right to the assistance of legal counsel that the court has provided in line with the administration of justice. The right to legal assistance includes the right to choose a lawyer or counsel or get access a public defender in the cases that justice demands. In addition, the defendant and his lawyer will be given facilities and enough time to prepare for defense. (Taha and Ashrafy, 1386)

Prohibition of Compulsory Confessions

It should be noted that the purpose of inquiring the accused is discovering the truth not imposing the desired demands on accused. So prosecutor or judge must discover the truth by raising useful and clear questions and they should avoid resorting to illegal methods. According to Jurisprudence and jurists, a confessor must have the power of reasoning wise and be a free person. So confession of a demented person is legally invalid due to the lack of adherence to Elimination Tradition. (Shahide sani, 33). However, some public jurists consider the practice of torturing the defendants by burgesses and the governors of Islamic societies to get confession as a true one but on the other hand, they have refrained the practice of torturing done by judicial judges, but Shia scholars don't consider the practice of torturing an accused to obtain confession as a legal process (Montazeri, 1376). No person who is accused of a criminal offense should be forced to confess or witness against himself and this right should be considered in both before and after trial. The subparagraph (a) of paragraph 1 in Article 55 of the Statute of the International Criminal Court decreed that "the accused should not be forced to confess against himself. The Human Rights Committee has opined that " forcing an accused to provide information and get confession, or obtaining the confession by using torturing and other inhumane methods have preliminarily been prohibited. Therefore, deceiving the accused during interrogation is prohibited. Paragraph 1 of Article 67 of the Statute of the International Criminal Court prescribes that "The accused shouldn't be forced to confess the allied gilts; he can remain silent without that his silence to be considered as a confession or admission. According to Article 6 of the Law of Respecting Legitimate Freedoms, in order to protect the civil rights of citizenry in the investigation stages, some measures should be avoided like blindfolding the person and despising him. In compliance with Article 7 of this law, the police and prosecutors and investigators must avoid covering their faces and sitting behind the defendants, or taking them to undisclosed locations and generally taking illegal actions.

Of course in Article 10 of above law, it has clearly been prescribed that "investigations should be done in accordance with scientific and legal methods. And with those who ignored the orders and regulations will be dealt seriously.

Article 199 of the new criminal procedure law approved in 1392 concludes that legislator of penal system has to prevent interrogators from any kinds of distortions in addition the investigators can also take effective steps to defend the rights of the accused by determining the legal obligations and options like signature or finger print of accused, writing the accused's answers, and preventing possible abuses in the investigation processes.

Results

The required studies and researches have been conducted to answer the following question that "how is the procedures of the accused right to defend himself in penal system of Iran and in the international criminal courts "and accordingly the legal disadvantages and shortcomings and examples of each are also illustrated. In order to improve the quality of laws, especially criminal processes, some necessary proposals will be presented. According to what have been studied in this research, we understood that although in the past and at the present time some steps have been taken in criminal law of Iran, the right of the accused to defend hasn't been considered in a way that he deserves and unfortunately this right has been neglected somewhat in Iranian Penal System. In Iranian Penal System and International Criminal Court, in recent years some cases of observance of the right to defense have been reported that among them we can point to respecting legitimate freedoms and retaining the right to civil defense of course, there isn't enough guarantees of their accomplishment. In criminal law of Iran and international criminal courts, some rules related to the observance of the accused's rights to defend haven't been laid down clearly and different interpretations cause the personalization behaviors toward the accused that conflict with the dignity of law. But an important step that has been taken by the criminal system of Iran toward the basic principles of defense right is approving the new laws of code of criminal procedure in 1392 in which the right of accused to defense has been further considered. Approving this law is an important revolution in reviving the rights of accused.

References

- Akhundi, Mahmud, (1392), Practical Criminal Procedure, vol.5, no.3, Mizan Publication
- Ardabili, Mohammad Ali, (1381), General Criminal Law, vol.1, no.4, Tehran: Mizan Publication
- Bahramipour, Rasoul, (1392), Comparative Study of Law Official's Requirements for Protecting the Rights of Accused in Criminal System of Iran and France, the Master's Thesis of Criminal Law and Crimology
- Eydi, Hossein, (1391), the International Justicers and International Court of Justice, no.1&2
- Karimiyan, Esmaeel, (1386), the State of the Judiciary and Judicial Independence, Juristical Bulletin, Rasht, no.1
- Katouzian, Naser, (1386), The Introduction of Law and Studying Iran's Legal System, no.56, Enteshar Corporation
- Moazzen Zadehan, Hasan, (1373), Litigation Rights and Defence in Constitution of Islamic Republic of Iran, Bulletin of Juristical View, the College of Judicial Sciences and Official Services, no-Rajabi, Abdollah & Sandyani, Mahdiyeh, (1392), the Right of Accused, the Master Thesis of Criminal Law and Crimology
- Shahidi, Mahdi, (1382), Civil Rights, the Influences of Contracts and Commitments, Majd Publication, vol.3, no.1
- Shams, Abdollah, (1383), Advanced Civil Procedures, vol.3, Tehran: Derak
- Mousavi Bojnourdi, Reza, (1392), the Government's Judicial Immunity in International Law, no.2
- Zamani, Seyyed Gasem, (1383), the International Responsibilities of International Organizations, the Journal of Law, no.24
- Zeraat, Abbas, (1387), General Comparative Criminal Law, Tehran: Fekr sazan Publication.