

The rights of Accused person against Silence in the International Documents and Iran's Law

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ABSTRACT- the right of accused person includes all advantages and facilities which are considered to an accused person from the starting of a just prosecution to sentencing him for defense him against claims which are allocated to him unlike the commitment of legal exception or exemption; such that the defense against society's advantages must not end in neglecting the rights of accused criminal. In this respect, the penal court regulations must be amended in a manner that in addition to respecting the rights and obligations of society must help an innocent and common person to prove his/her innocence. Among many regulations and laws, it is the penal codes and rules related to penal courts, especially, that contribute a significant role in continuity and survival of arrangement and discipline in a community. Themes like, trial and Prosecution issuing the decree of proscription for criminal persons without any injuries and damage to them and their rights as well as preserving sinless and respectful persons from any unjust and unlawful proscription, which are among the most significant objectives of penal court codes, are directly concerned to the order in internal and world community and society. Right to silence and the right to be preserved from any torture are included in the rules recognized by majority of the countries as a lawful right of an accused person or criminal and because of its significance it is chosen as the subject matter of this article; in addition we investigate the orientation of Iran's laws and regulations as well as global and abroad documents. © 2014 Bull. Georg. Natl. Acad. Sci.

Key words: accused, right to silence, torture, fair trial

INTRODUCTION

Accused's right and its principles such as the legality of crimes and punishments, equality against law etc., are defined for the accused people 14 centuries ago by Islam, but it was in 18 century (French revolution, 1789) that governments accept these rules and principles and necessitate their citizens to follow them; in fact it was after 1789 that the majority of national and international rights and principles that we accept today as the accused's rights such as right to silence, prohibition from torture etc., were considered in international level as the definite and necessary rights. Many of the accused's rights that we know today and are defined internationally, not only were not considered as an accused's rights but also acting against it like torturing the accused, which is now prohibited in all countries' law and in international level we have the convention for prohibition of torture and other kinds of harsh, inhumane and degrading behaviors and punishments, was considered as a legal act before that period (i.e. before French revolution). In the Middle Ages animals were also subject to torture and even before slaughtering they were tortured; for example we can refer to a case in the late 14th century, i.e., in Jen Le Bon's reign when the regimen of a part of France called Burgni was conceded to Philip the Brave, son of the king; one day three female pigs along with a male pig killed and eat the shepherd; when the case is discussed in the court, the judge ruled that all pigs must

primarily be tortured and then executed for the said crime; in addition other pigs that were attended in the crime site were considered accessory to the crime and accordingly should be executed too! The owner of pigs who saw his rights trespassed, appeal to Philip the Brave and he sentenced that: "Hence the suppliant request us to execute the justice with regard to the four guilty pigs and exempt other pigs from punishment, we accept this request and ordain to do justice only to the three female pigs and that male one, other pigs, despite their attendance in the crime site, shall be exempt from any punishment (1).

BACKGROUND

As you know, confession is one of the evidences of confirming the claim but unlike civil codes in penal codes the accused's confession is only valid when it is a company with definite proofs and evidences. Moreover, we know that one cannot compel an accused to confession, and such a confession is legally invalid (38th principle of Iran's Law). The right to silence is in support of the accused and nearly is accepted by all countries of the world and the accused shall be informed of this right from the beginning of an inquiry. In 1963 the Center for UN Human Rights Studies stipulates that: "The accused right to silence is in line with the principles of human rights and must be respected by the police who should inform the accused or suspect from this right before inquiry." In the first paragraph of the 5th amendment of American Law (1971) the right to silence is defined as: "No one shall be compelled to answer about their major crimes or downgrading offences." Nowadays, before any inquiry, the American Police is obliged to ask the accused "whether they are tended to say something about their charge" and the police must warn the accused about the fact that "it is not obligatory for them to say anything about their crimes unless they tend to, but if they say anything it will be recorded and may be used as an evidence against them (2). It is noteworthy that the importance of "the right to silence" in America is to a degree that once in 1946 American Supreme Court reject the sentence against an accused who was charged with murder only for the fact that he was not given the right to silence(3). In article 114 of French penal court rules approved in 1957 it is stipulated that: "Prior to the inquiry an interrogator must inform the accused of their right to silence and this must be indicated in the minute, if the accused tend to answer it will be accepted by the interrogator....(4) Article 170 of the above rule states that in the case of non-observance of the abovementioned notes in the article 114 the investigation will be of no effect(5)

Accused's right in Iran

In the terminology of law, silence is defined as following: "prohibition from saying or silence does not mean satisfaction"(6). The right to silence is predicted and defined obviously in Iran's statute. Moreover, the right to silence of the accused is implied from principle 38 of Iran's Statute: "Any kind of torture for taking confession or acquiring information does not allowed, enforcing someone to testify, confess or swear shall not be allowed, and such a testifying, confession and swear is invalid. The trespasser from this principle shall be punished according to the law." In addition, the last part of article 129 of Iran's penal court rules (approved in 2000) stipulates that: "Questions must be concise and obvious; suggestive questions, or deluding and compelling the accused to say something should not be allowed, if the accused abstain from answering his refusal shall be indicted in the minute. Paragraph 11 of article related to legal freedoms and preserving the right of citizens is also refers to the accused's right to silence and stipulates that: "every accused have the right to refrain from answering any legal and private questions, which are unrelated to the crime and investigation to the related authorities." In this article the right to silence is limited to incorrect and illegitimate questions. Hence, it is inferred from these articles that in the primary stages of investigation the accused have the right to silence and one cannot compel them to make a confession and such a confession would be invalid, but the important point is that unlike the rules of US and many other countries it is stipulated in Iran's statute that the court is obliged to inform the accused of their right to silence, and this is a weakness that must be amended. And finally it is important to note that the accused's silence is not equal to their confession but it is their pretention to deny, which is in line with the abovementioned points.

The accused's right to silence in international documents

From among the collected materials about the accused's right to silence in international documents we can refer to followings: Article 14 of convention for international civil and political rights (part (J), paragraph 3) with regard to a person charged with a penal crime stipulates that: "... The accused shall not be compelled to testify or confess ..." That is, nobody with a penal crime must be forced to testify or make a confession against themselves, which is stated in principle 38 of Iran's statute too; this is to indicate that since this issue is considered as an accused's protective rights hence it is accepted directly or indirectly in most countries of the world.

Second principle of Body of Principles for the Protection of all Persons Under any form of Detention or Imprisonment states that: "It is not allowed to take advantage of the position of a detained person and force him/her to confess to a crime or compel them to testify against themselves." The same is also declared in the minute of

manifest about fair trial and compensation; in addition there are some cases in UN resolutions, which support the idea that the accused's right to silence shall be observed and for preserving the accused's right to protection and freedom it is necessary to respect his/her right to silence. Articles 55 and 67 of International Penal Court Rules are other documents in which it is referred to the accused's right to silence, whereby the accused shall not be compelled to confess or testify against themselves, and take silence, but this silence neither refers to their conviction nor to their innocence(7). Nowadays, most of civilized countries of the world have directly accepted this right for the accused and some countries like Iran refer to it indirectly, but it is necessary to legislate a new rule, which directly refer to the subject: the accused shall be informed at the primary stages of detention and investigation of their right to silence, as it is stipulated in US law in which if the accused had not warned of their right to silence, the writ against them on the basis of their confession or evidence would be annulled.

The origin of torture and inhuman behavior

Definition and history of torture

It seems that the best definition of torture is the one defined in international penal court rule: "Torture is to cause a major physical or psychological pain or tribulation on a detainee or on a person under the control of a torturer".

But the pain resulting from prohibition, boycott and legal actions was not called torture(8), this was not always considered as a crime but for a long time (up to 18th century) it was taken as a legal act; it is said that in the ancient Greece Aristotle and Montez consider torture as the most certain way for acquiring confession, and in ancient Rom it's use were limited (at least theoretically) to slaves, outsiders and other people who were not of complete legal identity. It was in 384 AD that the Church declared it (torture) as something unpleasant and absurd. Although an especial group was tortured but in Rom Emperor other groups, accused with the charge of betrayal in particular, were gradually exposed to torture. Also in France and England torture was used for taking confession and eliciting other kinds of information. Moreover it was used a lot in Japan.4th century before Christ Buddhism rules and disciplines were governed in Chinese wars, also in Greek, Rom, Indian, Babelian, and Islamic civilizations it is emphasized not to use inhuman behavior (torture) in wars. Then this doctrine were prevailed at European countries and gradually it (torture) was used only for the cases in which there were convincing reasons for the conviction of the accused who was tortured to confess to a crime, or this is done only for the individuals with bad personality(9).

Pros of torture believed that when there is no way for discovering the fact, torture would be the best method for uncovering it; while torturing was not a correct method both logically and ethically was used up to the middle of the 18th century after which gradually during a 50 years period, torture lost its legal quality. But in 1930 the Nazis reused this method until it is prohibited by Human Rights Declaration in 1948. Despite this it is observed that sometimes torture is being used as an approach to uncover the fact or to acquire confession.

Prohibition from torture and inhuman behavior in Iran's law

As it is said many discussions have been made during history about using torture for taking confessions from the accused, in this regard principle 38 of Iran's Statute stipulates that: "Any kind of torture for taking confession or acquiring information is prohibited, forcing one to testify, make a confession, or swear shall not be allowed and such a testifying, confession or swearing will be invalid. The trespasser from this principle shall be punished according to the law." As it is noted if a compelling confession, swearing or testifying is taken such a testifying, confession or swearing will be null and the trespasser shall be punished according to the article 578 of Iran's Islamic punishment law, it is stipulated in this article that: "If a judicial or non-judicial state employee or officer tortures an accused physically (or mentally) to compel him/her to make a confession to crime, in addition to retaliation and paying the specified diyya*for that crime, the torturer shall be punishable with imprisonment for a term of six month to three years; if somebody have ordered this action only that person shall be punished with imprisonment for the said term and if the accused die because of the infliction of a (mental or) physical suffering the torturer shall be taken as the murderer and the one who ordered the torture shall be taken as the one who ordered murdering." Therefore, as it is seen before the accused is exempt from any duty and they shall not be considered as a convict unless they sentence to conviction. Hence any kind of annoyance is illegal and considered as a torture and inhuman behavior and the trespasser shall be punishable according to the above article. Torture is also considered as a kind of aggression to one's life, which is prohibited according to the above principle and shall not be trespassed.

Prohibition of torture and inhuman behavior in international documents

La Haye Conventions of 1899 and 1907 and the 3rd joint article of Geneva Conventions of 1949 and Protocols of 1977 have prohibited torture. Torture is also prohibited in different resolutions by UN General Assembly, the most important of which are five resolutions issued in 1973-76 that were approved without any opposition. Then by the request of UN General Assembly, the Commission on Human Rights approved a "convention against torture and other inhuman and cruel treatment or punishment"(10). First article of this convention presents following definition

of the torture: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. The next article of this convention obligates governments to refrain from torture and also prohibit them from returning the convicts and accused to a government that is supposed to torture them (11)." Moreover, as it is said torturing people is prohibited in international penal court rules. Article 15 of Human Rights Declaration stipulates that: "No one shall be under torture or cruel, inhuman, and degrading treatment or punishment." And article 7 of International Convention on Political and Civil Rights is also repeat the above statement, and it is also declared in article 5 of Human Rights Declaration, which also state that no one shall be under any medical tests or operations unless he (the accused) want to do so voluntarily and without any obligation in this case performing such test is allowed. It is also stated in some other cases that the accused shall be treated humanely and like innocent people; they shall not be exposed to any annoyance or torture or even to any degrading treatment. It is also stated in different conventions that no government or country shall be allowed to consider torture as a legal act and even they are not allowed to consider torture as a legal act for some crimes and exceptional cases. It seems that the most comprehensive international document in this regard is the convention on prohibition of torture and other cruel, inhuman and degrading treatments and punishments approved in 1984; since there are a lot of contradictions between Iranian legal punishment- such as scourging, which is eliminated from many countries' rules, because it is considered as a kind of torturing; and also cutting hair, or turning the convict around a city on a donkey back, or crucifying, which all considered in the said convention as a torture or an inhuman and degrading treatment - and the content of the said convention Iran do not join to this convention.

CONCLUSION AND SUGGESTIONS

The accused right to silence is one of the favorable parts of the principle of exemption, which is due to its high importance in today's law is considered as the most important part of an accused rights. An accused's rights and his right to silence in particular, is originated from natural rights. An accused's statements are valid and can be taken as the evidence for proving his crime only when they are stated voluntarily and without any obligation. If the confession is made compulsorily it will be invalid and of no judicial effect. As a result, since legally it is impossible to compel an accused to speak about his crime, he shall be of right to silence in different stages of trial. Therefore, the origin of right to silence can be taken as an inevitable principle, i.e., "impossibility of compelling one to testify against himself". Hence we suggest the followings: 1. There is no definite rule in Iran's court rule in which the right to silence of an accused is defined clearly for the investigator or interrogator and from the words of article 129 it cannot be inferred that such a declaration is assigned to research judges and authorities; hence amending this weakness seems necessary.

2. Through describing the accused right to silence and his reluctance to cooperation, one cannot compel the accused to confess to a crime or said something about it, and taking confession in this condition is illegal and invalid.

3. Presenting evidence and its burden is among the responsibility of institute for investigation and prosecution, and the manner of acquiring evidence is one of the most important results of the principle of exemption, which must be done through relying on correct legal methods and with observing all ethical principles and standards.

4. According to principle 37 of Iran's Statute and with considering the fact that the right to silence is an inevitable part of the principle of exemption, the accused silence does not necessarily is an evidence for his conviction, but it can only be considered as portion of evidence for the judge otherwise the uncertainty shall be interpreted to the accused's benefit.

5. The role of counselor in the process of investigation and assistance must not be ignored and in this regard as it is said present rules are faced with serious ambiguity and inefficiency. The certain thing is that accepting the right to silence for the accused until the attendance of his counselor can be in line with observing Human Rights and fair trial and leads to the conformity of internal standards with the content of those international documents which Iran joined and committed to obey its rules.

უფლებები ეჭვმიტანილი წინააღმდეგ საერთაშორისო დოკუმენტები და ირანის სამართალი

უფლება ბრალდებულის მოიცავს ყველა უპირატესობა და საშუალებები, რომლებიც ითვლება ბრალდებულის საწყისი სამართლიანი ბრალდების მიუსაჯა თავდაცვის წინააღმდეგ პრეტენზია, რომელიც მისთვის დათმობილი განსხვავებით ვალდებულება სამართლებრივი გამონაკლისი ან გათავისუფლება; ისეთი, რომ თავდაცვის წინააღმდეგ საზოგადოების უპირატესობა არ უნდა დასრულდეს უფლებების უგულვებელყოფით ბრალდებული. ამ მხრივ, სისხლის სამართლის სასამართლოს რეგლამენტის შესაბამისად, უნდა შეიცვალოს ისე, რომ გარდა პატივისცემის უფლებები და მოვალეობები საზოგადოება უნდა დაეხმაროს უდანაშაულო და საერთო პირი, დაამტკიცოს მისი / მისი უდანაშაულობა. მათ შორის ბევრი რეგულაციები და კანონები, ეს არის სისხლის სამართლის ნორმების და წესების დაკავშირებული სისხლის სამართლის სასამართლოები, განსაკუთრებით, რაც ხელს უწყობს მნიშვნელოვანი როლი უწყვეტობა და გადარჩენის მოწყობა და დისციპლინის თანამეგობრობას. თემები, როგორცაა, სასამართლო და პროკურატურა ბრძანებას of სისხლის სამართლის პირები ყოველგვარი დაზიანებების და დაზიანება, მათი და მათი უფლებების, ისევე როგორც შენარჩუნების უცოდველი და ურთიერთპატივისცემის პირები ნებისმიერი უსამართლო და უკანონო, რომელთა შორის ყველაზე მნიშვნელოვანი მიზნების სასჯელაღსრულების სასამართლოს კოდექსი, უშუალოდ არის დაინტერესებული წესრიგის შიდა და მსოფლიო საზოგადოების და საზოგადოების წინაშე. დუმილის უფლება და უფლება უნდა იქნეს დაცული ნებისმიერი წამების შედის წესებს აღიარებული ქვეყნების უმრავლესობა, როგორც კანონიერი უფლება ბრალდებული ან სისხლის სამართლის და ამის გამო მისი მნიშვნელობა ის არის არჩეული საგანი ამ მუხლის შესაბამისად; გარდა ამისა, ჩვენ გამოიძიოს ორიენტაცია ირანის კანონები და წესები, ისევე როგორც გლობალურ, ისე საზღვარგარეთ დოკუმენტები.

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