

## The Principles in Support of the Accused during the Preliminary Investigation Stage

**Mansour Farrokhi, Ph.D.**

Assistant Professor  
Faculty of Humanities  
University of Hormozgan  
Iran

### Abstract

*The preliminary investigation stage is a phase of criminal process during which the accused is more vulnerable to the violation of rights. Thus, judicial officials have to pay attention to supervise the observance of defendants' formal and substantive rights. With a view to realize a fair trial, the principles relating to criminal procedure should be strictly observed. The preliminary investigation stage from crime detection to the issuance of the bill of indictment must be compatible with human rights standards. Human rights principles are known as constituent elements of every modern criminal justice system. Hence, the accused should only be placed on interrogation when he/she enjoys all the guarantees of due process. The purpose of the present article is to explain the principles governing preliminary investigation in order to support the accused. The principles of presumed innocence, the observance of citizens' privacy, respect to citizens' dignity and reputation, the observance of citizens' rights in obtaining evidence and the right to the guarantee of defense have been discussed in this article.*

**Keywords:** Preliminary Investigation, Accused, Human Rights principles, Citizenship Rights, Fair Trial

### 1. Introduction

Criminal procedure is one of the areas in which the observance of human rights is of great importance, since human rights criteria are major components of every fair criminal justice system. A fair hearing is achieved when the principles and rules of hearing system are governing the procedure and the accused will be placed on trial when he/she has all the guarantees of defense. (Jalili, 2015: 538). Due to the weak position of the accused in criminal process, the protection of defendants especially during the preliminary investigation stage plays an important role in creating a balance between the parties involved in criminal proceedings. Preliminary investigation is a stage of criminal proceedings that, in its broad sense, continues from the moment of crime detection in different ways, to issuance a decision of (prohibiting prosecution, dismissal or culpability), and setting an indictment by prosecuting attorney. (Niaziatabay, 2014: 164). There are two sets of principles relating to the defendant's rights; formal or procedural and substantive rights, both of which have been taken into account by legal authors in many countries. However, there are some principles having formal and substantive aspects together. For example, the observance of citizens' rights in obtaining evidence is merely a formal principle, whereas the presumption of innocence is substantive and the Observance of Citizens' Privacy is a dual aspect one.

Although the human rights principles of due process derived from international and regional documents, have been ratified as major elements of most national legal orders, arbitrary and often wrong interpretations impede the realization of human rights standards. In addition, improper performance of those principles is another challenge. However, carrying out an appropriate preliminary investigation may guarantee achieving criminal justice. Thus, the legal principles governing the preliminary investigation stage have a significant value and status. (Niaziatabay, 2014: 164)

In the present paper, the main goal is to clarify legal foundations and origins of human rights principles relating to the protection of the accused during the preliminary investigation stage. To this end, five major principles which are known as requirements of a fair trial have been discussed. The principles of presumed innocence, the observance of citizens' privacy, respect to citizens' dignity and reputation, the observance of citizens' rights in obtaining evidence and the right to the guarantee of defense are analyzed respectively.

## ***2. The Principle of Presumed Innocence***

Every individual charged with a crime has the right to be presumed innocent until proven guilty according to law. This principle requires that pre-trial detainees be treated in accordance with their status as unconvicted persons. Defendants must not be presented in court in a manner indicating that they may be dangerous criminals. Public authorities must refrain from making public statements about an accused which may prejudice the outcome of a fair trial. (Leslie et al, 2013: 8).

Pursuant to paragraph 2 of Article 14 of the International Covenant on Civil and Political Rights (1966) provides that 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Article 11, paragraph 1 of the Universal Declaration of Human Rights (1948), Article 8, Paragraph 2 of the American Convention on Human Rights (1969), Article 6, Paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and Article 6, Paragraph 1-b of the African Charter on Human and Peoples' Rights (1981) also contain similar provisions.

Today, the innocence of the accused is considered as a shared legal heritage of all nations of the world. The presumption of innocence is one of the fundamental rules and principles of criminal law which protects citizens' rights against the power ambitions of public entities. Any kind of expressing opinion by public officials about the responsibility and criminality of the accused before the proof of the offence is considered as the violation of the presumption. Moreover, the creation of any type of restrictions for individuals, though temporarily, before the discovery of any evidence of the charge, is considered as the violation of the presumption of innocence. (Ashouri, 2002: 39)

Another aspect of the presumption of innocence, is the defendant's right to remain silent during interrogation and trial. The right to silence is not explicitly mentioned in international documents, but it can be regarded as a feature of the presumption of innocence. This presumption and the right not to be compelled to testify against oneself necessitate the defendant's right to remain silent.

In all cases where the principles of independence and impartiality to the detriment of the accused have been violated, it can be said that the assumption of innocence is also ignored. Accordingly, in all cases where the accused is mistreated in the preliminary stages of the proceedings, in order to obtain a confession and or evidence, the presumption will be violated, if such confession and evidence is considered by the court as the basis of conviction. Inside the common law system, it has been repeatedly held that requesting the jury by the Prosecutor to stand against the accused due to his/her silence during the preliminary stage and failure to provide reasons before the court, endanger the presumption of innocence.

The scope of the implementation of the principle of presumed innocence is bound to prove the accused's fault and does not include the determination of the type or amount of penalty after the proof of the criminality.

The principle of presumed innocence does not prevent individual records and features and the quality of the commission of the crime to impact on the determination of punishment for the offence which has been legally proved before the court. On the other hand, it should be noted that investigation by competent authorities and issuing security orders after inculcation, despite creating restrictions for the accused, does not amount to the infringement of the presumption of innocence. Observer organizations on the implementation of human rights do not regard the following actions as the violation of the presumption of innocence:

- a) Putting handcuffs on the accused at various stages of the proceedings, even in the face of the jury;
- b) The necessary medical experiments performed on the defendant;
- c) Measurement of the amount of alcohol found in the blood of the accused;
- d) Taking photos or fingerprints of the accused and obtaining any evidence relating to his identity and the archive;
- e) Using the events contained in the other trials and the results of them against the defendant;
- f) The announcement that a person or persons suspected of committing the intended crime have been arrested;
- g) The public announcement of the preliminary investigation and interrogation of the offence and declaring that the suspects have pleaded guilty.

## ***3. The Observance of Citizens' Privacy***

The right to privacy of the individual and the principle of invulnerability of private life privacy requires that, except in necessary cases associated with judicial justice, privacy of individuals must not be infringed. Even in these cases, the essential conditions and formalities shall be carefully respected.

Nowadays, the observance of the privacy is one of the most important legal topics to which various countries have paid attention by appropriate legislation. Of course, in the case of its scope, particularly with regard to new information era and the acquisition of new technologies, detailed issues has been raised. It is essential to respect of the privacy and non-interference in the private affairs of the defendant; investigating the issues which have not any relation to the offence and or the notice of defendant's records which may be used against him as a leverage, are forbidden by law. (Jalili, 2003: 17).

The immunity of private life of the accused is a very important issue that should be carefully considered by the judicial authorities and justice officers. Because even a trivial negligence in collecting evidence and discovery of crime, may amount to the infringement of the defendant's fundamental rights and freedoms. Today, modern scientific detection of crimes has enabled the justice officers to register and record criminal phenomena with speed and high accuracy. As a result, preliminary investigation is performed with a high quality.

Fields such as fingerprinting, forensic firearm examination, genetic identification; forensic entomology and the use of computers in order to identify the accused have been deeply developed so that a high confidence has been created in the accurate and rapid detection of crimes. However it should be noted that the necessity of observing the accused's right of defense during the crime detection stage requires that immoral and non-humane scientific and technological ways should not be used. In other words, the condition of the application of forensic science is that the accused's rights and freedoms are respected. Using hidden audio capture, employing the Visual equipment moving image and the photograph and the like, violate civil rights and are inconsistent with criminal justice Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights forbid any arbitrary and unlawful interference with individual privacy.

A dialectical analysis of the relationship of human values (such as privacy, equality justice, welfare, freedom, sustainability, participation, inclusion, solidarity) and security assumes that fostering broader societal goals that respect human values is a good way for advancing security of society and that conversely, a state of peace in society, is a good condition for the realization of human values. It is based on a realistic analysis of the relationship of society and phenomena such as crime, terrorism, surveillance, which means that it neither calls for law-and-order policies or the reliance on surveillance technologies because it considers such measures as purely reactive and not addressing existing problems societal causes nor ignores the actual existence of problems that affect common people and for which solutions are needed. (Fuchs, 2013: 8)

#### ***4. Respect to Citizens' Dignity and Reputation***

International legal texts adopt this concept of human dignity, connecting human dignity to the provision of human rights. Both the United Nations Charter and the Universal Declaration of Human Rights proclaim the equal dignity of all men and women. The first line of the Declaration's Preamble recognizes "the inherent dignity and..., the equal and inalienable rights of all members of the human family." Article one of the Declaration states: "All human beings are born free and equal in dignity and rights." Human dignity can currently be found in most of the world's constitutions. The tendency is toward further increase in the use of the term both in the number of appearances within a nation's constitution over time, and across countries' constitutional documents. The extensive use of the term since The Second World War (WWII) has also resulted in new and non-obvious uses and functions that are reflected in, and also dictated by, the appearance of the term in various parts of the constitutions. (Shultziner & Carmi, 2014: 473).

WWII was a turning point in the annals of the human experience. The brutality of the war, the utter disrespect for human life, and the systematic and planned execution of millions caused shock and trauma among the nations. The reaction was the emergence of new political and ideological frameworks. The UN, established in 1945, embodies the new political order. The new ideological framework is most clearly manifested in the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the UN in 1948. Human dignity and human rights are the concepts most identified with this political and ideological shift after WWII. (Shultziner & Carmi, 2014: 465). The prohibition of torture and cruel, inhuman or degrading treatment or punishment is another result of the citizens' right to dignity and reputation. This is stipulated in Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, the latter also contains the prohibition of medical or scientific experiment without the person's free consent. However, it should be noted that any experiment, though without the defendant's consent, in order to detect a crime or to obtain evidence, is not forbidden, provided that it is performed with consideration to the person's dignity.

Since human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting. As the driving principle of the legal order, however, and as a root of Kantian thought, it possesses a certain fixed content. At a minimum, for example, it means that the social order must reflect recognition of the equality of humankind. This concept is anchored in article three of the (German) Basic Law. Equality means at least that persons are entitled to “equal worth” and that, accordingly, there can be no slavery or serfdom, racial or ethnic discrimination. Second, dignity means respect of physical identity and integrity, which is textually specified in article 2(2). This prohibits torture and corporal punishment and forbids imposing punishment without fault or levying disproportionate penalties. Third, dignity means respect of intellectual and spiritual identity and integrity. This is manifested most dramatically in the protection of personality rights, specified in article two and elaborated on in this article. Fourth, dignity means limitation of official power. This is particularly evident in the guarantee of proportionality, which circumscribes governmental means to legitimate ends and of procedural due process rights, which allow persons affected by official action to be heard and to be able to influence proceedings which concern them. Fifth, dignity means guarantee of individual and social existence. Tangibly, this is manifested in the article 2(2) right to life and in Germany’s social welfare state, textually anchored in article 20(1). (Eberle, 2012: 201).

The definition underlying the accounts embodied in the various frameworks is merely formal. It is that human dignity is the fundamental value of the human being. For the content of the idea of human dignity we must, however, turn to the experiences of love and friendship, in which the constitution of the person enjoys the most favorable conditions. Here we learn to respond out of our own depth to the equally fundamental value of the other. Hence, as an expression, ‘human dignity’, refers beyond criteria to the fundamental value of the existence of individual human beings. (Lebech, 2004: 12).

The legal evolution of the meaning of human dignity depends on several factors such as the political and legal system, the power of judicial review and legal tradition. The courts in some countries may even step back from their previous practices arguing that “human dignity is an abstract and subjective notion that cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.” (Staffen, 2016: 116).

The defendant’s right to dignity and reputation, requires judges not to mistreat and humiliate defendants during various stages of criminal proceedings. To this end, teaching professional ethics is of great importance. In most countries, judges’ education is only limited to technical legal discussions, whereas their perception of human dignity and reputation is necessary to realize a fair criminal justice.

### ***5. The Observance of Citizens` Rights in Obtaining Evidence***

In the criminal proceedings, any action that restricts the basic rights of the individual must have a legal basis. So, not only the temporary detention and other compulsory and binding actions against the accused, but also any kind of obtaining evidence are of great importance, as far as basic rights are concerned, infringement of which amounts to the violation of law and will result in violators` liability. (Niazpour, 2013: 54). In most countries the competence of the determination of the measures limiting the rights and freedoms of the individual are devolved to judges of the court. Although, in instantaneous cases, some powers are conferred on examining judges and police officers, their decisions must be confirmed by the judge of the court in a short period of time.

The principles relating obtaining evidence mentioned in judicial reports, are mainly connected to the appropriateness and legality of evidence, the meaning of which is that any kind of evidence may be admissible in criminal cases, except those explicitly prohibited by the constitution and or ordinary law. Although, in some countries, there is no enactment about modern means such as remote electronic eavesdropping, automatic surveillance and hidden camera, the prevailing opinion is that the arbitrary usage of such means is contrary to the personal freedom and privacy.

However, it seems that these ways of obtaining evidence should be strictly determined by the legislature. In obtaining evidence, professional secrets based on the people`s confidence such as those between physician and The press and mass media play an important role in the secrecy. Editors in chief should not be bound to testify or reveal the information. Besides, the publication of news relating trials in camera should be prevented, because the detrimental effects of such publication are irreparable. At least in countries where the freedom of the press is recognized, some restrictions or bans on the publication of certain content by the press or mass media in General, should be imposed. (Najafi Abrandabadi, 2007: 29).

In some countries, upon the belief in the principle of the accuracy of arguments, all the evidence and documents obtained by the way of the violation of fundamental rights and lack any legal ground, are known null and void. Such arguments are absolutely unreliable. Among the prohibited evidence, unidentified witnesses and the persons subordinate to the government and or the officers who do not reveal their real identification at the time of giving testimony or report. The acceptance of such testimonies or reports is dangerous to the discovery of the truth. Therefore, the witness's identity and his source of information should be certain and clear.

### **6. The Right to the Guarantee of Defense**

Following from the very nature of criminal procedure, prosecution by the State of the accused reveals an imbalance in term of rights and interests. As such, the accused must be equipped with certain legal rights if they are to be able to protect their legitimate rights and interest. This issue, in the broad sense, is not just the guarantee of the rights and interests of the accused as such but also the guarantee of the objectiveness and fairness of the whole process of criminal procedure. The guarantee of the accused's rights in general and the guarantee of the right to defense counsel in particular must be based upon a fair balance between the parties involved in criminal procedure. Knowledge of the criminal procedure has indicated that the right to defense counsel has been based on the theory of due process of law and on the right to a fair trial. (Loung, 2011: 18-19).

A suspect who is represented by a lawyer is in a far better position with regards to the enforcement of all his other rights, partly because he is better informed of those rights and partly because a lawyer will assist him in ensuring that his rights are respected. According to the European Commission, the right to legal advice is a second key element in the procedural rights for suspects. The right to legal assistance is covered by other European and international instruments as well: for instance the International Covenant on Civil and Political Rights. (Puyenbroeck & Vermuelen, 2011: 1024).

The right to defense counsel is recognized and guaranteed in most international conventions on human rights. In this section, the author will present aspects of the guarantee by analyzing the provisions of relevant international conventions on human rights; I will also suggest the impact these conventions might have on practical law-making. In addition, some regulations of a number of countries will be reviewed to show consistency with the conventions. (Loung, 2011: 30).

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the UDHR. Article 11(1) of this Declaration stated: "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". Even the foregoing statement does not directly mention the right to defense counsel but subsequent interpretation of Article 11 has shown that the right to defense counsel is a key element of the right to a fair trial as mentioned in Article 10 of the Declaration: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Based upon the spirit of the Declaration, the right to defense counsel has been recognized in international legal instruments in two contexts: (1) the global context (the United Nations itself) and (2) the regional context. (Loung, 2011: 30-31).

In the global context, the right to defense counsel is recognized in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as follows: everyone charged with an offence shall have the right (1) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; (2) to defend in person or through legal assistance of his own choosing; (3) if he does not have legal assistance, legal assistance will be provided to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. (Loung, 2011: 31). In addition, the right to defense counsel has been recognized by other relevant international instruments, such as the United Nations Basic Principles on the Role of Lawyers, the Rome Status of the International Criminal Court and many regional instruments including the European Convention on Human Rights (1950), American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981).

Nevertheless, many courts essentially nullify the Right to Present a Defense, by reducing it to the right to a "fair trial" with even-handed application of the rules of evidence – as if this fundamental constitutional right provided no more protection than the non-arbitrary application of the rules of evidence. It is the job of the advocate to demonstrate that the Right to Present a Defense provides much more protection than that or there is no point to having such a right to begin with. (Mahoney, 2011: 11).

## 7. Conclusion

Preliminary investigation stage is the most important phase of the criminal process, because the foundations of the criminal case are formed in this part of the proceedings. Any judicial mistake or abuse of powers in this stage may lead to the ultimate violation of law and trespass on defendants' rights. Legal writers highlight the need for the respect to the basic legal principles including presumption of innocence, observance of the right to privacy, respect to citizens' dignity and reputation, observance of citizens' rights in obtaining evidence and the right to the guarantee of defense. These principles ensure the realization of a fair trial and due process. A fair balance between the parties involved in criminal procedure necessitates protective measures for defendants, because due to the very nature of criminal procedure, the accused is in a weaker position. The above-mentioned principles may remove the imbalance between the accused and the prosecution. However, the performance of those principles in the preliminary investigation stage is not so easy, since detection of crimes and obtaining evidence is the priority of the prosecution and police officers in that stage and this may distract officials' attention of the strict observance of defendants' rights. I propose that every public prosecutor's office establishes a human rights section consisting of some prosecuting attorneys in order to assist the public prosecutor in supervising the observance of both parties' rights. It can largely prevent the violation of fundamental rights and main principles of due process.

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