A COMPARATIVE STUDY OF RIGHT TO SILENCE IN CRIMINAL INVESTIGATION IN USA, GERMANY AND IRAN

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Abstract: The purpose of this paper is to study the right to remain silence in USA, Germany and Iran's law in criminal investigation. Even though all the three countries respect the right and mentioned it in their Codes, but there are some differences in its scope. The method has been used is library based method. Although The Fifth Amendment in US recognize the right to silence but it doesn'tcover the accused personwho is not in custody. Iranian new Code 2015, in article 197 states the right to silence. Finally, section 136 of Germany's Criminal Procedure Code has accepted the right to silence. However, the Codes of the mentioned countries are silent about adverse inference. But in practice courts reasonfrom accused's silence to guilt.

Keywords: Right to Silence, Criminal Investigation, Police, Adverse Inference.

I. INTRODUCTION

The right to remain silent, which has emerged at both the pre-trial and trial stages, is underpinned by the privilege against self-incrimination, and the broader notions of the rule of law espoused by the liberal tradition. The consequence of this right proposes that one cannot be required to answer a question that might tend to expose oneself to criminal conviction.[3]The right to silence is a significant consequence of presumption of innocence. The accused person is presumed innocent until proved his/ her guilt. Furthermore, states bear the entire burden of proving such guilt. So it's not expected the accused to provide the information which help states to prove her/his guilt [3]. Right to remain silent aims to prevent the physical and mental hams of suspect or arrested at the police station and protect suspect from being tricked into making decision. The suspect should make decisionwhether speak or nor freely and without any pressure. If an individual waives his/her right, it should be knowingly and voluntarily otherwise his/ her answer should be ignored. The court should consider that whether the suspect is told before questioning that s/he has right to remain silent or not.[1]

The right to silent has developed in international and national law as an important aspect of fair trial. Before 17th century, police and court compelled the criminals to answer their questions in investigation process. Self-incrimination was significant evidence which police has taken it with violence methods. In this period of time, state and church used violence force to stifle oppositions. The methods which have been used by them were torture, long detectionand humiliation treatments. After 17th century, the privilege against self-incrimination has been developed. It expresses the aversion of forcing persons to speak against their own interests. Furthermore, it protects the dignity of the suspect and his/her right of privacy. [1]

There are some important international documents which protect the suspect's rights and effected national laws. One of them is the European Convention on Human Rights which came into force in 1953. Article 3 protects the right not to be subjected to torture and inhuman or degrading treatment or punishment. Article 6 emphasizes the right to a fair trial including 'the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (part 1)and the right to be 'presumed innocent until proved guilty by a court of law' (part 2). Another document is the European Committee for the Prevention of Torture which came into force in 1989. It aims to strengthen the protection of detainees from torture, inhuman or degrading treatment or punishment. Also the Roe Statute which came into force in July 2002 and set out the rights of the accused during investigation in article 55. It states that the suspect can remain silent, without this silence being a consideration in the determination of guilt or innocence.

The right to silence has no important role in the cases in which evidence inculpating the defendant is overwhelming or weak. In the case which the evidence is strong and irresistible, defendant faces with a serious prospect of conviction that the right to silence cannot be helpful for him/her. For this defendant the best strategy is to enter into guilty plea. Furthermore, in the case in which evidences inculpating the defendant are weak, the right of silence has no significant role. In this case the best strategy for defendant is to tell truth and s/he will likely be exonerated. [6]

1) The right to silence in Islamic Republic of Iran's law

The constitution of the Islamic Republic of Iran 1979 contains the key principles of fair trial.Such as right to liberty (p 32), presumption of innocence (p37), equality before the court(p34), prohibition of torture(p38), right to open hearing and access to legal

counsel(p35). Furthermore, Iran has ratified a number of international treaties guaranteeing fair trial rights, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). According to Article 9 of Iran's Civil Code, "the provisions of treaties agreed between the government of Iran and other governments in compliance with the Constitution have the force of law."

Principle 38 of the Constitution states: "Torture, of any kind, in order to obtain confession or information is forbidden. It is not permissible to force someone to testify, confess, or swear an oath. Such a testimony, confession, or oath is worthless. Anyone who deviates from this article shall be sentenced in accordance with law." However, the Constitution doesn't declare the right to silence clearly.

The first criminal code of Iran was enacted in September 1911 which was influenced by the French Code of Criminal Procedure. After Islamic Revolution in 1979 and in order to comply with Islamic rules, the Temporary Law of the Principle of Criminal Processing with some amendment in 1979 was valid till 1999. In 1999, a new code of criminal procedure, which aimed to suit the post-revolution changes, replaced the 1911 Temporary Law of the Principles of Criminal Proceedings. Despite of many movements to protect human rights in all over the world, this Code has been failed to guarantee the fundamental rights. For example, it did not guarantee the right to access a lawyer from the time of arrest. The Code also failed to limit length of provisional pre-trial detention, meaning that individuals could be detained for months, even years, without access to a lawyer. However this Code has been abolished with new Code of Criminal Procedure in 2015.

The right to silence has not been mentioned in the 1999 Code of Criminal Procedure. In the Code it's not recognized the right to silence of theaccused. But in article 129 its state that "the accused person's refusal to respond will be noted in the minutes."However in the Code 2015 the legislator has noticed this lack and in article 197 states that: "The accused can remain silent. In such cases, the accused person's refusal to reply or sign their statements will be noted in the minutes."

2) The right to silence in Germany's law

Germany Code of Criminal Procedure 1987 which amended by article 3 of the Act of 23 April 2014 has accepted the right to silence clearly in section 136. It states:

"1- At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with defense counsel of his choice. He shall further be advised that he may request evidence to be taken in his defense and, under the conditions set out in Section 140 subsections (1) and (2), request the appointment of defense counsel in accordance with Section 141 subsections (1) and (3). In appropriate cases the accused shall also be informed that he may make a written statement, and of the possibility of perpetrator-victim mediation.

2- The examination shall give the accused an opportunity to dispel the grounds for suspecting him and to assert the facts which speak in his favor.

3- At the first examination of the accused, consideration shall also be given to ascertaining his personal situation."

Also section 55 stated that "(1) Any witness may refuse to answer any questions the reply to which would subject him, or one of the relatives specified in Section 52 subsection (1), to the risk of being prosecuted for a criminal offence or a regulatory offence.

(2) The witness shall be instructed as to his right to refuse to answer"

As it is clear in the section 136, the accused has right to remain silent. In later proceedings his/her silence should not be used against him/her.

3) The right to silence in USA's law

In USA law, The right to be silent in criminal investigation contains the communicating acts in all ways –orally, in writing or nod of heads- but it does not protect suspects from being required to yield physical evidence from their bodies, such as fingerprinting, photographing, writing or speaking for identification, appear in court and so on. [1]

However, In Fifth Amendment of American constitution it's stated that no person shall be compelled in any criminal case to be witness against himself.Many American people think that the Fifth Amendment protects their right to keep silent when questioned by the police officers.However it said that the Fifth Amendmentdoes not protect the right to silence instead protects persons only from improper methods of interrogation. In the Fifth Amendment the word "compel" is emphasized and if any questioningof persons dose not employ coercion, there is no right to persons to remain silent and if they do, the government is permitted to use their silenceagainst them in later legal proceedings. Also it has said that the Fifth Amendment does not afford an individual who has neither been indicted, nor arrested, nor temporarily detained by police-a right to remain silent in the face of police interrogation.one example of this claim is the case of Salinas V. Texas. In December 1992, Texas police learned of the murders of two brothers who have been killed in their home. Police found the gun shell in the crime scene and also learned that the victims attended a party the night before the murders. Several weeks after that, police went to Salinas's home. He accepted to talk with police. He told that his father has a gun and gave it to the police and agreed to go police station. At the

police station, Salina was takes to an interview room. He did not receive Miranda warning. He answered all the police questions until he was asked that whether his shotgun would match the shells found at the crime scene. Salinas refused to answer the question. Instead, he looked down at the floor, shuffled his feet, bit his bottom lip and began to tighten up. After a few minutes of silence, police asked other questions and Salinas answered them again. Later, he was prosecuted for murder. In the trial, the prosecutor has interpenetrated Salinas's silence as very important evidence. The prosecutor told the jury that an innocent person would answer the police question and would tell I wasn't there but Salinas didn't respond. The jury convicted Salinas. On appeal, Salinas argued that they use of his silence as substantive evidence of guilt violated the Fifth Amendment. The State declared that the Fifth Amendment did not apply in these circumstances because Salinas was not in custody, and thus, not subjected to government compulsion when questioned by the police. Salinas is significant because it undercuts the popular notion that Americans possess a right to remain silent when questioned by law enforcement officials. After this case, majority of courts held that a person's silence during none-custodial police questioning can be used as substantive evidence of guilt. [4]

ADVERSE INFERENCE

In England, after Parliament has adopted Minister John Major's proposal to limit the right of silence, it's allowed the judges and juries to consider the accused silence as evidence against him both in police station during integration or in court during trial. They also allow drawing adverse inferences when s suspect remains silent. Major's new law contains four sections describing that trigger the use of adverse inferences from silence. The first and the second sections allow such adverse inferences "as appear proper" to be drawn when the accused does not tell the police any fact relied upon in their defense at trial if they would have been "reasonably expected" to mention that fact during integration or dose not testify in court during trial. The third section allows such adverse inferences as appear proper to be drown when accused failure to response the police questions while s/he is arrested in possession of any suspicious objects or when suspicious marks are found on the accused's person or clothing or in the place where the accused was arrested .furthermore, the fourth section is when the suspect failure to explain to the police that why s/he was present at a place or about the time of the offence for which s/he was arrested. It should be considered that, using adverse inference shifts the burden of proof and weakens or removes the presumption of innocence. Also, these changed will jeopardize characteristics of a democratic society such as strictly limited government, restrained in its ability to compromise individual dignity, privacy, and autonomy. [2]

England's new limitation could influence to the right to silence in the United States. Some American law enforcement officials advocated limiting the right to silence [2]. However in common law the jury could not reasonably infer guilt from accused's silence. According to the Fifth Amendment, if a jury reasons from accused's silence to guilt, then the accused is compelled to be witness."Therefore, to restore some of the original force of the Fifth Amendment, the Supreme Court correctly decided that a jury instruction is constitutionally mandated, when requested, to reduce the effect of an adverse inference from a defendant's silence. [5]

In Iran's criminal procedure code 2015, it's not clarified that whether the court can use the adverse inference or not. However, article 211 Iran's Penal Code 2013 determined the knowledge of judge as one of significant evidences to prove the guilt stating that" Knowledge of the judge is defined as a certainty resulting from manifest evidence in a matter brought before him. In cases where a judgment is based on the knowledge of the judge [as the proof of the offense], he is obliged to stipulate in the judgment the manifest circumstantial and hearsay evidence that has been the source of his knowledge." So, it can be said that if accused remains silent in previous proceeding, it could beused by the judge as a circumstantial evidence.

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