

The Role of the Accused's Attorney in the Criminal Justice System of Iran, Mashhad 2014

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Abstract—One of the most basic standards of fair trial is the right to defense, hire an attorney and its presence in the hearing stages. On the one hand, based on the reason and justice, as the legal issues, particularly criminal affairs, become complicated, the accused must benefit from an attorney in the court in order to defend itself which requires legal knowledge. On the other hand, as the judicial system has jurists such as investigation judges at its disposal, the accused must enjoy the same right to defend itself and reject allegations so that the balance is maintained between the litigating parties based on the principle of "equality of arms". The right to adequate time and facilities for defense is cited among the principles and rights relevant to the proceedings in international regulations such as the International Covenant on Civil and Political Rights. The innovations made in the Code of Criminal Procedure in 2013 guaranteed the presence of the accused's attorney in the proceedings. The present study aims at assessing the result of the aforementioned guarantee in practice and made attempts to investigate the effect of the presence of accused's attorney on reducing the punishment by asking the question and addressing the statistical population of this study including 48 judges of lower courts and courts of appeal. It seems that in despite of guarantees provided in the new Code of Criminal Procedure, Iran's penal system, does not tolerate the presence of an attorney in practice.

Keywords—Defense attorney, equality of arms, fair trial, reducing the penalty, right to defense.

I. INTRODUCTION

A criminal fair trial requires the accused to be able to defend itself in person or through another familiar with the science of law against the alleged accusations. This represents one of the most valuable concepts of justice, i.e. the judicial justice. Judicial justice is a value and must be protected and realized in any legal system by considering the required tools and mechanisms. The proceedings are not fair undoubtedly if the judicial justice is impaired during the proceedings. Therefore, one of the most important factors affecting the judicial justice is presence of an attorney and his unique role in the proceedings from the time the crime was committed until the end of the judgment enforcement. Moreover, the right to an attorney is one of the guarantees that ensure the accused's right to defend itself and one of the effects of the presumption of innocence. In international documents and criminal law systems of countries, attempts are made to attach great importance to this right in order to preserve the accused's rights and guarantee a fair trial.

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A. The Right to Defend: Necessities and Needs

1. International Documents

Human rights and their implementation mechanisms were set and guaranteed first by the United Nations Charter. After this charter, International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights were the most important documents guaranteeing the implementation of human rights of which the first is protected more by the sanctions. Universal Declaration of Human Rights (UDHR) consists of a preamble and 30 Articles. The preamble of the Declaration contains a series of fundamental concepts and thoughts such as dignity, freedom of opinion and expression, equality of human rights, equality of nations and governments and the development of friendly relations between nations [1]. The right to an attorney is not mentioned explicitly in the Declaration of Human Rights, but according to the 11th Article of the Declaration which reads "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense", it can be deduced that one of the required guarantees for the defense is quick access of the accused to an attorney and benefiting from his legal and consulting services. Therefore, the 11th Article may be generalized to the right to an attorney.

There is no article indicating the use of an attorney in all 111 Articles of the UN Charter, but Article 92 of the International Court of Justice in the fourteenth chapter of the same charter states "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter" [2]. The right to an attorney is explicitly cited in the Statute of the International Court of Justice in clause 2 of Article 42 "the parties can get help of legal advisers or attorneys before the tribunal". Moreover, clause 3 under the same Article states "representatives, advisers and attorneys of parties have privileges and immunities necessary for the free exercise of their duties before the Court" [3]. The right to an attorney is explicitly included in the clause D of Article 14 of International Covenant on Civil and Political Rights "everyone has the right to be present at the trial and defend itself in person or by an attorney of his own choice, and if he has no attorney, he must be informed of this right and in cases where the interests of justice administration require, an attorney will be appointed for him directly by the court, and honorarium will be free of charge in case of his financial inability ".The

American Convention on Human Rights (1978) in the part E under clause 2 of Article 8, the African Charter on Human Rights (1982) in the part C of clause 1 of Article 7, the Islamic Declaration of Human Rights (1990) in the clause E of Article 19 and the European Convention on Protection of Human Rights and Fundamental Freedoms (2004) in part C under clause 3 of Article 6 included the mentioned right under the title of "the accused's right to a fair trial". This right is so important from the view point of authors of the mentioned documents that even some of them, especially authors of American Convention on Human Rights included it among inalienable rights of the accused and in this way, insisted on the presence of attorney (either selectively or freely) in the criminal process.

Apart from the basic conventions of human rights that are binding on the global or regional levels, the international community has dealt with this important issue in the framework of the regulations and other documents and formulated certain standards to promote human rights and act based on them. Documents such as Principles for the Protection of All Persons under Any Form of Detention or Imprisonment passed by the UN General Assembly in 1988, Basic Principles on the Role of Attorneys adopted by the eighth UN Congress on Prevention of Crime and the Treatment of Offenders in 1990, UN Rules for the Protection of Juveniles Deprived of their Liberty adopted by the UN General Assembly in 1990, European Prison Rules, the Statute of the International Criminal Tribunal for the former Yugoslavia and Rwanda and finally the Statute of the International Criminal Court and the relevant bylaws specified explicitly or implicitly the right to an attorney in the preliminary investigation. Today, these documents are cited in many scientific analytical texts, especially in international forums, and dimensions of such a right are introduced based on their provisions. Therefore, it can be seen that transnational criminal policy decision makers have been incorporating the accused's right to an attorney among the manifestations of civil rights and the right to fair trial in the criminal process for nearly five decades in both global and regional levels.

The right to an attorney in the preliminary investigation stage was prescribed in the law in the Canton of Neuchâtel, Switzerland adopted in December 8, 1893 for the first time. In France, the law of December 8, 1897 allowed the accused for the first time to have an attorney from the first moment the examining magistrate summoned him, and the examining magistrate shall inform the accused of this right before the interrogation by virtue of the aforementioned law (Article 114 of the French Code of Criminal Procedure). Failure to comply with this law is among grounds for breach of the verdict according to the French Supreme Court.

2. Law System of Iran

Accused of this right before the interrogation by virtue of the aforementioned law (Article 114 of the French Code of Criminal Procedure). Failure to comply with this law is among grounds for breach of the verdict according to the French Supreme Court. [4]. This right is considered in the

Constitution of the Islamic Republic of Iran as well. Public rights are among the most important cases set forth in constitutional law, which are known as the "rights of the nation". The government is obliged to protect all public and private rights of citizens such as this right which is derived from the administration of justice. All persons whether the accused or the plaintiffs, the demandant or defendant want to be treated fairly [5]. Justice is one of the requirements for the judiciary. This government body is equipped with jurists, and insightful persons such as public prosecutor, examining magistrate, puisne judge and judge that all are educated judges. They, on behalf of the public authority, prosecute the accused and finally convict or acquit them. Attorney, by providing legal advice, may prevent the client from moving in a way that leads to severe criminal conviction. In fact, the attorney may teach the accused what to say in defending statements, how to answer possible questions in the investigation stage, and when to keep silent in response to certain questions. Therefore, the attorney guidelines to the accused during the investigation may lead to the collection of less evidences and less severe punishment, consequently. At the same time, the attorney can prevent the severe verdict of the court against the client by submitting the legal arguments in defense of the accused, and benefitting from his familiarity with the court's performance. Also the attorney may use his knowledge of laws and regulations on commuting the punishment. Therefore, to keep the sides of the scales of justice identical, there should be persons as attorneys in order to defend and guide the accused. In such circumstances, it is necessary for an attorney to freely defend the client before the public prosecutor who defends rights of the society [6]. Failure to observe this right amounts to the negation of a balance between the litigating parties and the lack of proper administration of justice in the society. However, in terms of civil liberties and given the needs of today society, advances in technology, widespread communications, etc., the "right to attorney" is one of the rights of the public from which all citizens of this country can benefit [7]. The principle of the right to an attorney at all stages of the criminal proceedings is recognized essential in the Iranian ordinary and basic laws [8].

In fact, the right to an attorney is among the most important guarantees for the accused to defend itself from exposure of a crime until the enforcement of the judgment. Logically speaking and due to increasing complexity of legal issues, particularly in criminal affairs which are connected with honor, dignity, lives and properties of people, the accused should be able to benefit from this right in defending itself, because the attorney eliminates false accusations attributed to the client by relying on his legal knowledge and experience and by presenting justified defense based on legal principles and arguments [9]. In this regard, Article 35 of the Constitution stipulates that litigating parties have the right to an attorney in all courts, and the required arrangements to appoint attorneys should be made in the case of inability of the parties to hire an attorney. In other laws, Public and Revolutionary Courts are obliged to accept power of attorney in all criminal cases presented by attorneys to the accused at

any step of the proceedings regardless of the type of the charge and allow the attorney and the client to meet each other to sign and draw up the power of attorney if not made earlier. In addition to attend during the investigation or hearing proceedings, the attorney shall perform various duties and present legal solutions to protect the legal rights of the accused such as the right to object to the issued writs and the like. It should be noted that depriving the defense attorney from these rights finally leads to the violation of the accused's rights [10]. Among the different relevant laws, particularly Article 35 of the constitution, Code of Criminal Procedure of 2013 has guaranteed the constitutional rights of individuals (in its general sense) among which observing rights of the society, victim and accused are the most important objectives deemed for the implementation of the Code of Criminal Procedure of 2013 (Article 1). The right to "appointed attorney" and "court-appointed attorney" is one of the requirements to enforce the aforementioned law (Article 7 of the Code of Criminal Procedure, pertinent to Article 3 of the Law Concerning Respecting Legitimate Freedoms and Protecting Citizens' Rights adopted on May 4, 2004 that has been limited with the sanction provided for in Article 570 of the Islamic Penal Code), which sometimes becomes obligatory (offenses under Article 348 pursuant to Article 302 of the Code of Criminal Procedure for punishments of depriving life, life imprisonment, mutilation and intentional crimes against the physical integrity with the third of full blood money or more, fourth degree prison sentences and above, as well as political and press offenses that are within the competence of criminal courts No.1) in the sense that in dealing with such crimes, courts shall not be convened without the accused's attorney which confirms the important role of attorney's presence and the its undeniable effect on the fair trial based on the judicial justice. On the other hand, in explaining the Articles 3 and 5 of Code of Criminal Procedure passed in 2013 that respectively state "The judicial authorities should impartially and independently deal with charges attributed to persons in the shortest time possible and make an appropriate decision and avoid any action that would interfere with or prolong the process of Criminal Procedure", and " the accused must be informed immediately of the issue and the reasons for the alleged charges and benefited from the right to an attorney and other rights of defense stipulated in this law", It can be said that the presence of the defense attorney in the process of preliminary investigation and a fair trial can undoubtedly secure the legislator's purpose in preventing the prolongation and deviation of the proceedings and assisting law enforcement and justice administration and conducting investigations based on the discovery of truth.

The principle of recognizing the persons' right to a defense attorney in all criminal affairs has been articulated at the forefront of Article 46 of the Code of Criminal Procedure approved in 2013 with a Note stating " Except for offenses under the jurisdiction of the criminal court of number one, each litigating party is allowed to introduce a maximum of two attorneys to the court". The above Note means in crimes under the jurisdiction of a Criminal Court No. one, individuals

can even introduce more than two defense attorneys to defend their rights in the court. The number of attorneys, in any case, can be a maximum of three (Article 385). Other crimes that naturally are less important, each litigating party is allowed to introduce two defense attorneys to the court. However, the accused can demand the investigating court to appoint an attorney for him/her till the end of the first hearing. The court shall appoint an attorney for them by ascertaining their financial inability and considering the importance of the attorney presence for defending their rights (Article 347).

One of the most important developments made in the Code of Criminal Procedure in 2013 is that a person may "request an appointment with a defense attorney" immediately following prosecuted as the accused. In this meeting which should not last for more than an hour, it is necessary to keep the investigations and negotiations confidential. At the end the defense attorney may present hints to ensure his client's rights and include them in the case (Article 48). Another innovation brought by the law is to make the accused aware of his/her right to an attorney of which the former law was in short. Article 52 of the new law provides that "whenever the accused is prosecuted, enforcers of justice shall explain and provide the accused with the rights specified in this Act in writing, receive the receipt and attach it to the case". However, litigating parties are allowed to choose their attorney(s) in the preliminary investigation from among attorneys of justice who are approved by the Head of the Judiciary to deal with crimes against the internal or external security as well as the organized crimes punishable under Article 302 of this law (the amendment Note to Article 48). This prescription of the legislator is taken clearly contrary to the dignity of the defense attorney because attorneys are, religiously, legally and morally, committed to adhere professional principles to keep the secrets of society (security cases) and individuals; therefore, imposing restrictions on the defense attorney in these areas is in stark contrast with the philosophy of swearing and enforcement of sanctions to disclose the secrets of others. One of the missions of attorneys in criminal affairs is to contribute in discovering the truth and assisting the judicial system in this field. In fact, the collaboration of judges and attorneys can administer the criminal justice in a way that is desirable to the society, victim and delinquent. In addition, the split between attorneys approved by the Head of the Judiciary, and those who are not, is not based on any legal criterion and standards and causes countless corrupt sequences.

Imposing on the examining magistrate the duty of notifying and explaining the accused of his/her "right to have an attorney" in the preliminary stage of investigations is an indicator of a positive change in the criminal system which is accomplished by the examining magistrate before the start of the preliminary investigation. The aforementioned right should be stipulated in the summons and the accused must be notified about it. Moreover, by attaining more information about the accusation and its causes, the defense attorney may provide information necessary for discovering the truth and defending the accused or enforcing the law. These statements shall be written in the minutes (Article 190). More importantly, the

deprivation of the accused of this right or absence of explanation in this connection would invalidate the investigations (Note 1 of Article 190). Therefore, it seems that the legislator has enforced useful and severe sanction for recognition of this right and this marks somehow the significant role of the attorney within the preliminary investigation. Even the legislator has prescribed, in the case of empathic questions or other violations of law by the examining magistrate, the attorney is allowed to remind him (Note of Article 95). The right to an attorney is so important that even if the accused does not introduce an attorney for crimes liable to punishment of depriving life and life imprisonment during the preliminary investigations, the legislator requires the examining magistrate to assign an attorney to represent the accused in the court (Note 2, Article 19). However, it seems that recent legislative initiatives have been overlooked or at least moderated by imposition of the Article 191 of Code of Criminal Procedure in 2013 which, with incorporation of "the writ of unavailability", reads "if examining magistrate believes that studying or having access to all or some of the papers, documents or records is inconsistent with the necessity to unveil the truth, or the case relates to crimes against national or external security, he is allowed to issue "the writ of unavailability" along with stating the relevant grounds. The accused or his attorney shall be notified of this writ in person, and may be pleaded against within three days in a competent court. The court shall examine and make a decision about the set forth objection in extra time".

Given the achievements and innovations made in Procedure Code concerning the right to an attorney, it can be said that the law has undergone valuable and positive changes in the following three areas of (a) number of attorneys, (b) making the accused informed of the right to an attorney and assigning a court-appointed attorney, and (c) scope of authority of the defense attorney.

It must be acknowledged that the legislative act of the Expediency Discernment Council enacted in 1988 and legal considerations of Code of Criminal Procedure in 2013 are in fact a renaissance in the admission date of attorneys in magistrate's courts and courts. This right is recognized even for foreigners residing in Iran as one of non-political public rights, although they are not allowed to participate as attorneys in courts [11]. Thus, the right to an attorney is one of the fundamental indicators of a fair trial at all stages of criminal proceedings, including preliminary investigations and hearings.

Supreme Court provides that in all criminal trials of Islamic Republic of Iran, the attorney's attendance in crimes involving the death penalty or life imprisonment and other cases is mandatory and optional respectively. Keeping this issue unnoticed is deemed a violation of the verdict of Supreme Court.

Code of Criminal Procedure of 2013 provides necessary grounds for new developments towards a fair hearing to take more important steps in the preliminary investigation and criminal procedure. This research tries to investigate

standpoints of criminal judges on the role of attorney in reducing the punishment of the accused and evaluate its effect on the verdicts issued by judges by a one-question questionnaire.

II. FIELD RESEARCH

A. Methodology

Two types of basic and applied researches are distinct from each other in terms of the goal they pursue. An applied research seeks to achieve scientific objectives and emphasizes the desirability. Precisely speaking, an applied research is an attempt to provide solutions for scientific problems in the real world, aiming at meeting individual, group and social concerns [12]. The present study is, accordingly, an applied one.

B. Time and Place of the Research

The research was conducted in 2014 within the judicial district of Mashhad which is among the five largest cities in Iran.

C. Statistical Population

The statistical population of this research with 53 participants includes judges of lower courts (common pleas and criminal courts) and courts of appeal in the judicial district of Mashhad.

D. Sampling and Sample Size Determination Method

Due to the small size of population, all members were considered as a whole. However, due to shrinking away of the participants from cooperation, only a total of 48 questionnaires were collected. The aforementioned sample size was considered on two accounts; first, complete information of all members of the population was not available. Second, according to the researcher, the results of this population (judges of lower courts and courts of appeal of Mashhad) can be generalized to the whole country as well.

E. Validity and Reliability

By validity, it means that the tool is expected to measure the characteristics and traits of interest. The validity is important because inadequate and inappropriate measurements could make any scientific research worthless [13]. Since questionnaire is the most important tool for data collection and measurement of variables in this study, it is very important that how much the questionnaire is valid and reliable. Designing an appropriate question with phrases minimizing the ambiguity is essential for the validity and reliability of a questionnaire. The question is whether the questionnaire measures an important aspect of research purpose or not? Therefore, the importance of validity lies in the fact that "scale" and content of the tool or the question contained in the tool measures the variable and subject of the study precisely [14]. Reliability, i.e. credibility, accuracy and trustworthiness, is one of the technical characteristics of measuring tool for a questionnaire. It is defined as "if a tool made to measure an attribute or a variable is used in similar conditions in another

time or place, it must produce similar results". In other words, a valid reliability tool enjoys repeatability and is able to measure similar results.

One of the tools that is widely used to measure reliability is Cronbach's Alpha Reliability Coefficient that is easily calculated using SPSS software (Statistical Package for the Social Science) [12]. Cronbach's Alpha value of 0.912 was obtained for the question used in this study which indicates a very high reliability and appropriate validity for the question and data collection and analysis, respectively. It should be noted when the value of Cronbach's Alpha Coefficient is closer to 1, the question reliability is high. The acceptable minimum value of reliability is 0.7 [15].

F. Data Collection and Analysis

To collect data and measure the research variable, a one-question questionnaire was used inspired by the 5-point Likert scale with rating scale of nothing, very low, low, moderate, high, very high. In this respect, interviews with judges were made when needed. This research was carried out based on data analysis within which inferential statistical methods were used including one-sample t-test and Friedman test using SPSS software for data analysis. SPSS statistical software of which the version 21 was used in the present study is supplied by IBM to analyze the data.

G. Decreasing the Punishment of an Accused

The effect of the attorney presence on reduction of the accused punishment was the measured variable in the related question and the participant judges in the statistical population were asked to express their ideas in this regard.

III. DATA ANALYSIS AND RESULTS

Research question and results are as follows:

1. How big is the effect of the accused's attorney presence on determining the minimum penalty for the accused?

TABLE I
FREQUENCY DISTRIBUTION OF ITEMS (1) THE PRESENCE OF THE ACCUSED'S ATTORNEY

Amount	Frequency	%
Nothing	33	68.8
Very low	6	12.5
Low	5	10.4
Medium	4	8.3
High	0	0
Very high	0	0
Total	48	100%

As it can be seen in Table I and Fig. 1, it is seen that none of the participants believed in the very high and high effect of the presence of the accused's attorney on determining the minimum punishment of the accused, but 91.7 percent believe in the less than average effect of this factor. Thus, vast majority of members of the sample considered the above factor insignificant.

The presence of the the accused's attorney

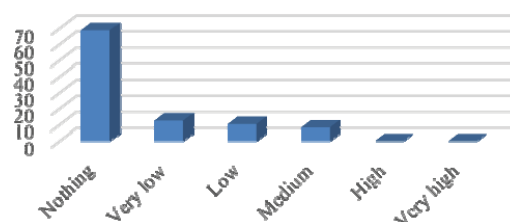


Fig. 1 Frequency of item No.1

TABLE II
FREQUENCY DISTRIBUTION OF PARTICIPANTS' RESPONSES TO THE ITEM: THE PRESENCE OF THE ACCUSED'S ATTORNEY AFFECTS THE DETERMINATION OF MINIMUM PUNISHMENTS

Item NO	Item	Not at all	Very low	Low	Medium	High	Very high
1	The presence of the accused's attorney	68.8	12.5	10.4	8.3	0	0

Considering the significance level of the aforementioned factors is greater than 0.05, this factor is normal as shown in Table III Kolmogorov-Smirnov test.

TABLE III
NORMALITY TEST OF THE PRESENCE OF THE EFFECT OF THE ACCUSED'S ATTORNEY ON DETERMINING THE MINIMUM PUNISHMENT

The presence of the accused's attorney	Sample size
48	1.144
	Kolmogorov-Smirnov Z score
	0.112
	The level of significance

According to the normality of the above factor, to answer to the question, one-sample t-test was used. The results are then presented in Table IV.

TABLE IV
T-TEST OF THE PRESENCE OF THE ACCUSED'S ATTORNEY INFLUENCING THE MINIMUM PENALTY

Factor	The presence of the accused's attorney	T	Degree of freedom	Sig. (2-tailed)	Mean Difference	Confidence interval 95%	
						Lower bound	Upper bound
1		-16.98	47	0.00	-2.41667	-2.702	-2.130

Since significance level of "the presence of the accused's attorney" was more than 0.05 error test and both upper and lower bounds were negative, indicates that the null hypothesis is not rejected. Therefore, according to the members of the studied population, the above factor has no significant effect in determining the minimum punishment by judges.

IV. CONCLUSION

As noted, the right to an attorney is considered one of the undeniable and absolutely essential indicators of judicial justice in all legal systems. Despite the stipulation of Criminal Procedure Code enacted in 2013 and the need to the presence of an attorney in all stages of the proceedings, and according

to the results obtained from analyzing answers to the question on this factor, it can be clearly stated that judges are reluctant to include this important factor in the judicial decisions which is due to many factors. In other words, in issuing well-founded and solid judgments, the judicial system of Iran has no strong desire and belief in the necessity for and role of an attorney who may reduce the differences in all cases by presenting strong legal views and arguments. There is no doubt that on the one hand, the independence of the defense attorney can certainly prevent any judicial tyranny in issuing illegal judgments. On the other hand, the attorney is able to represent a unique role in preventing the proceedings from derailing of its norms and standards and trying to discover the truth and realize the justice rather than insisting on proving the innocence of the accused. Therefore, not only the judiciary is expected to change radically its indifferent and inappropriate approach in this regard, but also this belief must be internalized in the judicial power of the country since the role of attorney, besides its all positive contributions, could be of a supervisory position in preventing incorrect and dispersed verdicts. This materializes only by reviewing and revising policies and practical and theoretical orientations towards drafting and formulating laws and regulations dealing with clarification of the defense attorney real position in the body of the legal system of the country.

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