

# **Strengthen the Rule of Law and Access to A Fair Trial Through the Annulment of Illegal Evidence and Holding of Public Trial**

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### **Abstract**

Considering the requirements and duties that the investigator or judge must observe in terms of respecting the rights of the defendant and individual freedoms, as well as in terms of respecting the dignity of the judiciary in investigating and gathering evidence, violation of these requirements and duties in some cases can lead to unreliability of evidence or invalidity of research. For example, one of the most common and accessible ways of detecting a crime is the defendant's confession through torture, reluctance and coercion of officers and agents, that even if it leads to obtaining other material evidence that confirms their authenticity, it cannot be relied on and the material evidence obtained. Other cases of annulment of investigations include annulment of investigations conducted by persons other than judicial officers, annulment of investigations conducted in the event of deprivation of access to a lawyer, and non-observance of the requirements related to the preparation of the minutes of the interrogation sessions and the regulations related to the confession and testimony. Considering the existing cases, some criteria can be stated for the annulment of investigations, which are: gross violation of fundamental rights and freedoms or invasion of the most private privacy, prohibition of interrogation methods involving the risk of obtaining false confessions or information, prohibition of unfair crime detection methods or contrary to the dignity of the judiciary. Therefore, as a general rule, it can be said that the violation of the most basic rights of the defendant in the preliminary investigation stage, assuming non-compliance with legal requirements, invalidates the preliminary investigation and its implementation is not limited to disciplinary action or criminal prosecution. As a result, in order to respect and protect the rights of the defendant and the correct methods of obtaining evidence, it is necessary to clarify the provisions related to the request for annulment of the preliminary investigation in the Iranian criminal procedure. Deviation from the principle of openness of proceedings, except in cases permitted by law, which are prescribed only in democratic conditions and as a result of the balance of conflicting interests and values, is considered a violation of the principles of fair trial and disregard for the fundamental rights of individuals. Despite some initial assumptions that generally equate the components of a fair trial to the rights of the defendant, a public hearing also entails benefits to society. Therefore, the "individual right of the defendant" and the "public interest of society" should be defined and explained as the theoretical basis and justifications for the openness of criminal proceedings. This research, after designing and preparing the topics, describes the theoretical foundations of the openness of the trial.

**Keywords:** Defendant's Rights, Preliminary Investigation, Fair Trial, Justice, Principle of Equality

### **Introduction**

One of the goals of justice is to realize the dream of a fair trial, especially in criminal proceedings, in a way that guarantees the rights of the plaintiffs. Accordingly, throughout history, many efforts have been

made to achieve a fair trial. Observance of the principle of innocence and the principle of legality of crime and punishment is necessary to respect human dignity and observance of these principles in proceedings will lead to a fair trial and guarantee the rights and freedoms of citizens, which in addition to maintaining social order, it prevents the punishment of innocents or the double punishment of criminals. A fair trial requires a legal right for those involved in criminal proceedings, especially the defendant, that these rights are not rights granted to them but are inherent in them.

A review of recent legislative developments, including the Law on Respect for Legitimate Freedoms and the Protection of Citizenship, is a sign of the legislature's efforts to bring domestic regulations into line with these standards. The Iranian legislature has violated some of the principles and rules of fair trial in criminal proceedings, including the preliminary investigation stage, trial and execution of the sentence by enacting some regulations, including the presence of a lawyer in the preliminary investigation stage which must be with the permission of the judicial authority; or preventing the presence of a lawyer in the trial stage due to expediency and preventing corruption or deviating from Article 36 of the Constitution and delegating the investigation and punishment to a quasi-judicial body called the Dispute Resolution Council, which necessitates legislative reconsideration in these matters. Finally, it should be said that in order to achieve a fair trial, it is necessary to formulate criminal laws in accordance with the needs of the day and the structure of the judiciary and the state, and justice administrators should be selected from among legal scholars with good work motivation to meet the ideal human desire.

The administration of criminal justice, which is the goal of any criminal trial, will not have the opportunity to emerge without a fair trial in which the rights and freedoms of the defendant, the victim and other persons involved in the criminal process, are respected. The openness of the trial is a situation in which hearings are held and conducted without hindering the presence of ordinary people and the public media. This situation today is one of the important components of a fair and just trial of human rights in criminal cases. Deviation from the principle of openness of the trial, except in cases permitted by law, which is prescribed only in a democratic manner and as a result of a balance of conflicting interests and values, is considered as a violation of the principles of a fair trial and disregard for the fundamental rights of individuals. Despite some initial perceptions that generally consider the components of a fair trial to be the protector of the rights of the defendant, a public trial also involves benefits for society. Therefore, the "individual right of the defendant" and the "public interest of society" together should be defined and explained as the basis and theoretical justifications for the openness of criminal proceedings. The impartiality and independence of the judiciary is undoubtedly one of the general principles of law and is considered as a fundamental principle of the rule of law. (Fazaeli and Falsafi, 2008: 179).

In addition, the right to a fair trial requires that the judiciary handling disputes and complaints be immune from the influence and control of the other political or executive powers, and according to the principle of impartiality, the trial should be free from bias of the litigants and any prejudice. Therefore, the use of words that indicate the previous prejudice of the perpetrators and those involved in the judiciary against the suspects, in addition to create ambiguity about the independence and impartiality of the investigating authority, will be in clear conflict with the principles of fair trial and innocence. According to the principle of innocence, individuals are presumed innocent from beginning of the formation of any suspicion against them, unless their guilt is proven by a competent court<sup>1</sup>. Failure to pay attention to all these cases raises doubts in the public mind of the judiciary and may obscure the overall legitimacy of the said authority. The right of access to justice and the enjoyment of a fair trial are among the basic human rights enshrined in international human rights instruments, including the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the principles of transnational justice. Domestic law systems, in turn, have established a set of principles and rules for a fair trial. These principles include the three stages of the proceedings, including the preliminary investigation, the trial and the post-trial stage. The principles governing a fair trial are a set of principles and rules that guarantee the rights of the defendant. These principles guarantee what is known as a fair trial, and we have made the subject of the article and research. In this article, the researcher attempts to answer this question: "What is the strategy of the Iranian legislature in conducting a fair trial in special circumstances?". In response to the question, the hypothesis is raised that in special and critical circumstances, the principle is to enforce the law and

the Iranian legislature in conducting a fair trial in special circumstances should act in such a way that in addition to respect the rights of society, the also helps the defendant in self-defense. In this regard, the observance of the principles of a fair trial seems vital and necessary.

The purpose of this research is that according to the Human Rights Committee's interpretative view in the case of Article 4 of the International Covenant on Civil and Political Rights and the rules for declaring a state of emergency, this right should not be suspended in the event of conflict in a manner contrary to the principles of international humanitarian law and international law. Based on this goal, it seems that special circumstances have no effect on the conduct of a fair trial, even in exceptional circumstances such as war or threat of war, internal political instability or any other state of emergency, to justify deviation from the fair trial in certain circumstances.

#### 1- The Principle of Prohibition of Illegal and Arbitrary Detention

##### A- The right to be free

One of the fundamental human rights is freedom of movement. This right is also recognized in important international instruments, including Article 3 of the Universal Declaration of Human Rights, Article 9 of the Covenant on Civil and Political Rights, Article 6 of the African Charter and Article 5 of the European Convention on Human Rights. One of the most obvious examples of freedom is freedom of movement. However, sometimes the judicial authorities issue a detention order and practically cause the defendant to be imprisoned for the whole or part of the preliminary investigation. Detention is a very serious act against individual liberty and contrary to the presumption of innocence; because before the sentence is determined by a competent court, the defendant is practically serving his sentence. Detention, on the other hand, has detrimental effects on the administration of justice, so that the judges less will to acquit a person who has been detained for some time and, in order not to deny the interrogator, will to choose a sentence that is at least equal to the length of the temporary detention, and if it is long, they do not simply use the suspension of punishment and alternatives to imprisonment. (Lavasor and Stephanie, 2008: 845).

This situation is exacerbated when the public forces are obliged to pay damages to a person who has been detained for a long time. On the other hand, the criminal policy adopted by most developed countries, inspired by the positions of the new school of social defense, is aimed at increasing the use of alternatives to imprisonment, such as fines, daily fines, charitable work, and especially the use of suspension institutions are simple or care. The use of these tools is constantly recommended in order to avoid adverse prison conditions and its criminalization (Ansel, 2012: 103).

It is now clear that the suspension of the sentences of those detained during the preliminary investigation period, assuming the court grants the suspension, is contrary to the reason for the suspension and lacks its beneficial effects, especially on young people and adolescents. This is one of the important factors that can prevent the recurrence of crime and also the fear of arrest for many people. However, this fear is not only dashed by imprisonment during temporary detention, which can be very long in some cases, but also the defendant in the detention center (which unfortunately in many countries does not follow a different system from the prison of the convicts), loses his positive personality traits and resilience as a result of being with the other prisoners. (Ashouri, 2007: 141).

Temporary detention also has an adverse effect on the defendant's right to defense, depriving him of free access to legal information and the use of the advice of a lawyer, and does not allow him to provide a reasonable defense. Staying away from the social environment during the days of detention will have devastating psychological effects on the detainee, and most importantly, the social and psychological effects of temporary detention are not limited to the defendant and include those around him and his family. Given the many disadvantages of temporary detention, the current trend is to limit the issuance of temporary detention orders as much as possible, and substantive and formal conditions are considered for this to be minimized.

At the international level, if a person is remanded in custody as a temporary detention, his or her rights must be fully guaranteed, so that the defendant is simply deprived of his or her freedom of movement and his or her other rights are not harmed. This requires that cases of temporary detention be enforced or revoked, and then the criminal justice system move to use alternatives to temporary detention, and detention should be used only as a last resort and for a reasonable period of time in a place where the act

is very severe; either the prevention of the escape or hiding of the defendant is achieved only by arrest, or the release of the defendant leads to the destruction of the effects of the crime and collusion with witnesses and informants or the detention of the defendant as a precautionary measure justifies the preservation of the life of the defendant or prevents the recurrence of his crime.

#### B- No Arbitrary Detention

The issuance of a temporary detention order should be at the sole discretion of the judiciary, and judicial officers and administrative officials of the criminal justice system do not have such authority. Otherwise, such detention is arbitrary. Failure to comply with legal procedures should lead to the annulment of the detention order and the punishment of the issuing authority; because, as stated earlier, this agreement leads to the deprivation of the individual of the right to liberty, which is a severe punishment, followed by a trial and a decision of a judicial official.

Sometimes, according to the domestic regulations of a country, the issuance of a temporary detention order may not be considered arbitrary because it is prescribed by law, while according to international standards, the same detention may be considered arbitrary. For example, if a law is enacted to violate fundamental international standards, such as the right to freedom of expression, and where temporary detention is ordered, it is arbitrary detention. The term "arbitrary" in Article 9 of the International Covenant on Civil and Political Rights implies that it not only includes unlawful detention, but must also be interpreted more broadly to include disproportionate and unjust detention.

#### 3- Strengthen the Rights and Freedoms of The Defendant in The Preliminary Investigation Stage

Granting The right to interrogate the employees of the criminal justice system, such as the police, is one of the measures that criminal justice systems have envisioned to uncover the truth. According to these rights, interrogation is the investigation of a defendant into his or her possible involvement in the commission of a crime. In various penal systems, in addition to granting the right to interrogate the police, measures have been taken to prevent any possible violation of the rights and freedoms of the defendant. Acceptance of the right to silence, prohibition of torture, deception and deception of the defendant and the need to record the interrogation are the most important of these measures. In domestic regulations, in particular the Code of Criminal Procedure, some of these rights, including the right to remain silent, the prohibition of torture, deception and deception, are explicitly accepted, while the others, including the recording of interrogation, are incompletely accepted. The Criminal Procedure Code of 2013 does not provide a definition of interrogation and only some criteria governing interrogation are stated.

In addition, in some cases, especially in the sixth chapter of the second part of this law (summons and investigation of the defendant, witnesses and informants) the word investigation has been used instead of the word interrogation. It follows from the above definitions that only the defendant can be interrogated. There must be sufficient evidence to attribute the charge to the person before the interrogation. Therefore, the witness and informant cannot be interrogated. A look at the various articles of the Code of Criminal Procedure, including Articles 42, 59 and 60, also confirms this view. However, Article 206 states that "the investigation and interrogation of witnesses and informants before the trial is closed to the public". It seems that the use of the word "interrogation" in this article was due to the negligence of the legislator and the word "investigation" should have been used. Depending on the purpose of the interrogation, i.e., obtaining information from the defendant to find out the truth, the police may take actions that are contrary to the rights of the defendant during the interrogation in order to expedite the acquisition of evidence. Therefore, various measures have been taken in criminal justice systems to prevent any possible violations. In the Iranian penal system, some of these measures are explicitly provided in the second chapter of the second part of the Code of Criminal Procedure, entitled "Judicial officers and their duties"<sup>2</sup>, and others are stated in other chapters of the "Preliminary Investigations" section. Since, according to Article 2 of this law, "all actions of judicial officers in conducting investigations must be in accordance with the rules and regulations laid down for preliminary investigations", the police are obliged at the time of interrogation to meet the criteria set by judicial authorities during the preliminary investigation. Under surveillance, it monitors the stages in which the suspect is in police detention. Under surveillance is a right that allows judicial officers, in certain circumstances, to detain suspects for a period of time that is

now determined in many countries in terms of the severity of the punishment or the type of crime committed, in order to obtain results. Often in the course of surveillance, the police can gather the necessary evidence and prevent the disappearance of the effects and causes of the crime and the extent of its consequences. However, it is said that the person under surveillance is in an unstable, suspended and weak position due to some restrictions and conditions and sometimes holding numerous hearings and interrogations by the police forces during this period (Madani, 2009: 148).

Based on the presumption of innocence and the right to liberty of individuals as one of the indisputable legal principles, placing a person under the supervision of an action is contrary to the principle and should be applied in a limited way. From this perspective, two stages of surveillance and pre-trial detention are similar, and both lead to deprivation of liberty. Based on the necessity of this important principle, determining specific legal conditions and procedures for depriving individuals of their liberty and restricting it in exceptional cases, and for this reason, keeping a person by the police outside the statutory rules is considered illegal detention, followed by legal punishment.

#### 4. Prohibition of Interrogation Practices at The Risk of Obtaining False Confessions or Information

Judicial and law enforcement authorities, after preparing the interrogation and observing the defense rights of the defendants, during the interrogation should pay full attention to the defense rights of the defendants. The rules that must be observed during interrogation and to guarantee the defense rights of the defendant are focused on protecting the freedom of defense and preserving human dignity. According to these rules, during the interrogation, the absolute freedom of the defendant, both mentally and physically, is fully guaranteed.

##### A- Prohibition of Inductive Questions

One of the things that can affect people's morale and is prohibited in criminal justice systems is the ask of induction questions<sup>3</sup>. The questions raised should eliminate the irrational effect on the defendant's emotions and feelings. Also, statements that are caused by coercion or reluctance are not valid, and basically asking such questions not only affects the morale of the weak-minded and confesses under the influence of indoctrination, but also affects ordinary people. Therefore, such questions should be strictly avoided during interrogation.

In inductive questions, the type of question is such that it motivates people to accept the accusation; For example, asking a person defendant of car theft whether the car stolen by you was blue or red is an indoctrination because it subconsciously forces the person to accept the charge of theft and to think about remembering its color. The correct question is whether you accept the accusation of stealing a car model... according to the reasons ... or not.

In Iranian law, according to Article 60 of the Code of Criminal Procedure, the inductive questions as well as statements arising from coercion or reluctance are prohibited, but there is no enforcement guarantee in the text of this article to comply with it, and as mentioned earlier, the former Code of Criminal Procedure provided for a minimum disciplinary guarantee for raising such questions.

##### B- Deceiving the defendant

Deception of defendants by gaining their trust in false promises of exemption or mitigation of punishment for confessing to a crime and other cases disrupts the rights of the defense. The fact that investigating judges and judicial officers, resort to pleasant promises during the investigation in order to obtain a confession from the defendant, the fulfillment of which is beyond their authority, is a clear example of deception or deception of the defendant. Also, if two interrogators artificially assume different roles during the interrogation and, as a result, obtain information from the defendant by gaining his trust, they have violated his right to defense; for example, one of the interrogators appears in a violent and inflexible role and the other shows himself as kind and compassionate, and the defendant confesses to the crime under the guise of the appearance of the second interrogator and hoping for his help in getting rid of his abnormal situation.

##### C. Reluctance and Coercion

The reluctance and coercion of the defendant in response to questions during interrogation are obvious examples of violation to the defendant's defense rights. The coercion of defendants to obtain a confession is done through physical or mental torture. The torture of defendants is strictly prohibited in international

and regional human rights instruments. The most important international convention in this filed is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations in 1948.

Article 1 of the Convention defines torture as any act that intentionally inflicts physical or mental pain or suffering on a person, in particular with the intent to obtain information or confession from that person or a third party; or punished for an act on which this person or a third party has committed or is suspected of having committed a crime; either this person or a third party is intimidated or coerced for any other reason based on some form of discrimination, subject to the fact that such suffering has been perpetrated by a government official or any other person who has been in the official position of a government, or with his or her explicit or implicit consent. This term does not include the suffering that results exclusively from the enforcement of legal penalties and is inherent or causal of such penalties".

Article 4 of this Convention also stipulates that all confessions obtained from the defendant without observing the provisions of this law and denied by him in court, in the absence of other acceptable evidence, shall be null and void. (Jafari Langroudi, ex: 230).

Article 38 of the Constitution of the Islamic Republic of Iran, in its position prohibiting the torture of the defendant during interrogation, states: "Any form of torture to obtain a confession or information is prohibited. Forcing a person to testify, confess or take an oath is not permissible, and such a confession and oath has no value and validity, and the violator of this principle will be punished according to the law". This principle explicitly and without any exception prohibits any torture, whether physical or mental, by any means and method, and considers it invalid. (Jafari Langroudi, 2007: 230)

Pursuant to this principle, paragraph 9 of the single article of the Law on Respect for Legitimate Freedoms and Protection of Citizenship stipulates that any torture of a defendant for the purpose of obtaining a confession or forcing him to do other things is prohibited. (Ashouri, 2007: 39).

Article 129 of the Code of Criminal Procedure prohibits coercion and reluctance for the defendant. Article 578 of the Islamic Penal Code stipulates that any government employee or judicial or non-judicial official who harasses a defendant in order to force him or her to confess, shall be sentenced to imprisonment from six months to three years in addition to retaliation or payment of DIYAT, and if anyone has ordered in this regard, only the ordering party will be sentenced to the said imprisonment. If the defendant dies due to harassment, he will be responsible for the murder of the murderer and the perpetrator of the murder. Due to the explicitness of this article, some jurists do not consider mental torture and torture of non-defendant ones such as witnesses to be covered by this article. (Golduzian, 2007: under Article 578).

As a result, according to the above legal principles and materials, it can be said that a confession based on torture has no legal effect and such a confession can be rejected by the defendant; Even the torturer is sentenced to a legal punishment according to the degree of the perpetrator. Regarding the effect of confession on the basis of torture, the question arises as to whether, if accompanied by another reason, the torture obtained for confession would impair that reason or is that reason still valid? For example, if someone confessed to steal as a result of torture and then handed over the property, will the defendant be acquitted because the confession is undocumented or other reasons remain in force? It can be answered, in systems where the system of " persuasion of the judge's conscience" prevails, the reasons are all methodical and any reason can have the same value as the other reasons, and confession is not considered the queen of reasons until other reasons are out of the question by damaging it (Ashouri, ex: 270).

In Iran, the Supreme Court has stated the reasons in its ruling<sup>4</sup>. Therefore, if torture is used to obtain a confession, the confession alone will not be affected and the other reasons have their validity and can be cited. In the above case, the surrender of his property is a reason for committing theft, and obtaining torture for confession does not harm that reason.

#### 5- Prohibiting the Methods of Detecting A Crime Contrary to Justice or Contrary to The Dignity of The Judiciary

The Code of Criminal Procedure is a set of rules and regulations for the detection of a crime, prosecution of the defendant, preliminary investigation, mediation, peace between the parties, procedure, issuance of verdicts, methods of appealing against verdicts, execution of verdicts, determination of duties and powers of judicial officials and judicial officers. Therefore, prosecuting the defendant and observing the rights of

the defendant are among the goals of enacting the Code of Criminal Procedure, and the rules governing it are, of course, stated in the law. But what are these rules and what rights the defendant has in this way? The important point is that this law does not only consider the rights of the plaintiff and the defendant, but also a set of provisions that include the rights of all members of society.

Inspection in the word means the act of inspector and inspection (Moein, 1996: 455) and the term is a inspection of houses, places and objects in cases where there is a strong suspicion to discover the defendant or the tools or instruments and the reasons for the crime. In this way, the inspection will be useful for revealing the truth and completing the preliminary investigations and preventing their destruction. (Imani, 2003: 90)

In fact, the most important and vital judicial action in gathering evidence and discovering and confiscating educational property resulting from the crime is home inspection, workplace and other places that the perpetrator uses to hide the said property. The legal element of this action is Article 137 of the Criminal Procedure Code of 2013, which stipulates: "Inspection of houses, closed places, as well as search and inspection of property in cases where, according to the evidence, there is a strong suspicion of the presence of the defendant or the discovery of tools, instruments and evidence of the crime, by order of the investigator". Therefore, entering residential houses without the request or permission of the homeowner is permissible when a crime has been committed and there is a strong suspicion that the defendant can be arrested in a residential home or there is a suspicion that the causes, effects and signs of the crime or its instruments can be found in a residential home. In such cases, only the judicial authority in charge can enter the homes of individuals or, by special order of the judicial authority, the officers of the judiciary can inspect the homes in specific cases and for a specific time. (Ashouri, 2013: 59)

According to Article 77 of the Code of Criminal Procedure, if the crimes referred to in paragraphs (a), (b), (c) and (d) of Article 302 of this law are evident, before the presence and intervention of the investigator, the prosecutor will take the necessary measures to preserve the effects and signs, gathering evidence of the crime and preventing the defendant from escaping and hiding.

According to this article, the preliminary investigation of obvious crimes, which is the subject of the four paragraphs of Article 302, is one of the cases in which the prosecutor has the right to initiate the investigation before the investigation by the investigator and to continue the investigation until a normal time. The usual time will be until the presence of the investigator. Article 78 of the said law provides: "In the case of obvious crimes which are beyond the jurisdiction of the local court, the prosecutor is obliged to take all necessary measures to prevent the erasure of the effects of the crime and the escape and hiding of the defendant and any investigation to find the crime, and immediately sends the result of his actions to the competent judicial authorities. This article is taken from the repeated Article 23 of the Code of Criminal Procedure 1290<sup>5</sup>. Investigating obvious crimes has deprived the authorities of jurisdiction to investigate the crime scene, and the preliminary investigation of these crimes has been left to the prosecutor, who, after conducting the investigation, issues the case to the competent authorities. According to Articles 307 and 308 of the Code of Criminal Procedure adopted in 2013, Tehran Criminal Court and the Criminal Court of the provincial capital are the place where the crime took place. (Ashouri, 2013: 61)

#### 6- Grounds for Deviating from The Principle of Separating the Prosecuting Authority from The Investigation

The grounds for deviating from the separation principle of the prosecuting authority from the investigating authority are examined in two separate sections, each of which will be mentioned later in this paragraph. In the first part, the prediction of investigative bodies other than the investigator, including prosecutors and judges of criminal courts one, two and children on one hand, and the increase of summary proceedings on the other hand, and in the second part, maintaining and expanding the prosecutor's guardianship rather than the investigator in all preliminary researches stages are known as one of the most important fields of deviation from the separation principle of the prosecuting authority from the investigating authority.

##### 1- Predicting Research Institutions Other Than the Investigator

One of the important grounds for deviating from the separation principle of the prosecuting authority from the investigating authority should be considered the idea of removing the investigator from the Iranian judicial system. As mentioned, in judicial systems based on the absolute separation of the prosecuting authority from the investigating authority, the only authority competent to conduct a preliminary investigation is the investigator or the investigating judge, and no authority other than the investigator can be responsible for this. It would be worth mentioning that the removal of the investigator in some countries, including Germany, Italy and Portugal, and the commission of a preliminary investigation into the prosecutor, who is doing this with the help of his deputies and the police force, has not been done with the aim of increasing the powers of the prosecutor. In these countries, regardless of the fact that the necessary mechanisms have been used to control the actions of prosecutors and to observe equality of necessary mechanisms between the plaintiffs, but the removal of the investigator has been done with the aim of avoiding inspection methods. The removal of the investigator from the Iranian judiciary, which was done according to the law on the establishment of general courts in 1994, as stated, apart from entrusting all stages of the trial to a single judge, has led to an increase in the powers of law enforcement. (Ashouri, ex: 11).

Iranian legislature, in enacting and approving the Code of Criminal Procedure 1290, by adopting French law, had accepted the investigative system in the preliminary investigation stage (according to which, the preliminary investigation of all crimes is the responsibility of the investigator and prosecution of crimes is the responsibility of prosecuting authority or the prosecutor), however, has never adhered to the absolute separation of two authorities from each other, and in many cases has deviated from this principle. In the Code of Criminal Procedure 1290, after accepting the principle that the preliminary investigation of all crimes is the responsibility of investigator as the investigating authority, for a short time, while deviating from this principle, it has been assigned investigating the misdemeanor crimes to prosecutors who are inherently prosecuting authorities. With the removal of the judiciary from the judiciary and the establishment of courts with general jurisdiction, there was no distinction between the stages of prosecution, investigation and trial, and the legislature entrusts all of these stages to a single judge. In drafting the Code of Criminal Procedure adopted in 2013, the legislature has expanded the scope of deviating from the principle of separation of the prosecuting authority from the investigating authority, and after repeating this principle in Article 92 of the law, in many cases, he has explicitly provided preliminary investigations of crimes, which in principle should have the exclusive jurisdiction of the investigating officer or investigator, sometimes to the prosecuting authority or the prosecutor and sometimes to the judges of the court. Article 92 of the aforementioned law stipulates: "Preliminary investigation of all crimes is the responsibility of the investigator". The mentioned article of the law, considers the preliminary investigation of all crimes in the exclusive jurisdiction of the investigator as the investigating authority, while in Article 90 of the same law, also considers "the other judicial authorities" to be competent for this important matter. The fact of the matter is that with the expansion of the competent authorities to conduct preliminary investigations other than the investigator, the ADC Law adopted in 1992 has made it much more difficult for the investigator to explain the investigative position. It is interesting to note that Article 8 of the Amendment to the Code of Criminal Procedure adopted in 2015, by deleting the word "absence" in Article 92 and replacing it with the word "deficiency", has again provided the prosecutor with preliminary investigations on non-crimes subject to Article 302.

## 2- Anticipating the Investigative Role for The Prosecutor and The Judge of The Court

According to Article 92 of the Code of Criminal Procedure approved in 2013, apart from the crimes mentioned in Article 302 of this law, in the absence of an investigator, the prosecutor also has all the duties and powers assigned to the investigator. In this case, if the prosecutor refers the preliminary investigation to the prosecutor, the final appointments of the prosecutor, as well as the appointment leading to the arrest of the defendant, must be made by the prosecutor on the same day of issuance, and the prosecutor is obliged to comment within twenty-four hours. However, according to the mentioned article and also Article 8 of the amendment to the Code of Criminal Procedure adopted in 2015, the prosecutor's permission to conduct preliminary investigations other than crimes subject to Article 302 of this law is limited to "lack of investigators", but due to lack of judicial staff in all jurisdictions are tangible

and the initiation of an investigation by the investigator is subject to the referral of the prosecutor. On the other hand, the prosecutor has the superior authority over the judicial authorities of the prosecutor's office that the investigator is one. The prosecutor will have the authority to conduct the investigation in order to manage the preliminary investigation process, especially in important and sensitive cases and in non-crimes, takes up the subject of Article 302 and conducts an investigation with the help of judicial officers. Another judicial authority that is responsible for the duties and powers of the investigator under the new law, is the judge of the court. Note to Article 92 of the said law stipulates that in case of absence of the investigator or his excuse to perform his duty and lack of access to another investigator in that prosecutor's office for the crimes subject to Article 302 of this law, the court judge, at the request of the prosecutor and appointing the head of the jurisdiction, performs the duty of the investigator only as long as the said situation remains.

### 3- Increasing Summery Proceedings

A summary proceeding is a form of criminal investigation in which a case is brought before a court by the prosecutor without an indictment. This type of trial, which takes place in the legal systems of other countries without the presence of a jury, is often common in simple crimes such as traffic offenses. The legislator in drafting the Code of Criminal Procedure approved in 2013, while providing Article 86, which deals with the filing of criminal proceedings in court without indictment and in non-crimes subject to paragraphs A, B, C and T of Article 302, along with seventh and eighth degree has also placed the direct jurisdiction of the court to deal with crimes against chastity; in such a way that the judges of the prosecutor's office, in the face of such crimes, do not have the right to intervene and conduct preliminary investigations, and must send the case to court by issuing an incompetence order. Currently, the crimes that can be prosecuted briefly or without an indictment in Iranian law are: a) Crimes against chastity, b) Crimes of children and adolescents, c) Crimes of seventh and eighth degree, d) Crimes committed in the jurisdiction of the district, e) Crimes of violation, c) Crimes and violations of government penalties (Goldoost Joybari, 2015: 17).

### Conclusion

The principle of separation of the prosecuting authority from the investigating authority is one of the salient features of the mixed judicial systems in the preliminary investigation stage. According to this principle, the preliminary investigation of all crimes is the responsibility of the independent investigating authority, and the prosecution of the crime is the responsibility of the prosecuting authority or the prosecutor. This principle has been accepted by the Iranian legislature; however, it has been deviated from in many cases; in a way that makes the existence of the investigator as an investigating authority unnecessary. Looking at the material described in the first paragraph, there is a need for impartiality of the governing process, the possibility of "subjective and objective" preliminary investigations based on the application of two criteria of impartiality by the prosecutor, when takes responsibility of investigating a crime. The faltering position of the investigator in the new criminal policy, which leads to the departure of the preliminary investigation stage from the state of cohesion and integration, is one of the most important cases that has been stated to deviate the principle of separation of the prosecuting authority from the investigating authority.

The necessity of referring the case by the prosecutor in order to start the preliminary investigation by the investigator, anticipating the prosecutor's supervision over the investigator's investigation in all stages of the preliminary investigation and the right to provide necessary training and attend interrogation sessions, deprivation of preliminary investigation of the authorities' obvious crimes subject to 308 of the Code of Criminal Procedure adopted in 2013 from the investigator and assigning it to the prosecutor, permission to conduct investigations of obvious crimes subject to paragraphs A, B, C and T of Article 302 by the prosecutor, permission to conduct preliminary investigations of non-crimes subject to Article 302 by the prosecutor, allowing the trial judge to conduct a preliminary investigation of the crimes mentioned in the article, the prosecutor's guardianship over the investigator after the completion of the preliminary investigation and the issuance of the final order, denial of the preliminary investigation of the investigator in crimes against chastity and the limitation of investigative competence of the investigator for children

and adolescents' crimes along with increasing the summary proceeding of crimes should be considered as a clear and practical context for deviating from the principle of separation of the prosecuting authority from the investigating authority.

The development and promotion of the level of criminal justice is one of the important indicators of the general development of any society; in other words, if the social justice system considers the principles of fair trial, including the right to a public hearing, which is not obstruct the presence of people and the media in court hearings and to publish the trial with respect for the rights of the defendant and the victim and support them, citizens will feel judicial security and consequently will be more willing to contribute to the development and excellence of their society. Instead, if the criminal justice system, which belongs to an authoritarian and non-democratic system, holds trials in secret, it will cause stagnation and even regression in society, and other citizens will no longer be willing to participate in the progress of society.

Public trials one of the most important guarantees of the defendant's defense rights; because when the trial against him is held in public, he no longer finds himself alone and powerless before the judiciary, and he is confident that the judge will not abuse his governmental power for fear of public scrutiny and arbitration. The impossibility of the defendant to waive this right is due to the fact that the right to a public hearing is an obligation for him; because he has a duty to society not to commit a crime, and when he commits a crime, people have the right to oversee the way he is trialed. On the other hand, the government can ensure the health of its judiciary by holding a public trial.

This principle, in addition to guarantee the rights of the defendant, also serves the interests of society. The occurrence of any crime damages the order and security of society. Therefore, in order to heal the wounds on the public conscience, it is necessary to hold a trial in front of the eyes of the citizens. In fact, the presence of the people in court hearings allows them to oversee the proper administration of justice.

In view of the above, it can be concluded that guaranteeing the rights of the defendant and the interests of society together form the basis of the principle of public trial. Therefore, the individual rights and interests of the defendant cannot be sacrificed under the pretext of protecting the interests of society, nor can the public interests be ignored in the name of guaranteeing the defense rights of the defendant. The benefit of society is basically nothing more than the benefit of individuals, even the benefit of defendants and criminals. Citizens' rights are guaranteed in a democratic society, and society is in a democratic state when it respects the rights of citizens. In a democratic society, collective and individual rights overlap and are jointly considered and protected. Therefore, it is necessary to consider the personal interests of the defendant and the public interests of the society together as justifiable reasons for the principle of openness of criminal proceedings.

The exceptions to this are in fact the solution to the conflict between individual interests and the collective interest and the preference of the best interest. Elimination of conflict and preference of value or superior interest is not limited to criminal justice and law in general, but such a solution is applied in all credits and managerial decisions in all its dimensions and levels.

It seems that in special and critical circumstances, the principle is to enforce the law, and the Iranian legislature, in conducting a fair trial and special circumstances, must act in such a way that, in addition to respecting the rights of society, he also helps the defendant defend himself. In this regard, the observance of the principles of a fair trial seems vital and necessary. Influenced by the global model of fair trial and the use of comparative studies, governments have distanced themselves from the audit system in the preliminary investigation phase by adopting new approaches. Meanwhile, the legislature of the Islamic Republic of Iran has considered these important developments among the regulations governing the defense rights of the defendant, and the attention and protection of the defendant from beginning of the criminal process (crime detection stage) has been considered by the legislator. The Code of Criminal Procedure of 2013, by being influenced by the global model of fair trial and the use of comparative studies by adopting new approaches, has distanced itself from the investigative procedure in the preliminary investigation stage. In the meantime, the regulations governing the defense rights of the defendant have undergone significant changes, and his attention and protection from beginning of the criminal process (crime detection stage) has been considered by the legislator. The right to meet with a

lawyer, a doctor, telephone contact with relatives during the intervention of judicial officers are some of the rights of the defendant in this stage.

It is suggested that the Iranian legislature provide the right of notification to refer the case to the litigants and to present a defense bill and pays special attention to the developments of delinquency in recent years, especially the quantitative development of gang and organized and terrorist crimes, and adapt traditional strategies for dealing with all types of crimes with today's delinquent developments.

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### FOOTNOTES

<sup>1</sup>Article 37 Of Constitution of The Islamic Republic of Iran

<sup>2</sup>Articles 63-28 of the Code of Civil Procedure approved in 2013

<sup>3</sup>Article 60 of the Code of Criminal Procedure (2014), in forced or reluctant interrogations from the defendant, the use of derogatory words, asking inductive or deceptive questions and questions outside the subject of the accusation are prohibited, and the statements of the defendant in response to such questions is not valid. The date, time and duration of the interrogation must be recorded in the minutes of the proceedings and must be signed by the defendant.

<sup>4</sup>Judgment No. 615, dated 31/3/1941, Branch 5 of the Court, Matin Collection, p. 30

<sup>5</sup>Repeated Article 23 of the Code of Criminal Procedure 1290; In the case of obvious crimes committed by government or municipal officials or public service officials, which are the responsibility of the Supreme Court to prosecute government officials, public prosecutors and interrogators are obliged to take all necessary measures to prevent the elimination of the effects of the crime and the escape of the defendant, and any investigation they deem necessary to discover the crime, and to report the results of their actions to the Prosecutor General of the Criminal Court as soon as possible.