

Comparative Study of Attorney's Intervention in Pre-Trial Stage and Its Influence on Fair Judgment in Iran and the United States of America

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Abstract

In the legal system of Iran and United States of America attorney possesses the most important position in the Criminal Procedure. This position in Iran and United States of America plays a key role in the pre-trial stage. Legal system in the United States of America is called "common law", and Criminal Procedure in this system is "adversarial". The court does not exist in this system. Iran's legal system which is almost similar to the French system has the court body. Despite this difference, in the two criminal justice systems, there are similarities within the pre-trial arrangements (Yousefi, 2011). Therefore, in this study, the influence of attorney's intervention in pre-trial stage, on three elements of the most important principles of a fair trial, including the principle of neutrality, equality of arms, not giving judicative role to a pursued person have been reviewed. Finally, it was found that attorney's intervention in the preliminary investigation can have negative effects on the principles of fair trial.

Keywords: Attorney, Pre-Trial, The Principle of Fair Trial, Iran's Criminal Justice System, the United States of America's Criminal Justice System

Introduction

Today, with the development of human civilization, the rights of all members of society, including the accused, are very important. Maintaining these rights has been entrusted to the criminal justice systems and courts. All the officials who work in these organizations should be committed to preserve the rights of the accused. The attorney in Iran and the United States of America should also obey this law, and although he/she follows the accused of a crime, as he/she is part of the judicial system, should be committed to this issue. It should be noted that although the tasks and options of the attorney in Iran and the United States of America are not quite compatible, the nature of his action which is prosecuting the accused is the same in both countries. This prosecution is in the name of society and to protect society. Despite this similarity, the criminal justice system in Iran and the United States of America are two different types. The Iran's criminal justice system is a type of French system which prosecution and investigation authorities are relatively separate, while the criminal justice system in the United States of America is called the adversarial system and prosecution and investigation authority is the same person (ibid). By this uniqueness or separation of prosecution and investigation authorities, in these countries, principles of fair trial in each of the two countries have faced challenges which will be discussed later. It also should be noted that among the principles of fair trial, we have considered the principle of neutrality, equality of arms, not giving Judicative role to a pursued person.

Concepts and Position of Investigation and Prosecution in Iran and the United States of America

Concept of Investigation

Criminal investigation in the United States of America is a process during which reasons are being discovered, collected, prepared and presented, so that what has happened, and who is responsible for it, will be cleared. We use inductive reasoning in this method (Hess & Hess Orthmann, 2010). Indeed what distinguishes investigation from prosecution is that in investigation the reasons are collected or in other words they are obtained but the prosecution is a process that the authority implements against the accused and benefits the collected reasons in this process.

As mentioned, investigative measures cover a wide range of measures, including: obtaining and discovery of reason, assessment of reason, issuance of security supply and the final comment on the accused (prior to trial). However, according to the definition of criminal prosecution in the United States of America's law, issuance of the attorney's final decision, in form of indictment, is the result of research not a component. The direct intervention occurs when the attorney do the research himself and the indirect intervention is the attorney's approval supervision on the investigation authorities in which he can impose his decisions on them or disrupt their advance.

The Concept of Prosecution

As it has been inscribed in Moeen Persian Dictionary, prosecution literally means to follow up, to pursue, to chase, to trace etc. (Miri, 2011). Legally and terminologically prosecution can be defined in both general and specific forms. Prosecution, in its general term, refers to all actions and orders of the attorney since the discovery of the crime until the issuance of the indictment and its defense. Prosecution in its specific term refers to pursuing the public trial since the issuance of the indictment (Koushki, 2008).

What we should declare is that, in accordance with paragraph "a" of Article 3 of the Courts Rehabilitation Law, and Article 22 of New Code of Criminal Procedure Regulations: "Prosecuting a person who is accused with a crime" is among the duties of court or the head attorney. This paragraph seems to consider the general concept of prosecution.

Pre-Trial Stage

The pre-trial stage is a stage which is prior to the beginning of the trial. This stage which starts from the occurrence of the crime, has some differences in Iran and the United States of America. In the United States of America when a crime occurs, police begins some investigations. At this time police can arrest the suspect on the basis of a "probable cause", and then will inform the attorney, and then if the attorney determines that the person has committed a crime, the indictment will be issued. The indictment in important criminal matters must be approved by the grand jury (Yousefi, *ibid*). However, unlike Iran in which the preliminary investigations end by issuing the indictment, in the United States of America, there are other processes after this stage of the trial. Some of these steps are as follows: "arraignment" in the presence of a judge, "pretrial detention", or issuing the "bail" and "plea bargaining". Regarding pre-trial detention, it should be said that there are two types of arrest in the United States of America's law: one is enforced by police after the crime is committed and it is called arrest and in this type of detention, depending on state laws in which it has occurred, police can put suspects in jail from 48 to 72 hours¹. Another type of detention is the equivalent of temporary detention in Iran, which should be executed by the judicial authority. In Iran, In accordance with Article 19 of Code of Criminal Procedure Regulations, preliminary investigations are a set of measures which start since crime occurrence until submission to the judicial authorities.

¹-<http://criminal.findlaw.com/criminal-rights/how-long-may-police-hold-suspects-before-charges-must-be-filed.html>

The Concept of Attorney's Intervention

Attorney's intervention in the pre-trial investigations means that, the attorney interferes, whether directly or indirectly, in the investigations before the trial begins. Attorney's interference and influence in pre-trial investigations, exists in both Iran and the United States of America. In Iran the following items could be mentioned:

1- Paragraph "h" of Article 3 of the Courts Rehabilitation Law on the demand of completion of investigations from the interrogator; and in the new law, articles 73 to 78 about supervising or performing the investigations.

2- Paragraph "v" of Article 3: in the case of crimes which are beyond the competence of the province's criminal court, the attorney can perform the preliminary investigations. In this case the attorney can issue all arrangements which could be issued by the interrogator. This issue has also been mentioned under Article 92 of the new law.

3- Paragraph "z" of Article 3, considering the approval supervision of the attorney on prosecutor, including investigating prosecutor. In Article 88 of the new law, supervision and training of the prosecutor to interrogator has generally been expressed. It seems that the new law, comparing with the old one, has not accepted the prosecutor's authority and power over the interrogator.

4- Paragraph "b" and "y" of the Courts Rehabilitation Law and Article 32 of the new law, over the influence and presiding of court agents. Note that court agents are some officials who are involved in obtaining reasons in favor of or against the accused. Investigative agents, in the United States of America are somehow dependent on the prosecutor. In the Federal scope, federal attorneys have their own investigator agents, which are working in the attorney's office as employees and federal attorneys have ongoing interaction with other research institutions such as the FBI, as well. In general, both in federal and in local prospect, investigators are forced to follow the attorney whether or not they agree with him.

In the United States of America, unlike Iran, more attention has been attached to the prosecutor's impact on personal freedom. In this country, authority of some measures though just in research areas, have been taken from the attorney or is under supervision. Among these include:

- 1- Indictment should be confirmed by the grand jury (Yousefi, *ibid*).
- 2- The order of recording telephone conversations is in the judge authority².
- 3- Issuance of supplying detention of the accused and the decision on whether or not the accused remain in detention is in the judge authority³.

Position of Attorney in Iran and the United States of America

Attorney literally means one who executes justice and it is also the title of the referee, judge, King and Amir (Moeen, 2002). In legal terms, "Attorney or Attorney General is a person who performs his duties in order to maintain public law, supervise over and implement laws and prosecutes criminal offenders, according to the legal regulations" (Akhondi, 2009). With approval of the Courts Rehabilitation Law, duties and powers of the attorney has again returned to the judicial authority.

In the United States of America, the attorney prosecutes Persons who are accused of crimes in the name of government, in different levels including department, city and federal levels. Attorneys have extensive powers, in the United States of America, including decisions on whether or not to prosecute the accused?

Attorneys in the United States of America have different types. In the federal level⁴attorneys are known as Federal Attorneys. There is an attorney for every federal court in the United States of

² http://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html

³ *ibid*

America. President elects the federal prosecutors and they mainly play administrative roles; while their deputies carry out more tribunal affairs.

U.S attorney General which is the president of the Department of Justice, is US Justice first person and supervises and presides on federal attorneys.

District attorneys, in the states, cities and urban levels, are responsible for pursuing the accused of crime and are responsible for enforcing laws, as well. These attorneys prosecute most of criminal cases and are not accountable or responder to anyone for it. Title of this attorney is different in various states, though their duties are the same.

Ninety-five percent of these attorneys are elected by the people and have a 4-year term; except for the states of Alaska, Connecticut, Delaware, District of Columbia, New Jersey and Rhode Island, in which attorneys are either appointed or are a member of the state attorney's office.

State Attorney General is the highest law enforcement official in the federal level, and usually has the authority to pursue complaints against district attorneys. But a state attorney prosecutes a town or city attorney for misconduct. In rural areas the highest law enforcement official is called county attorney. These attorneys, who are working in small offices, prosecute criminal cases themselves. In urban areas the highest law enforcement official is called city district attorney. The city's attorney office entrusts prosecution of crime, the trial and re-appeal to different divisions.

To investigate the crimes of high-ranking government officials, with the aim of ensuring public confidence in neutrality in any criminal investigation of high-ranking government officials, independent counsels will be appointed by the U.S Attorney General. The Attorney General will appoint an independent counsel, where he has received claim of misdeed by a high-ranking government officials from reliable sources. Recently, this judicial body is so involved in political or sectarian matters, critics have called for the abolition of this temporary organization.

Attorney's intervention in the investigation and prosecution of the case and the principle of neutrality

The principle of neutrality means that judicial authority should not be affected by the influence of external factors such as emotions and public reactions or the media propaganda or internal factors, such as personal beliefs and attitudes, and should opine without bias or prejudice, but based on objective reasons and arguments (Najizvareh, 2010).

In some regulations of Iran's laws, judicial authorities are explicitly obliged to be neutral. Including paragraph 4 of Article 17 of the "law of monitoring judges behavior", Adopted in 1390 AH, where all the officials, including attorneys have been obliged to be neutral and abandoning this neutrality will result in police prosecution. We cannot say that the attorney is an exception in this regard; but there is a contradiction that is how the prosecutor is obliged to preserve neutrality and simultaneously prosecute the accused? In response, we can say that despite prosecuting, attorney must also maintain a neutral position in the collection, assessment and presentation of the evidences. The reason is that attorney is not as a private plaintiff and he is not only pursuing conviction of accused. Attorney as part of the criminal justice system, He is obliged to maintain and protect the individual and social rights, including the rights of the accused. It seems that beyond the attorney's duty to prosecute, whether in Iran or in America, there is the duty of finding the truth and if the truth

⁴ Federal attorneys prosecute federal crimes and state attorneys, prosecute state crimes. Federal crimes are being applied against state crimes. The difference between federal and State crimes is that Federal crimes violate the federal laws and state crimes violate state laws. Among federal crimes we can mention crimes such as drug trafficking and organized crime and so on and among state crimes we can mention crimes such as Murder, robbery, kidnapping and etc. For more information see links below:

<http://www.goudiekohn.com/practice-areas/federal-state->

Openly accessible at <http://www.european-science.com>

is somewhere in favor of the accused, must not be hidden. Therefore the attorney's neutrality is related to the reasons.

Comparing Neutrality of Attorney and Investigating Authority

Neutrality and impartiality of attorney is somehow different from neutrality of prosecutor respecting reasons and that is because although the prosecutor is a part of the magistrate court, but he is not a litigant And his only task is to research and discover evidences related to the case. So, his neutrality will be observing items which are in favor of accused in Gathering evidences and uncovering his circumstances and considering them in his calculations. In this case, Article 39 of the Code of Criminal Procedure regulations states: "Judges and investigating judges have to perform the investigation and discover circumstances which are in favor or against the accused with ultimate neutrality". Therefore neutrality of investigation and prosecution authorities, In this case, has a difference that is the investigation authority's task is investigation, interrogation and evidence gathering, while the prosecution authority should prosecute the accused on the grounds of obtained evidences. So the task of prosecuting authority or attorney is related to the evidences related to the accused to assess the summation of obtained evidences and reasons and apply them if they fit with the charges against the accused and on the other hand should consider reasons which are in favor of the accused in the case. An important point to be noted here is that Iran lawmaker unlike the separation of prosecution and investigation authorities principle in the paragraph "v" Article 3 of the courts Rehabilitation Law states that: "in the case of crimes in which the province attorney has not the authority, the attorney has all the duties and powers that are assigned to the interrogator". The provisions of this article have been repeated in Article 92 of the new law, the difference is that the new law has stated that in the absence of the prosecutor, the attorney will investigate crimes which are not the subject of Article 302. It is close to the Anglo-Saxon countries laws, where there is no separation between investigation and prosecution authorities. In the countries where adversary system prevails, unlike the other countries, including Iran, which have independent investigation official, which is the interrogator, there is no separation between investigation and prosecution authorities.

In these countries, there are three sides in a criminal case, on one hand, there is attorney who has the liability to prove the guilt of accused, and the other side is the accused body and on the third side stands the judge who will judge with neutrality in the challenge between the attorney and the accused (or his lawyer) (Neubauer&Fradella, 2008).

It should be noted that in the criminal justice system of the United States of America, at the federal level Federal attorneys usually have investigation agents in their office. In the United States of America all kinds of attorneys have wide powers and authority and investigation agents are dependent on attorneys, in this country and should follow his recommendations even if they disagree with them (Hess & Hess Orthmann, 2010).

So, in this country and countries with similar legal systems, like what has been predicted in paragraph 3, the investigation authority is a part of prosecution authority.

Comparing neutrality of attorney and judge

"Judge's neutrality necessitates him not be affected by the influence of external factors such as emotions and public reactions or the media propaganda or internal factors, such as personal beliefs and attitudes, and he should opine and issue his verdict Without bias or prejudice, but based on objective reasons and arguments" (Najizvareh, *ibid*).

Although the above explanation is about the neutrality of the judge (magistrate), but it prevails about the attorney as well; meaning that during a criminal prosecution, the attorney should

not be influenced by sentiment and non-legal factors, including media advertisements and public reactions. But in general there is a difference between neutrality of the judge and an attorney, about the reasons, and that is The judge acts as a referee in a criminal case between the attorney and the accused, and finally will issue his verdict in favor of one of them which is the cornerstone of his neutrality in assessing the evidences for or against the accused and finally will issue a decree by assessing the reasons; while the attorney is in one side of the conflict. In Iran, where the attorney issues an indictment, he acts as a judge, because in accordance with paragraph "1" of article 3 of courts Rehabilitation Law, the attorney will issues the indictment if he agree with interrogator's opinion about the guilt of accused; Otherwise, he may believe in Non-prosecution or cessation of pursuing. So, here the attorney will assess the reasons before trial begins which ultimately affect the criminal proceedings. So here is attorney's neutrality is close to that of the judge.

In the United States of America's law, it is not exactly like what was explained above, but it is not very dissimilar, because firstly, in the United States of America's law the attorney, in a personal assessment soon decides whether or not to pursue charges. And secondly even if he decided to pursue the case, he has to do this beyond a reasonable doubt (Hoffman, 2000). Here the phrase "beyond a reasonable doubt" means that according to current evidences, no doubt about guiltiness of accused would enter the mind of any reasonable or ordinary person. Therefore in America in which the attorney is a part of the criminal justice system, he will decide on a subjective analysis that the accused should be prosecuted or not. Therefore the attorney and the judge are both parts of the criminal justice system which should pursue the truth and justice and in this regard their duties are similar; but their difference is that one of them is the accused prosecutor and the other must only a mere judge.

The attorneys should prosecute with sheer neutrality and justice. In the Article 34 of Model Code of Criminal Procedure, it has been mentioned that the attorney should analyze both the accused and the petitioner's reasons⁵. This indicates the moral duty of neutrality or in another word, indiscrimination of attorney in the investigation. This issue applies, in America in general, and in Iran particularly in cases where the attorney, himself conduct the investigations. The principle of neutrality, in this case, in Iran and the United Sates of America is encountering dangers; because the attorney is one side of the conflict. In America, although, some of the attorneys are highly sensitive about their moral duty, but some of them have political ambitions, as well and some other have based their credibility on the basis of the persistent prosecution of obstreperous cases, So they intend to win the case At any cost (Lerman& Philip, 2008). Of course, such an attorney will pay more attention in his investigation in the reasons which are against the accused. The same applies to Iran, where the attorney conducts the investigations himself. So, attorney's intervention in pre-trial stage endangers the principle of neutrality which should be considered in the investigation. This issue can apply in Iran as well as in America.

Attorney's intervention in the investigation and prosecution and the principle of equality of arms

Equality of arms means equal Facilities of both sides of legal or criminal conflict, in self-defense. Both sides of conflict should have equal Facilities and opportunities. The sensitivity of this issue is furthermore in criminal cases than in civil cases; because the Adversarial principle of trials in civil trials prevents serious damage to the mentioned principle. But in criminal conflicts, because of delegating the authority of prosecuting to the attorney, who benefits from government resources and experts, this is a real obstacle in the path of applying this principle and its implementation. In

⁵ United Nations, Prosecution Service, Osce, Belgium, 2006, p. 6

such a situation, if the accused does not be supported, in case of his innocence, his exoneration will be difficult. Certainly the attorney which is one side of conflict and perform the investigations himself, and on the other hand he is a powerful authority both in Iran and the United States of America, has more access to the information sources and documents, than an accused who may be an ordinary citizen. In the United States of America's legal system in order to increase the available information resources for accused which is on the other side of the conflict, some principles such as discovery of evidence and disclosure of evidence have been established in favor of the accused to compensate to some extent for the inequality in power and inequality in access to the resources. In this justice system, there is a pretrial procedure, which is called discovery of evidence procedure; this means that one side of the conflict, at the request of the other side, is required to offer information on hearing to him or her. Under this procedure the accused and the attorney are allowed to review, test, and copy or take photographs from Documents and evidences owned by the other side (Ferdico& Totten, 2008). This approach in the criminal system is aimed to eradicate unfair superiority of one side over the other (Neubauer&Fradella, 2008).

Discovery of evidence principle has some disadvantages, including:

1- In the Civil trial Procedure, this principle is very effective, but in a criminal case, there is no usual legal right to disclose reasons (ibid).

2- Discovery of evidence principle, in the Criminal Procedure Regulations⁶, has been only accepted in the area of federal crimes which their regulations have been established in the Articles 12, 16 and 26 of Federal Codes of Criminal Procedure.

3- This principle defends the accused radically and unilaterally, because according to the US Constitution's Fifth Amendment, he is exempted from self-incrimination and does not have to declare evidences against himself (Del Carmen, 2007).

In this case The Fifth Amendment to the US Constitution (1791) states: " No person will be considered responsible for a heavy or infamous crime, unless based on the Indictment or impeachment issued by the grand jury; Except for the case of ground forces, naval or paramilitary forces which are actually at Service at the time of war or public danger. Nobody will be twice detained or executed for a single crime. No one in any criminal case is obliged to testify against himself and will not be deprived from his life, liberty and property without passing the necessary legal procedures. Private property will not be available for public use, without paying fair compensation.

4- Since in this system there should be a request in order to present the evidences (ibid), it doesn't compel the attorney at the outset to offer evidences in favor of the accused, so the attorney will have no obligation to declare evidences without request of the accused or his lawyer.

Due to limitations and disadvantages of this system, dissatisfactions were raised, As a result, United States courts cautiously, developed compulsive declaration of reasons (Neubauer&Fradella, 2008). This means that the attorney declares the reasons in favor of the accused without asking him.

Part (a) of Article 2, 3-6, America lawyers club, about the attorney's duties declares: "the attorney should present the extenuating unclassified information at the time of sentencing or earlier to the court and to the accused person; unless when the attorney is exempt from this responsibility by the court protection order".

⁶ Federal crimes are being applied against state crimes. The difference between federal and State crimes is that Federal crimes violate the federal laws and state crimes violate state laws. Among federal crimes we can mention crimes such as drug trafficking and organized crime and so on and among state crimes we can mention crimes such as Murder, robbery, kidnapping and For more information you can go to links below:

<http://www.goudiekohn.com/practice-areas/federal-state-crime>

Attorney's pre-trial intervention in the investigation and prosecution and the principle of separation of judgment and prosecution

One of the principles of a fair hearing is that the attorney should not have judicial role, because in this case, the attorney will be the judge in his conflict.

In some cases some judicial options could be granted to the attorney, as followings:

a. Judge's decision in criminal case, regarding whether to terminate the prosecution or not.

b. Decision on the releasing or detention of the accused on the safeguarding condition

c. Issuance Sentence of punishment. It should be noted that in a minority of European countries, judge's judicial role has been entrusted to the attorney, because attorneys can impose penalties directly to accused. Sweden and the Netherlands are among these countries (Luna & Wade, 2010).

Violations of this principle, has some models both in Iran and in America. Basically, the judicial authority can decide on the rights and freedoms of accused. Unlike this principle, attorneys in Iran have the authority to make decisions at the preliminary investigation stage on manumission or detaining the accused. Moreover any kind of authority which can terminate the prosecution process is considered a judicial authority, because basically the judge (interrogator) can end up the trial (Hoffman, 2000). Attorneys can terminate the persecution in America, too. However, the prosecution will be hindered provided that it includes the benefit of society. So it will be morally permissible as well.

Conclusion

Attorney's intervention in criminal cases can violate rights of the accused and be contrary to fair trial principles. In America which the prosecution and investigation authorities are the same, these principles are in danger, because the attorney is on side of the conflict and the prosecution should be performed by a neutral person. These dangers exist in Iran as well, because in a wide range of crimes, the attorney is the prosecutor and at the same time can decide about the liberties and rights of the accused which are contradictory, while in America attorney's authority is being more controlled.

References

- Akhoondi, M. (2009). Code of Criminal Procedure(2nd ed.). Tehran: SAMT, V.6.
- David, Neubauer, and Henry Fradella (2008). America's Courts, Wad Worth, Belmont, U.S.
- Erik, Luna and Marianne, Wade (2010). Prosecutors as judges, Washington and lee law Review, 67(4).
- Ferdico, John and Henry Fradella and Christopher Totten (2008). Criminal Procedure, Tenth Edition, Wads Worth, Belmont, U.S.
- Hess, Karen and Christine Hess Orthman (2010). Criminal Investigation. Delmar Publishing, Clifton Park U.S.
- Hoffman, Dennis (2000). Criminal Justice. IDG books word wide.
- Karen, Hess and Christine Hess Orthmann (2010). Criminal Investigation, Ninth Edition, Delmar Publishing, Clifton Park U.S.
- Koushki, G. (2008). A Review On The Powers And Duties Of The Attorney In The Criminal Procedure Code In Iran And France. Master thesis, ShahidBeheshti University.
- Lerman, Lisa and Philip Schray (2008). Ethic Problems in the Practice of Law, Aspen Publishers, New York.
- Miri, S. R. (2011). Prosecution (1st Ed.). Tehran: Mojdeh.

- Moeen, M. (2002). Moeen Persian Dictionary. Tehran, V. I.
- Najizvareh, M. (2010). Impartial Proceedings in Criminal Matters (1st Ed.). Tehran: Shhredanesh.
- United Nations (2006). Prosecution Service, Osce, Belgium.
- Yoosefi, I. (2011). Assessment of global tendency to remove the interrogator. Journal of Legal Studies, (2).
- <http://www.babafars.ir/fa/paygahe-ghavanin-iran/majmooe-maghalate/jazai-maghalat/449-tasawi.html>
- <http://www.goudiekohn.com/practice-areas/federal-state-crime>
- http://www.oas.org/juridico/mla/en/usa/en_usa-int-desc-guide.html