

THE PRINCIPLE OF PUBLICITY IN CRIMINAL MATTERS BETWEEN THE REQUIREMENTS OF PROCEDURAL LEGALITY AND THE PROTECTION OF THE RIGHT TO PRIVACY

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Abstract

If the prosecution and punishment of the offender are necessary to protect the public interest of society and the interest of the individual, this must be done within the framework of respecting human rights as enshrined in various international instruments and upheld by different constitutions. This requires that the accused be tried in a manner that ensures the protection of all their rights, fulfilling the procedural legality by guaranteeing the right to defense, equality before the law, and the publicity of their trial, thereby achieving what is known as a fair trial. However, the principle of public hearings in criminal cases may conflict with the privacy of individuals, which necessitates its protection. Consequently, it may be necessary to exempt certain cases from this principle out of respect for the right to privacy, as it affects the private lives of individuals.

Keywords: *Publicity, fair trial, privacy, public order, public morals.*

INTRODUCTION

To protect society's interests and achieve justice, it is necessary to punish every person who commits a crime, whether it be a felony, misdemeanor, or violation, in order to deter them and anyone else who might consider harming the rights of society and individuals. This is done by prosecuting the offender through the public prosecutor, who represents the public interest, until a judgment is issued condemning them. However, committing a crime does not justify arbitrary treatment in their trial, in line with international conventions that emphasize respect for human rights, which include principles and rights that the court must uphold. This approach has been adopted by various countries in their legislation, starting with their constitutions, which embody these principles and are reflected in the Criminal Procedure Code. Legislations have stipulated the need to guarantee the defendant's right to defense, establish all mechanisms ensuring judicial independence, and ensure the equality of litigants before the court, in addition to the court's commitment to the principle of publicity in all sessions it holds, to achieve transparency and ensure that the accused is given a fair trial.

However, while the principle of publicity is a cornerstone of a fair trial, it often conflicts with individuals' private lives, necessitating a balance between the two or the establishment of exceptions to protect the right to privacy. This implies that the principle may not be applied in certain cases.

The importance of this topic lies in the role of the principle of publicity in achieving transparency, thereby preventing the judiciary from arbitrary rulings, while also respecting private life to avoid harming individuals' reputations and defaming them, which could result in damage to them. This necessitates prioritizing the protection of private life over the principle of publicity, a stance taken by the majority of legal systems. This makes the subject worthy of research and exploration to address various issues it raises. Based on the above, the following question is posed:

To what extent have legislations succeeded in balancing the achievement of the principle of public hearings in criminal matters, as constitutionally enshrined, with the protection of individuals' private lives?

To study this subject, the inductive method was used to examine the various texts governing this issue in both Algerian legislation and comparative legislations. The comparative method was also utilized to shed light on the legislative texts adopted by some countries and to compare them with Algerian legislation.

To answer this question, it is necessary to address the following elements:

1. The principle of public hearings in criminal cases.
2. The exceptions to the principle of public hearings.



1- The Concept of the Principle of Public Hearings.

The principle of public hearings is one of the cornerstones of a fair trial. Without it, the session is considered null and void for violating constitutional provisions and procedural legality. To fully understand this principle, it is necessary to explore its concept and justifications, which will be explained in the following two subsections.

A- The Concept of the Principle of Public Hearings.

Procedural legality requires that the trial of the accused be conducted publicly. To grasp the concept of this principle, we must first define it, then discuss its legal basis, and finally, outline its regulations, which will be detailed as follows.

a- Definition of the Principle of Public Hearings :The principle of public hearings or public trials is defined as the allowance for all people, without any discrimination, to enter the courtroom where the trial is being conducted. This enables them to observe and follow all the discussions, pleadings, procedures, and rulings or decisions made during the session(Daifi, 2016-2017, p. 132). The only exception to this is the deliberation phase, which is conducted in secret(Boussaid, 2015, p. 250). Publicity is considered an effective oversight mechanism for ensuring the proper administration of justice and serves as a guarantee for the accused, who will feel more reassured(Daifi, 2016-2017, p. 132).

Therefore, public trials can be defined as a mechanism for overseeing the work of judges, whereby the public is allowed to attend sessions with all their proceedings and actions without any discrimination for any reason, up until the pronouncement of the judgment or decision, with the exception of the deliberation session, which is conducted in secrecy.

b-The Legal Basis for the Principle of Public Hearings :The principle of public trials has received significant attention as one of the key elements in ensuring a fair trial, both in international instruments and national legislations. These will be discussed as follows:

First: The Principle of Public Hearings in International Instruments.

The first international document to include the principle of public trials was the Universal Declaration of Human Rights(Faligha, 2022-2023, p. 232). Article 10 states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of their rights and obligations or any criminal charge against them(Article 10 , the Universal Declaration of Human Rights dated December 10, 1948). Similarly, Article 6, paragraph 1 of the European Convention on Human Rights stipulates that everyone has the right to a public hearing(Article 6 , the European Convention on Human Rights , 1950). The same is true for the International Covenant on Civil and Political Rights of 1966, specifically in Article 14(Article 14 ,the International Covenant on Civil and Political Rights adopted by the General Assembly , 1966). Moreover, the American Convention on Human Rights of 1969 in Article 8 also emphasizes that criminal proceedings must be public to ensure a fair trial. Additionally(Article 8 , the American Convention on Human Rights , 1969), the 2004 Arab Charter on Human Rights in Article 13(Article 13 , the Arab Charter on Human Rights of 2004 , 2004), paragraph 2, and the Rome Statute of the International Criminal Court both stipulate that the trial of the accused must be conducted in public sessions(Article 67 of the Rome Statute).

Second: The Principle of Public Hearings in Various National Legislations.

Most national legislations have adopted the principle of public trials as a fundamental pillar in achieving a fair trial for the accused. This can be seen in the Algerian, French, Jordanian, and Egyptian legislations, which will be elaborated on below:

- In Algerian Legislation: The constitutional framers in Algeria have enshrined the principle of public trials as a guarantee for litigants. The Constitution provides that judicial decisions are pronounced in public sessions, a principle that is also reflected in many provisions of the Code of Criminal Procedure. For instance, it is stipulated that the sessions of the Court of Assizes, both at the first instance and appellate levels, must be public, and the rulings of the Supreme Court must also be announced publicly(rticle 169 of Presidential Decree No. 20-442 dated December 30, 2020, regarding the issuance of the constitutional amendment).

-In French Legislation: The French legislator has also adopted the principle of public trials. Articles 306 and 400 of the French Code of Criminal Procedure state that proceedings must be public unless public order would be compromised, in which case the court may decide, in a public session, that the trial will be conducted in private(Articles 306 and 400 of the French Code of Criminal Procedure).

-In Jordanian and Egyptian Legislation: The Jordanian Constitution, like other constitutions, has adopted the principle of public hearings. Article 101, paragraph 3, states that trials must be public unless the court decides to hold them in private when it concerns public order and morals, with the judgment being announced in a public session. This principle is also enshrined in Article 171 of the Jordanian Code of Criminal Procedure. The Egyptian Constitution similarly upholds this principle in Article 187, and it is further reflected in Article 268 of the Egyptian Code of Criminal Procedure(Article

101, Paragraph 3, of the Jordanian Constitution published in the Official Gazette No. 1093 dated January 8, 1952).

c- Regulations for the Principle of Public Hearings.

To ensure the realization of public hearings, several regulations must be met. Without these, it cannot be said that the trial has fulfilled the requirement of publicity, which is a crucial component of a fair trial. These regulations include the presence of the public and the publication of trial proceedings, as outlined below.

First: Presence of the Public.

Publicity is achieved by allowing the public to attend court sessions without any discrimination for any reason. The term "public" refers to individuals who are not parties to the case, as the parties themselves are naturally involved in the proceedings and must be present even if the court decides to hold the session privately. (Marzouk, 2015-2016, p. 172) Public hearings require that all aspects of the session, including the interrogation of the parties, the hearing of witnesses, and the arguments of their lawyers, be open to the public and the press.

This obliges the court to undertake several measures, such as providing information to the public at the appropriate time and place, as well as facilitating public access to the courtroom. However, this does not mean the court must provide large venues; it is sufficient to accommodate a reasonable number of spectators. The absence of public attendance does not invalidate the principle of publicity. Additionally, the judge has the authority to prevent minors from attending (Article 285 of the Algerian Code of Criminal Procedure).

Second: Publication.

Publication refers to allowing the dissemination of the trial proceedings through various media channels, including social media platforms and other forms of media. This ensures that the public can access information about the trial even if they are not physically present, further reinforcing the principle of publicity. (Faligha, 2022-2023, p. 229)

B- Justifications for the Principle of Public Hearings.

Legislations have adopted the principle of public trials due to its importance for the accused, society, and justice in general. Based on this, we will address each element accordingly.

a-A Guarantee for Achieving Justice :The public's presence at hearings serves as oversight of the judge's work, making the judge more diligent in fulfilling their duties and adhering to the application of legal provisions while striving for justice. This diligence extends to the public prosecutor, who is a key party in criminal proceedings, as well as to other participants like lawyers and witnesses. It encourages them to be meticulous in presenting their motions, defenses, and requests (Faligha, 2022-2023, p. 230).

b- A Guarantee for Protecting Society :Publicity ensures what is known as general deterrence, where people witness the punishment of the perpetrator and the consequences for those who violate laws. Public trials also have a political purpose, allowing society and public opinion to be involved in matters of interest and giving them the opportunity to stay informed (Boulehiya, 2015-2016 , p. 168). This demonstrates that a trial is a public procedure attended by the audience and not merely a matter between the judge and the accused. Additionally, publicity helps in correcting behavior and promotes equality and peaceful coexistence among individuals (Mohamed Rashad Mohamed El-Sadek, pp. 417-418).

c-A Guarantee for Protecting the Accused :Public trials provide reassurance to the accused, knowing that the judge is working under public scrutiny, thereby encouraging the judge to ensure justice. The accused's prosecution procedures may tarnish their reputation, but being able to defend themselves publicly and present their arguments, which may prove their innocence, allows the court to issue a verdict of acquittal (Mohamed Rashad Mohamed El-Sadek, p. 418). This, in turn, restores the accused's reputation and negates any criminal accusations, reinstating their status and dignity before society (Faligha, 2022-2023, pp. 230-231).



2- Exceptions to the Principle of Public Hearings.

The general rule requires that trials be conducted publicly to ensure a fair trial. However, there are cases where one of the parties involved has a particular status that compels judicial authorities to hold the session privately, without the presence of the public. This applies to litigants with specific statuses, such as minors and military personnel, or when a public trial would harm public morality or public order, as will be discussed in the following two sections.

A-The Status of Litigants.

Minors and military personnel have specific characteristics in their trial procedures, leading to sessions being held privately due to their special status, which will be explained in the following sections.

a-Minors :One of the distinctive features of juvenile trial procedures is that the sessions are held privately before the juvenile court(Saber N. S., 2008). It is punishable for anyone to broadcast or publish a summary of what takes place in these sessions in the press, on the radio, the internet, in films, books, or by any other means. This includes any discussions, orders, rulings, or decisions issued in juvenile cases(Articles 82 and 137 of Law No. 15-12 dated July 15, 2015, regarding the Protection of Children, Official Journal of the Algerian Republic No. 19, dated July 19, 2015.). The purpose of this is to protect the minor and avoid subjecting them to humiliation, which could have psychological and future consequences, as well as to protect their family and society from the spread of juvenile delinquency(Mohamed Rashad Mohamed El-Sadek, p. 435).

However, upon examining Article 82 of Law No. 15-12, it is noted that it states that proceedings are to be held privately before the misdemeanor court(articles 135 and 162 of Law No. 18-14 dated July 29, 2018, amending and supplementing Ordinance No. 71-28 dated April 22, 1971, concerning the Military Judiciary Law.). The text implies that all trial procedures, from the initial questioning to the final pleadings and requests until the issuance of the judgment, should be conducted in secrecy. Therefore, the article contains some ambiguity in its wording, which should be addressed(Faligha, 2022-2023, p. 236).

b- Military Personnel : In addition to minors, the trials of military personnel also have specific characteristics. Although ordinary courts are generally competent to hear all cases, regardless of the perpetrator, Algerian law has designated special courts for military personnel to ensure the proper administration of justice. The Military Justice Law allows for the prohibition of the publication or transmission of what occurs in the sessions, whether in whole or in part, by any means. However, the judgment itself must be issued in a public session. This restriction is imposed by law to maintain security and public order, requiring the sessions to be held privately, even though the judgment remains public.

B- Preserving Public Order and Morality.

The law allows for exceptions to the general rule of public trials, which aim to ensure a fair trial. In certain cases and for specific issues, sessions must be held privately to preserve public order and morality. This will be explained as follows:

a-Confidentiality of Trials to Preserve Public Order :The term "public order" is broad, flexible, and wide-ranging. Therefore, the concept of public order, which is associated with deviating from the principle of public hearings, is left to the judge's discretion, depending on the public interest of society and the political, social, and economic directions of the state. Due to the ambiguity of this term, judges tend to be strict when determining cases in which public trials might disrupt public order(Boussaid, 2015, pp. 262-263).

Legal scholars have offered various definitions of public order. One such definition describes it as: "a set of essential interests upon which the existence of society is based, whether political, social, or economic." The legal scholar Abdel Razzaq Al-Sanhouri defined it as: "The legal rules that are considered part of public order are those intended to achieve a public interest, whether political, social, or economic, and relate to the higher order of society. These rules take precedence over individual interests, and all individuals must respect and fulfill this interest. They cannot oppose it through agreements among themselves, even if those agreements benefit them individually, because individual interests cannot outweigh public interest.(Al-Samboosi, 2019, p. 357)"

From these definitions, it is clear that they are comprehensive and cover various aspects of public order but do not precisely define the specific issues and cases related to it.

In the judiciary, Algerian courts provided a definition of public order in a 1982 ruling, stating: "Public order means the set of rules necessary to protect social peace, ensuring that every citizen can exercise all their political rights across the national territory within the framework of their legitimate rights."



This definition, like the previous ones, does not precisely identify the issues and cases associated with public order.

Legislatively, public order is not explicitly defined in legal texts, as defining such terms is the role of legal scholars, not legislation. However, Article 3 of the UAE Civil Transactions Law provides some examples of issues related to public order, such as matters of personal status (inheritance, marriage, lineage), regulations governing systems of governance, freedom of trade, rules of private property, and wealth distribution, as long as they do not contradict the fundamental principles and definitive rulings of Islamic law.

It is noted that this article only mentions examples of public order-related matters without being exhaustive, allowing for the inclusion of all issues tied to the foundations of society. The law cannot list every issue in detail so as not to restrict the judge's discretion when handling a case where public hearings could harm public order, considering societal developments. The Emirati legislator and other legal systems were wise in leaving these matters undefined.

In Algerian legislation, the term "public order" is mentioned frequently in various contexts without specifying the issues related to it. This is evident in Articles 24, 93, 97, 161, 204, 344, and 461 of the Civil Code, and Article 285 of the Code of Criminal Procedure, which states that criminal court sessions should be public unless they compromise public order or morality. However, the text does not specify the relevant cases and remains general.

Issues related to public order include conspiracies and threats to state security, such as coup attempts or incitement to change the system of governance, as well as crimes that, if publicly tried, could harm the interests of society by revealing methods and techniques used in criminal activities, potentially leading to the spread of crime (Boussaid, 2015, p. 263).

b-Confidentiality of Trials to Preserve Public Morality: The term "public morality" is also broad and flexible. It has been defined as: "a set of rules that people feel obligated to follow according to an ethical code born out of inherited beliefs, customary practices, and established traditions (Saoud, 2011, p. 07).

" Al-Sanhouri noted that religion plays a significant role in shaping morality, with the moral standard becoming more pronounced as religion becomes more intertwined with civilization. Various factors influence the concept of public morality, including customs, traditions, norms, and the universal values that distinguish between good and evil. All these elements form what is known as public morality in the absence of specific legal provisions. While the criterion for public order is based on public interest, public morality is grounded in ethics, both of which are characterized by objectivity and relativity.

Among the cases that affect public morality are crimes related to ethics, such as sexual assault, adultery, indecent acts, incitement to immorality, and prostitution. These cases are kept confidential to protect the litigants' privacy and reputation and to shield society from details that may be offensive to public decency.

It is worth noting that the International Covenant on Civil and Political Rights, in Article 14, allows for excluding the public and the press from attending sessions when necessary to preserve public order, public morality, or national security, or to protect the privacy of the parties involved in the trial or in specific exceptional circumstances that could disrupt the course of justice (Article 14 of the International Covenant on Civil and Political Rights adopted by the General Assembly on December 16, 1966.)

From this text, it is clear that it remains general and does not specify the cases and issues that compromise public order and morality, as most legislations have done, for the reasons previously mentioned.

CONCLUSION

From the above, it can be concluded that public hearings are a fundamental principle for ensuring a fair trial. Through public hearings, the judge and all other parties are under the scrutiny of the public, which in turn ensures justice—the ultimate goal of criminal policy. However, this principle is subject to exceptions from two perspectives: the first relates to the status of the litigants, such as minors due to their age and military personnel due to the sensitive nature of their work; the second relates to preserving public order and morality to safeguard the public interest and ethical values. The findings from this study reveal that most legislations do not specifically identify the cases related to public order and morality, while some mention them as non-exhaustive examples. This approach by legislators is wise, as explicitly listing and limiting these cases in legal texts would restrict the

judge's discretion and hinder their role in preserving public order and morality. For instance, a case involving a breach of public order or morality may be presented, and the judge may be unable to declare it confidential due to the limitations of the legal text. Additionally, societal evolution introduces new issues where public hearings could harm public order and morality. Therefore, the following recommendations are proposed:

1. Maintain General Provisions on Confidential Sessions:** Continue to include general legal provisions that refer to the confidentiality of sessions when cases presented to the judge threaten public order and morality, without specifying these matters exhaustively. This allows the judge the necessary discretion to protect the public interest and adapt to societal developments.

2. Amend the Military Justice Law: Revise Article 135 of the Military Justice Law to include explicit language stipulating that sessions in military courts must be confidential, prohibiting public attendance, not just the publication or partial disclosure of the proceedings. This amendment is necessary to safeguard national security given the sensitive nature of military duties.

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