

**LEGAL GUARANTEES FOR THE ACCUSED UNDER ARREST PROCEDURES IN  
ACCORDANCE WITH THE PALESTINIAN CODE OF CRIMINAL PROCEDURE  
NO. (3) OF 2001**

**Majdi Ahmad Ass'ad Alhaj Ibraheem**

[20223348@std.neu.edu.tr](mailto:20223348@std.neu.edu.tr)

Near East University, Law department, TRNC, 10 Mersin, TR-99040 Lefkosia, Türkiye

**Assist. Prof. Dr. Ahmad Mustafa Ali**

[ahmed.ali@neu.edu.tr](mailto:ahmed.ali@neu.edu.tr)

Near East University, Law department, TRNC, 10 Mersin, TR-99040 Lefkosia, Türkiye

## **ABSTRACT**

In our research, we address this guarantees of the accused in light of the arrest procedure (pretrial detention) in the Palestinian Code of Criminal Procedure, which is considered one of the serious procedures that affect the personal freedom of the individual, where we first talked about what is the arrest procedure and the different designations that were mentioned in the legislation, but despite the different terminology that the basic essence is agreed upon The arrest is a procedure depriving freedom for a temporary period to achieve justice, and the definition of arrest in language and terminology and legitimately that all definitions agreed However, the arrest is a deprivation of liberty to complete the investigation procedure and access to the truth, and its legal nature and the compatibility of the arrest procedure with the presumption of innocence and the justifications for the arrest have been clarified, which is to prevent the accused from escaping and protect society and achieve the public interest and the interest of the individual because the accused is protected from attacks that may be exposed by the victim or one of his relatives and the preservation of evidence that the accused may hide and access to the truth becomes difficult and prevent him from contacting witnesses or his partners In addition, the presence of the arrested accused in the hands of the investigator helps to complete the investigation faster.

**Keywords:** Legal guarantees for the accused, criminal procedures, Palestinian Code of Criminal Procedure, arrest.

## **1. Introduction**

### **First: An introductory introduction to the study and its importance:**

The development of societies at the present time is measured based on the preservation of the rights and freedoms of individuals in them, and the guarantees granted to individuals in the Code of Criminal Procedure, given the importance of this subject, I had to examine the guarantees that an individual must enjoy at the investigation stage, and there is no doubt that arrest constitutes a dangerous measure for the personal freedom of the individual and the most prejudice to his freedom because under which the individual is imprisoned inside the prison, as

the original is the imprisonment of the individual if he commits a punishable crime.

The general rule in the law, the accused is innocent until proven guilty and his arrest may suggest to the court that the detainee committed the crime, so we should interpret the provisions of the arrest in a framework that achieves the public interest and the interest of the accused, as the arrest aims to reach the truth and prevent the accused from escaping, the goal of the arrest is to maintain security and safety.

The investigation procedure requires the presence of the accused in person, and in this case, to prevent him from escaping or to prevent him from tampering with evidence or contacting witnesses, the law granted the investigative authorities and the Public Prosecution to take many measures, including pretrial detention.

### **Second: The problem of the study:**

The fact that the Palestinian Code of Criminal Procedure, which is currently applied in the Palestinian courts, has copied other laws that were applied in the West Bank and Gaza Strip, which has led to some problems and conflicting interpretations of the provisions of the current law, including arrest.

Article 3 of the Universal Declaration of Human Rights stipulates that "Everyone has the right to life, liberty and security of person."<sup>1</sup> Article 9 stipulates that "no one shall be subjected to arbitrary arrest, detention or exile." Article 1/9 of the International Covenant on Civil and Political Rights stipulates that: "Everyone has the right to liberty and security of person. No one may be arbitrarily arrested or detained. No one may be deprived of his liberty except for such reasons as are prescribed by law and in accordance with the procedure prescribed therein."<sup>2</sup>

### **Third: Study Questions:**

In view of the many following questions: Who is the competent authority to issue the arrest decision? What are the rights and guarantees of the accused in the face of the decision? In addition, some people file a criminal complaint to the court against a person knowing that he is innocent to pressure him when he is pretrial detention to do a certain job and this complaint is malicious<sup>3</sup>.

### **Fourth: Objectives of the study:**

The main objective of the detention study is to find a solution to the problems related to the arrest procedure, study the problems, ambiguity and shortcomings of the Palestinian Code of Criminal Procedure and try to find solutions to them, as well as knowing the legal basis for arrest, the most important guarantees enjoyed by the detainee and stipulated in the law and the alternatives that may be taken instead of conducting arrest.

### **Fifth: Study Methodology:**

In order for this research to achieve its objectives and lead to its purposes, I will follow the analytical approach to analyze the legal texts related to the research and the comparative method, where I will compare the provisions of the Palestinian Code of Criminal Procedure

---

<sup>1</sup> Universal Declaration of Human Rights 10 December /1948

<sup>2</sup> International Covenant on Civil and Political Rights 16 December /1966

<sup>3</sup> Al-Sharifel, Omar Wassef: Pretrial detention (a comparative study), p. 11

with the provisions of the Egyptian Code of Procedure with reference to other laws. The decisions of the Palestinian Court of Cassation will be reviewed.

## **2. The nature of the arrest procedure.**

Sometimes judicial officers or judges may have to maintain security and safety and complete the investigation to take some measures that take away the freedom of the individual before the trial, as it is considered arrest and is considered one of the most dangerous of these procedures that lead to the deprivation of the freedom of individuals, as the origin of the accused is innocence until proven guilty

When an arrest measure is taken, the individual's purpose is to protect him from assault and prevent the victim's family from retaliating against the accused.

The arrest also makes the accused within the reach of the investigator to be able to interrogate him and confront witnesses at any time, all of which leads to achievement and access to the truth, as arrest represents a conflict between two interests, the interest of the individual, who has the right to enjoy personal freedom and the interest of the group, which has the right to access the truth <sup>4</sup>.

### **1.2 Concept, justification and legal nature of detention**

First: The concept of arrest:

The legislation mentioned different names for this procedure, such as the Egyptian legislation called it the concept of pretrial detention, while the French legislator adopted the term temporary detention, while the Jordanian and Iraqi legislators called it the term arrest, and despite the difference in nomenclature, they all agreed that the arrest procedure is a measure depriving freedom for a temporary period required by the investigation procedures.

a) Arrest language: It is the detention of a person in a specific, specific or closed place with control over him and preventing him from leaving<sup>5</sup>. It is also known as the prevention, arrest, imprisonment and imprisonment (the place where he is imprisoned). <sup>6</sup>

B) Detention idiomatically: In the Palestinian Code of Criminal Procedure, there is no specific definition of detention, as it only states its conditions, controls and duration, so the Swiss Federal Penal Code defines pretrial detention as pretrial detention (any detention ordered during the criminal case due to investigation needs or security reasons).<sup>7</sup>

C) Arrest jurisprudence: The views of jurists differed in the definition of arrest, as some defined it as the placement of the accused in prison during the entire period of investigation or in part or until the end of his trial <sup>8</sup>.

We believe that the arrest is: the detention and detention of the accused before the issuance of the verdict at a place and time specified in the law to complete the investigation, and in the public interest.

Second: Justifications for Arrest:

---

<sup>4</sup> Al-Ahmad, Ajmad 2008, p 72

<sup>5</sup> Ibn Manzur, 1992, p. 45

<sup>6</sup> Ibn Manzur, 1992, p. 360

<sup>7</sup> Swiss Federal Penal Code of 1973 Article 110

<sup>8</sup> Sorour, 1985, p. 623

1. The arrest procedure maintains public security, as it protects society and achieves the public interest in it, in addition to protecting the interest of the accused, as it is considered a means of deterring the accused from not committing another crime after his release.
2. Investigation requirements: Arrest leads to the presence of the accused in the hands of the investigating authority so that it can interrogate him and complete the investigation procedures,<sup>9</sup> and this entails advantages, including: preventing the accused from influencing the prosecution witnesses, preventing him from hiding the material impact of the crime, or communicating with his accomplices to hide the effects of the crime.
  1. The presence of the accused inside the prison ensures the execution of the sentence after the conviction, while if the accused is outside the prison, he may decide to escape the sentence.

### Third: The Legal Nature of Detention:

We should refer to the following things when talking about the legal nature of detention<sup>10</sup>:

1. The compatibility of the arrest procedure with the presumption of innocence:  
Article (14) of the Palestinian Basic Law, and Article (67) of the Egyptian Constitution stipulate<sup>11</sup> that (the accused is innocent until proven conviction in a legal trial in which he is guaranteed the guarantees of his own defense, and every defendant accused of a felony must have a lawyer to defend him)

There are two views of jurists on the compatibility of the arrest procedure with the presumption of innocence:

First: The arrest procedure does not contradict the presumption of innocence as a rule of evidence, nor does it exist

A legal basis that allows him to be treated as a convict<sup>12</sup>

Second: The arrest procedure contradicts the presumption of innocence because it deprives the accused of his personal freedom, stops his professional life and exposes him to ostracism by his society<sup>13</sup>.

### b) Arrest is not a punishment:

Punishment is the penalty imposed by the judge in the name of society to implement a judicial ruling on those proven responsible for the crime in order to deter him and deter others and<sup>14</sup> based on this definition we note that arrest is not considered a punishment, but the punishment is consistent with the arrest that both restrict the freedom of the person to the fact that they differ in<sup>15</sup>:

- 1) The arrest is issued by the prosecution, but the penalty is issued by a judicial authority.
- 2) Arrest is issued without discussing the evidence and without the accused defending himself,

---

<sup>9</sup> Wissam Nasr, Justifications and Controls for Arrest 2011 Research published on the Internet

<sup>10</sup> Al-Ahmad, Hamad 2008, p. 75

<sup>11</sup> The amended Egyptian Constitution of 2007 published on the Internet

<sup>12</sup> Hafez, 1998, p. 30

<sup>13</sup> Al-Ahmad, Ahmed 2008, p. 76

<sup>14</sup> Al-Halabi, 2008, p. 230

<sup>15</sup> Al-Ahmad, Ahmed 2008, p. 78

but the punishment is decided after discussing the accused and defending himself and after the trial

3) Arrest restricts the freedom of the accused before the conviction is proved, but the penalty restricts the freedom of the accused after the issuance of the conviction.4) The aim of the arrest is to interrogate the accused, but the aim of the punishment is reform and deterrence.

c) Arrest Conduct of an investigation:

The preliminary investigation is divided into two parts: the first aims to examine the evidence and attribute it to the accused, such as inspection and inspection<sup>16</sup>. The second: a precautionary measure to prevent the accused from escaping or to prevent him from tampering with the evidence of the crime or to prevent him from influencing the prosecution witnesses.<sup>17</sup>

Accordingly, we note that the detention of the accused for interrogation is one of the measures that affect his personal freedom.

## 2.2 Conditions that must be met in detention in order to become legal

First: Objective Conditions:

Detention is a dangerous procedure because the arrested person may be innocent and thus harm him, and for this reason, there is a provision in the Palestinian Code of Criminal Procedure on several objective conditions that must be met to take the arrest procedure, as the arrest deprives the individual of his personal freedom by placing him in prison for interrogation, and these conditions can be summarized as follows:

(a) Crimes for which arrest may be made:

Crimes for which arrest may be made are subject to two criteria: the criterion of the gravity of the penalty and the criterion of place of residence.

1) The criterion of the gravity of the penalty

Article 30 of the Palestinian Code of Criminal Procedure stipulates the crimes for which arrest is permissible, namely *flagrante delicto* in felonies or misdemeanors in which the prison sentence exceeds six months.

Or if the judicial officer objects during the performance of his job or tries to flee from the place of arrest, or in the event that he commits a crime and refuses to give his name or address, or does not have a fixed and known place of residence in Palestine, the Public Prosecution may issue an order for the arrest and arrest of the accused if there is sufficient evidence to accuse him of committing a misdemeanor or felony punishable by imprisonment for a period of six months, according to the provisions of Article 31 of the Palestinian Code of Criminal Procedure.

Article 32 affirms that: "Anyone who witnesses the offender in *flagrante delicto* in a felony or misdemeanour in which he may be arrested under the law may be detained and handed over to the nearest police station, without waiting for an arrest warrant from the Public Prosecution."

The Palestinian legislator has agreed with the Egyptian legislator in terms of relying on the criterion of gravity of the penalty in determining the crimes in which arrest is permissible, but

---

<sup>16</sup> Hafez, 1998, p. 31

<sup>17</sup> Al-Ahmad, Ahmed 2008, p. 76

the difference is in determining the degree of gravity, as <sup>18</sup> the Egyptian Code of Criminal Procedure stipulates in article 1/134 ((The permissibility of arrest as a general rule in felonies and misdemeanours whose penalty exceeds three months' imprisonment))

Thus, we note that the crimes for which arrest is permissible are felonies and misdemeanours punishable by a penalty of more than six months and that it is not permissible to arrest for offences.

Article 114 of the Jordanian Code of Criminal Procedure stipulates that after interrogating the accused, the Public Prosecutor may issue an arrest warrant not exceeding fifteen days if the act is punishable by imprisonment or a more severe penalty.

From the foregoing, we note that the Jordanian legislator has authorized the Public Prosecutor to issue an arrest warrant against the accused or the defendant if the penalty is imprisonment without specifying its duration, and this arrest is permissible, meaning whatever the gravity of the penalty.<sup>19</sup>

#### 2) Standard of residence:

Most laws and legislations resort to a distinction between the accused who has a fixed place of residence and the accused who does not have a fixed place of residence to apply the arrest procedure to him, as the accused who does not have a fixed place of residence does not provide sufficient guarantees to attend the investigation procedure or the execution of the penalty when it is sentenced, and this is stipulated in the Palestinian Code of Criminal Procedure in Article (1/117).

From the above, we note and implicitly understand that it is permissible to release the accused and recover the arrest decision if he has a fixed and known place of residence, but there was no explicit and clear provision for this matter, it would have been better if the legislator had stipulated this to avoid disagreement.

Article 2/134 of the Egyptian Code of Criminal Procedure stipulates that "the accused may always be held in pretrial detention if he does not have a known place of residence in Egypt." Thus, we note that the Palestinian legislator has agreed with the Egyptian legislator in determining the crimes for which arrest is permissible based on the criterion of residence.

#### 1. Sufficient evidence of the accusation:

In order to issue an arrest warrant against the accused, there must be sufficient evidence to prove that the accused has committed the crime. Based on the opinions of jurists, sufficient evidence can be defined as a set of concrete facts through which we conclude that a certain person committed the crime.<sup>20</sup> But these evidence does not reach the strength of the evidence on which the final judgment is based.

Article 2/31 of the Palestinian Code of Criminal Procedure stipulates that: "If there is sufficient evidence to accuse a person of committing a felony or misdemeanour punishable by imprisonment exceeding six months, the judicial officer may request the Public Prosecution to issue an arrest warrant."

---

<sup>18</sup> Odeh, 2001, p. 126 (referred to: on 2007, p. 34)

<sup>19</sup> Awaisa, Osama: Explanation of the Code of Criminal Procedure - First Edition (2005)

<sup>20</sup> Abu Afifeh, 2011, p. 271

Through this provision, we implicitly understand and note that no arrest may be made against a person without sufficient evidence of the accusation or reasonable cause since the arrest would harm the accused. Article (134) of the Egyptian Code of Criminal Procedure stipulates that (the investigating judge may, after interrogating the accused or in the event of his escape, if the incident is a felony or misdemeanor punishable by imprisonment for a period of not less than one year and the evidence is sufficient, issue an order to detain the accused in pretrial detention.....))

#### 1. Duration of detention

One of the topics that raise controversy is the duration of detention, and the reason that the detention is for a limited period is that it is an investigation procedure, as it is by its nature a temporary stage of the case, the duration of detention varies according to the party from which the decision is issued, it should not exceed the period specified by the law, and if it increases and lasts more than necessary for the period specified by the law, it becomes an arbitrary measure. There are three regulations for determining the duration of detention:

1. The traditional system: This system does not set a maximum limit on detention, it is sufficient to control a higher authority when requesting renewal or extension, and through this system it results that the defendant can remain in detention for a period that may last for the duration of the sentence.<sup>21</sup>
2. The French system: It is the system that sets a maximum limit for the duration of detention in misdemeanors without felonies.<sup>22</sup>
3. The third system is the system that sets a maximum limit for the duration of detention in misdemeanors and felonies.<sup>23</sup>

Article (4/120) of the Palestinian Code of Criminal Procedure stipulates that ((In no case may the period of detention referred to in the three paragraphs above exceed six months, otherwise the accused shall be released immediately unless he is referred to the competent court for trial)) Article (108) also stipulates that ((The prosecutor may arrest the accused after interrogation for a period of forty-eight hours, and the detention shall be extended by the court in accordance with the law.)) We note through this Forty-eight hours after interrogating the accused, the Public Prosecution shall, if the prosecution deems it necessary to extend, request it from the justice of the peace. The extension of the detention period shall not exceed fifteen days, in accordance with the provisions of Article (119) of the Palestinian Code of Criminal Procedure, which stipulates that ((If the investigation procedures require the continuation of the detention of the arrested person for more than twenty-four hours, the prosecutor may request the magistrate judge to extend the detention for a period not exceeding fifteen days.))

As for the Egyptian legislator, Article (51) of the Egyptian Code of Criminal Procedure stipulates that ((the detention order issued by the prosecution shall not be effective except for a period of four days following the arrest of the accused or his handing over to the Public Prosecution if he was previously arrested.))

---

<sup>21</sup> Murr, Muhammad Abdullah Muhammad: Pretrial Detention, p. 202

<sup>22</sup> Ibid., p. 202

<sup>23</sup> Ibid., p. 202

Through this text, we understand that the Public Prosecution may order a maximum period of four days, and in the event that the justifications for the arrest disappear before the expiry of this period, the accused may be released before its expiry. The period of detention shall commence from the day following the arrest of the accused if the arrest warrant has been issued by the Public Prosecution, but if the arrest warrant is issued by the judicial officer and the accused is handed over to the Public Prosecution within twenty-four hours, the four-day period shall begin to be calculated from the day following the delivery of the arrested person to the Public Prosecution.<sup>24</sup>

d) Interrogation of the accused:

The Palestinian legislator stipulates in Article (108) of the Palestinian Code of Criminal Procedure that ((The prosecutor may arrest the accused after interrogation for a period of forty-eight hours, and take into account the extension of detention by the court in accordance with the law.))

From the foregoing, we note that the law requires that the issuance of an arrest warrant by the Public Prosecution must be preceded by the interrogation of the accused. If the arrest warrant is issued prior to interrogation, the arrest procedure shall be null and void, except if the accused is a fugitive who may be arrested and detained without questioning.

Article 94 of the Palestinian Code of Criminal Procedure defines interrogation as "interrogation is the discussion of the accused in detail about the acts attributed to him, confronting him with inquiries, questions and suspicions about the charge, and asking him to answer them."

The Egyptian Court of Cassation legally defined interrogation as discussing the accused in detail in matters of the charge, its conditions and circumstances, confronting him with the evidence based on it, and discussing it in his answers in a discussion intended to extract the truth that he is silent about<sup>25</sup>.

Interrogation is one of the most important essential conditions for the arrest to be legal, through this procedure the accused is discussed in the charge attributed to him to reach the truth, and the result of this interrogation is either proven or denied from the accused

The question of the accused differs from his interrogation in that the question is when the accused clarifies his crime and listens to his answer, while interrogation ensures that the accused discusses in detail or confronts him with the evidence of the accusation<sup>26</sup>. It is always one of the most important investigation procedures

Second: Formal Conditions:

The formal conditions (procedural controls) of arrest are an important guarantee for the exercise of the right to take this action, and any violation of these controls is a violation of personal freedom, as the accused is innocent until proven guilty, so some formal conditions must be met for the validity of the arrest and the protection of the accused from it<sup>27</sup>. Considering that detention is one of the most serious measures that violates freedom, it must therefore be carried out, in accordance with the forms provided for by law, and used within the scope of the wisdom

<sup>24</sup> Hafiz Magdy Pretrial detention

<sup>25</sup> Cassation of January 25, 1931 Collection of Legal Rules Part Two No. 168 p. 222 Referred to Hafez 1998 p. 98

<sup>26</sup> Al-Tantawi, p. 49, referred to Al-Ahmad, Ahmed 2008, p. 47

<sup>27</sup> Omar Sharif, Pretrial Detention (A Comparative Study, p. 277)



for which it was enacted<sup>28</sup>.

In this requirement, you will talk about the formal conditions necessary for the arrest to be legal and explain each separately:

1. The authority competent to issue the arrest warrant:

An arrest decision is defined as any act or procedure pursuant to which the investigating judge orders the presence or even arrest of a person suspected of committing a felony or misdemeanor in order to provide information that leads to the disclosure of the truth<sup>29</sup>. Through this definition, we find that such a decision is of great importance, including preventing the suspect or defendant from escaping or tampering with or hiding evidence.

The arrest decision must be issued by those who have the authority to issue it legally, and the competent authority to issue the arrest decision is the investigating authority, and the judicial officer is not competent to order the arrest, and despite the absence of the Palestinian Code of Criminal Procedure from a clear text specifying the competent authority to issue the arrest decision, it stipulated that the arrest should be preceded by the interrogation of the accused, and this is stipulated in Article (105) of the Code of Criminal Procedure that ((The interrogation must take place within twenty-four hours from the date of sending the accused to The prosecutor who orders his arrest or release.)) Article 95 of the aforementioned law stipulates that: "The prosecutor shall interrogate the accused in all felonies and misdemeanors in which he deems fit to be interrogated. From this text, we understand that interrogating the accused is a procedure reserved by law for the prosecutor and that judicial officers do not have the power to interrogate the accused, and therefore cannot issue an arrest warrant.

Article 131 of the Code of Criminal Procedure stipulates that: "If the accused has not been referred to trial, the application for release on bail shall be submitted to the judge, who shall be entitled to issue an arrest warrant."

It should be noted here that the arrest decision must be issued by the judicial authorities that own the arrest, and these bodies are:

1. Public Prosecution. b) Investigating judge c) Criminal judge d) the court to which the case was referred.

Article 119 of the Palestinian Code of Criminal Procedure stipulates that "If the investigation procedures require the detention of the arrested person to continue for more than twenty-four hours, the prosecutor may request the magistrate judge to extend the detention for a period not exceeding fifteen days." From this text, we understand that the Public Prosecution issues the arrest decision, and if the investigation procedures require an extension of the period, the competent court shall have the power to extend it. The legislator did not restrict the court with any time restriction except what was stated in Article (5/120), which stipulates that ((The arrest of the arrested accused may not continue in all cases more than the period of the penalty prescribed for the crime for which he was arrested)).

---

<sup>28</sup> Ibid., p. 277

<sup>29</sup> Omar Al-Sharif, Pretrial Detention (A Comparative Study), p. 279

Article 134 of the Egyptian Code of Criminal Procedure stipulates that "If, after interrogation of the accused or in the event of his escape, it appears that the evidence is sufficient and the incident is a felony or misdemeanor punishable by imprisonment for a period of more than three months, the investigating judge may issue an order for the pretrial detention of the accused." Investigation, otherwise the arrest shall be null and void

1. Reasoning for the arrest warrant:

One of the necessary measures to protect the freedoms of individuals and to provide adequate guarantees for the accused or the defendant must be when issuing the arrest warrant, there must be factual legal reasons that require the issuance of the arrest warrant and justify it, and what is meant by the reason for the arrest warrant is to show the reasons on which the investigation authorities relied in signing this procedure. The Sixth International Conference on Penal Law, held in Rome on 27/9/1953, recommended the reasoning of the arrest decision and the decision to extend its duration so that the court to which the appeal against the said decision is submitted can ensure that it is based on justifying reasons<sup>30</sup>.

Although the Palestinian legislator did not explicitly stipulate that the arrest warrant must be reasoned and that would protect the accused from any arbitrariness, since causation means oversight of the Public Prosecution, Article 12 of the Palestinian Basic Law stipulates that "anyone who is arrested or arrested shall be informed of the reasons for his arrest or detention..." and this text indicates the need to cause the warrant for his arrest or arrest. As for the Egyptian Code of Procedure, it does not explicitly and clearly stipulate causation, like the Palestinian law, and this is evident from the text of Article (71) of the Egyptian Constitution that ((The person arrested or arrested shall be informed of the reasons for his arrest or detention immediately...)) This article referred to both the arrest and arrest procedure.

1. Execution of the arrest warrant within a certain period:

Article (109) of the Palestinian Code of Criminal Procedure stipulates that: ((1. Summons of habeas corpus shall be executed immediately, and shall remain in force until they are executed. 2. The habeas corpus may not be executed after the lapse of three months from the date of its issuance, unless approved by the person who issued it for another period. Through this text, the researcher believes that it is not permissible to execute the arrest warrant after the lapse of the specified period of three months.

As for the Egyptian legislator, Article (139) of the Code of Criminal Procedure stipulates that ((arrest warrants, habeas corpus and detention orders may not be executed after the lapse of six months from the date of their issuance, unless approved by the investigating judge for another period)) From the above, we note that it is not permissible to execute an arrest warrant after the lapse of the period specified in Egyptian law.

2. Arrest decision data:

Referring to the text of Article (110) of the Palestinian Code of Criminal Procedure, we find that the legislator has granted the accused many guarantees, which are a set of data

---

<sup>30</sup> Tariq Mohamed: Guarantees and rights of the accused in the Code of Criminal Procedure 2005

indicating that the arrest was issued by the authority that owns the issue. This article stipulates that summonses, habeas corpus and arrest warrants shall be signed by the legally competent authority and stamped with their official seal and shall include the following: 1. Name, descriptions and surname of the accused to be summoned. 2. The crime of which he is accused and the article of the accusation. 3. His full address and the duration of detention, if any.

The general rule is that the arrest warrant must be in writing in order to ensure its validity, to prove and invoke what is stated therein, and so that the person entrusted with the order to execute it knows the limits of the assignment assigned to him<sup>31</sup>. With reference to what the Egyptian legislator stipulated in Article (1/127) of the Code of Criminal Procedure, we find that he agreed with the Palestinian legislator regarding the data that must be included in the arrest warrant, and these data are mandatory in the arrest decision, as the above-mentioned article stipulates that ((Each order must include the name of the accused, his surname, industry, place of residence, the charge attributed to him, the date of the order, the judge's signature, and the official seal.))

### **3. End of detention and its effects.**

Since detention is a measure depriving him of liberty, there must be guarantees that ensure that this procedure is not arbitrarily applied and rights through which he can confront the arrest procedure issued against him because of the deprivation of liberty it contains.

People who defend human rights agree that arrest is a "necessary evil" and legislation should only act and accept this measure in return to be careful to minimize its harms as much as possible.

#### **1.3 Guarantees and rights of the accused vis-à-vis the arrest procedure**

First: The right of the accused to appeal the arrest decision

The Palestinian legislator stipulated in Article (135) of the Code of Criminal Procedure that (the order issued in the request for release on bail may be appealed by the Public Prosecution, the arrested or the convicted person with a request submitted to the competent court to hear the appeal) We note through this article that the arrest decision issued by the court may be appealed, meaning that if the detainee requests his release and the court to which this request is submitted has rejected it, the detainee may appeal this decision, and it is understood from this that it is not permissible to appeal an order Arrest directly, and also the detainee may not appeal the arrest order issued by the Public Prosecution, i.e. the forty-eight hours period owned by the Public Prosecution to arrest the accused.

From the above, we note that the legislator has erred as it did not stipulate the right of the arrested accused to appeal the arrest decision issued by the Public Prosecution, and such a position contradicts the constitutional principles stipulated in the Basic Law, where its provisions guarantee that personal freedom or the right of a person to resort to the competent authorities to appeal against any decision that would prejudice his freedom<sup>32</sup>. The Palestinian

---

<sup>31</sup> Hafez Magdy Moheb: Pretrial detention

<sup>32</sup> Al-Ahmad, Ahmad 2008, p. 103

legislator agreed with the Egyptian legislator regarding the inadmissibility of appealing decisions issued by the Public Prosecution.

Second: Deduction of the period of detention from the penalty:

The Code of Criminal Procedure adopts the principle of deducting the period of detention from the sentence issued on the convict, in the sense that it operates the principle of set-off between pretrial detention and the penalty for which it is required, since if the opposite is acted upon, it will be an additional penalty that contradicts the most basic principles of justice and deprivation of liberty from the convicted individual. This is confirmed by article 481 of the Palestinian Code of Criminal Procedure that "the period of the penalty of deprivation of liberty shall commence from the day of arrest of the convicted person on the basis of the sentence to be executed, and shall be reduced by the amount of periods of pretrial detention and arrest."

Article 397 of the same above-mentioned law also stipulates that a person sentenced to a custodial penalty shall be released when he has spent a period of pretrial detention equivalent to the period sentenced to him.

The Egyptian legislator in the Code of Criminal Procedure stipulates in Article (482) that ((The period of the custodial penalty shall commence from the day of arrest of the convict based on the judgment to be enforced, taking into account its reduction by the amount of the period of pretrial detention and the period of arrest)) and we note from the above that the deduction of the period of detention is by force of law and that he does not need a decision from the judge, so no party has the right to deprive the convict of it.

In the event that the arrested accused was acquitted of the crime for which he was arrested, in this case the period of detention shall be deducted from the penalty sentenced in any other crime he has committed, and this is confirmed by the text of Article (400) of the Palestinian Code of Criminal Procedure, where the article stipulates that (if the accused is acquitted of the crime for which he was arrested, the period of pretrial detention must be calculated from the convicted person in any other crime he has committed or investigated in it. During the period of pretrial detention.

Third: The right of the arrested accused to contact his lawyer:

The legislator was keen to provide guarantees for the arrested accused to relieve him and make him more able to deal with the difficult stage he is going through, and these guarantees include the right of the accused to contact his lawyer, and this is confirmed by the text of Article (123) of the Code of Criminal Procedure, where it stipulates that ((Every detainee shall have the right to contact his family and seek the assistance of a lawyer.))

Article 14 of the Basic Law stipulates that "every person accused of a felony must have a lawyer to defend him."

From the above, the researcher believes that the right of the arrested accused to contact his lawyer is one of the most important guarantees stipulated by the legislator, as it provides him with protection against any arbitrariness that he may be exposed to from the investigating authority, and also to verify the integrity of the procedures taken to achieve justice<sup>33</sup>.

### **2.3 Reasons for termination of detention**

---

<sup>33</sup> Al-Ahmad Ahmad 2008 p. 104

The detention of the accused may end during the investigation with him or after the investigation or after appearing before the competent court, and the arrest procedure can continue until the end of the trial and until the verdict acquires the final degree, but in line with what is targeted by the arrest system, logic requires the release of the arrested accused if there is no longer a benefit to be hoped for investigation, and when the justifications for arrest disappear<sup>34</sup>.

First: The nature of release and its considerations.

1. What is the release:

The arrested accused shall be released in the event that the reasons for his arrest cease to exist, and he shall be released at any stage of the case.

Articles 130 to 148 of the Code of Criminal Procedure stipulate the provisions for the release of detainees.

Release is defined as: the release of an accused detained pending investigation on bail or without bail<sup>35</sup>. The accused shall be released either by the Public Prosecution, the competent court or the court competent to try the accused, and the provisional release shall be ordered by the competent authority for arrest, whether on its own initiative or at the request of the arrested accused.

2. Release considerations:

One of the most important considerations taken by the competent authority for release is what relates to the arrested person, including what relates to the type of crime committed, and the competent authority that can weigh matters and take decisions that it deems consistent with the public interest and achieve justice.

1. Considerations related to the type of crime:

If the crime is a misdemeanor, release is the main rule and arrest is the exception to this rule, especially if the misdemeanor is a minor misdemeanor that does not pose a danger to society, but if the commission is of the type of felony, it is rare for the court to decide to release the accused due to the seriousness of the felony crime on members of society and the requirements of maintaining public security<sup>36</sup>.

1. Considerations relating to the arrested person:

If the arrested person has committed a previous crime and was punished for it, and despite that he commits a crime again, then in this case he is not deterred by any punishment that has been issued against him, and thus he poses a danger to society and his release on bail is difficult, but if the record of the arrested person is devoid of any precedents, meaning that he has never taken the path of crime, his release on bail is easier<sup>37</sup>.

If the detainee's state of health is not compatible with the detention system or increases as a

---

<sup>34</sup> Wassef Al-Sharif, Pretrial Detention Dr. Raouf Obaid: Practical Problems ... Previous reference

<sup>35</sup> Hafez Magdy Moheb: Pretrial Detention, p. 167

<sup>36</sup> Appeal No. 55/2004 issued by the Ramallah Court of Appeal on 18/2/2004 unpublished

<sup>37</sup> Omar Wassef Pretrial Detention

result of the arrest, the detainee's state of health justifies his release on bail<sup>38</sup>.

If the parties reconcile and the complainant waives his complaint at any stage of the case or expresses his non-objection to the release of the detainee in some crimes such as causing unintentional death such as traffic accidents, unintentional harm and other unintentional crimes, this would support the release of the detainee on bail<sup>39</sup>.

1. Release Cases:

1. Mandatory release:

Mandatory release means that the investigating authority or the court must order the immediate release of the arrested defendant if the conditions are met, and this release is in several cases stipulated in the Palestinian Code of Criminal Procedure.

The first case of acquittal:

Article 278 of the Code of Criminal Procedure stipulates that "if the court requires the acquittal of the accused, he shall be released immediately, unless he is detained for another reason."<sup>40</sup>

The Egyptian legislator has stipulated in Article (1/304) of the Code of Criminal Procedure that (if the incident is not proven or the law is not punishable by it, the court shall rule on the acquittal of the accused and release him if he is imprisoned for this incident alone.

Second case: lack of legal justification:

If the crime is of the type of offense punishable by a fine or a misdemeanor punishable by less than six months, or if the accused has a known place of residence, the accused may not be arrested. If the accused is arrested in any of the cases mentioned above, he must be released immediately without bail for lack of legal justification, as they do not pose any danger to society, as confirmed by the text of Article (396) of the Palestinian Code of Criminal Procedure.

The third case: insufficient evidence or lack of punishment for the act:

If it is found that there is insufficient evidence indicating that the defendant committed the crime, or that the act committed by him is a permissible act that is not punishable by law, or that the case has expired by statute of limitations, death or general amnesty, in such cases the accused must be released if an arrest warrant is issued against him, as confirmed by the text of Article (149) of the Palestinian Code of Criminal Procedure.

Fourth case: End of detention:

If the prosecutor issues an arrest warrant for the accused and the detention period expires without renewing it, the detainee must be released, and the authority that ordered the arrest is the one who orders the release, as Article (1/6) of the Palestinian Rehabilitation and Reform Centers Law stipulates that (the inmate shall be admitted to the center under a legal memorandum and it is prohibited to keep him in the center after the expiry of the period legally specified in the memorandum)).

Article (5/120) of the Palestinian Code of Criminal Procedure stipulates that (the arrest of the arrested accused may not continue in all cases more than the period of the penalty prescribed

---

<sup>38</sup> Palestinian Court of Appeal Decision No. 55/2004 to release the accused due to his health conditions as he was suffering from a heart disease

<sup>39</sup> Decision of the Palestinian Court of Cassation Cassation No. 47/2005 issued on 21/11/2005 unpublished

<sup>40</sup> Hafez, Magdy Moheb: Pretrial Detention, previous reference, p. 171

for the crime for which he was arrested)) The penalty shall be taken here by the period of the penalty stipulated in the Penal Code, not by what the court has ruled. The failure to continue the detention for a period more than the penalty does not mean that it continues for a period equal to it<sup>41</sup>.

Sixth case: Detention of the accused for more than six months before being referred to the competent court for trial: Article (4/120) of the Palestinian Code of Criminal Procedure stipulates that ((In no case may the periods of detention referred to in the three paragraphs above exceed six months, otherwise the accused shall be released immediately unless he is referred to the competent court for trial.)) Through the text of this article, we find that the legislator has set periods of detention during which he must be referred to the competent court to issue its decision. Either by extending his detention or releasing him.

## 2) Passport Release:

It is the permissible release of the arrested accused, and leaves it to the discretion of the authority granted by law the right to issue a decision on him, taking into account the integrity of the investigation and the requirements of justice<sup>42</sup>. The decision to release may be issued on the same authority or in response to the request of the accused himself, and in both cases such a passport release may be suspended on the condition of providing bail and/or a travel ban or any action decided by the court that would ensure the presence of the accused for investigation or trial and ensure the execution of the sentence imposed against him.

There are several cases of passport release of the accused, and these cases are

The first case: the investigating authorities release the arrested accused on their own.

Article 119 of the Palestinian Code of Criminal Procedure stipulates that "if the investigation procedures require the detention of the arrested person to continue for more than twenty-four hours, the prosecutor may request the magistrate judge to extend the detention for a period not exceeding fifteen days." Article 120 of the above-mentioned law stipulates that "the magistrate, after hearing the statements of the prosecutor, It is clear from this text that the justice of the peace has discretionary power to release or arrest the accused, and here it is necessary to hear the statements of the arrested accused<sup>43</sup>.

Second case: Release in response to the request of the accused

The arrested accused has the right to submit a summons requesting his release to the competent authorities, which may be the Public Prosecution, the Magistrate's Court, the First Instance Court or the High Criminal Court. Article 131 of the Palestinian Code of Criminal Procedure stipulates that: "If the accused has not been referred to trial, the request for release on bail shall be submitted to the judge, who is entitled to issue an arrest warrant."

If the arrested accused has been referred to trial, the authority to release the accused shall be vested in the competent court to try him, as confirmed by Article 132 of the above-mentioned Act.

---

<sup>41</sup> Decision of the Palestinian Court of Cassation Cassation No. 30/2005 issued on 30/6/2005 unpublished

<sup>42</sup> Al-Kilani, Farouk Lectures on the Jordanian Criminal Trial Status Law, previous reference, p. 178

<sup>43</sup> Tharwat, Jalal: Systems of Criminal Procedure, New University House, 2003, p. 514

d) Suspension of release on the condition of providing a provisional bail:

The competent authorities issuing the decision to release the detainee shall have the right to suspend the release on the condition of providing a provisional guarantee, and the discretion of this bail shall be up to the competent court.

The Palestinian legislator defined a precautionary guarantee in the text of Article (1/32) of the Penal Code as "the deposit of a sum of money or public bonds, or the provision of a full guarantor or insurance contract to ensure the good conduct of the convicted person or to avoid any crime."

Article 32 stipulates in the second paragraph of the same above-mentioned law that "bail may be imposed for at least one year and at most three years unless the law contains a special provision." The assessment of the reserve guarantee belongs to the competent court on the basis of the offence committed by the detainee, and this is confirmed by the text of article 3/32 of the Penal Code, which states that "the court shall specify in the judgment the amount of the amount to be deposited or the amount that must be guaranteed by the insurance contract or the guarantor, provided that it is not less than five dinars or more than two hundred dinars".

Through the above, we note that the reserve bail is limited to cases of passport release, and that the precautionary bail is an alternative to arrest, as the aim of both procedures is the presence of the accused to the investigation authority or to the trial.

The Palestinian legislator has specified the cases in which precautionary bail may be imposed in article 33 of the Penal Code, namely:

1. In the case of judgment in order to threaten or intimidate.
2. In the case of a judgment for incitement to a felony that did not lead to a result.
3. If there is room for fear that the convicted person will return to harm the victim or a member of his family or damage their property. These cases are exclusive.

Article 140 of the Palestinian Code of Criminal Procedure stipulates that: "If the court finds that the defendant's condition does not allow him to provide bail, it may substitute the obligation of the accused to present himself to the police station at the times specified in the release order, taking into account his circumstances, and may also ask him to choose a place of residence other than the place where he committed his crime."

The reserve guarantee has different types, including 1) Personal guarantee, which is: a pledge deed for the amount that the court deems sufficient, and to be signed by his guarantors if the court so requests. This is stated in Article 139/1 of the Palestinian Code of Criminal Procedure. 2) Financial guarantee: It is that an amount of money determined by the competent authority is placed and this money is deposited in the court fund and the amount may be paid either by the detainee or another person paying it on his behalf and this is considered a guarantee for the implementation of the terms of the pledge deed and this is in accordance with the text of Article (2/139) of the above-mentioned law.

2. Commercial Guarantee: The sponsor in this case must be a merchant and registered with the Chamber of Commerce, and the importance lies in the fact that the sponsor is full and able to pay the amount of the guarantee.



3. Judicial bail: It is that the bail is certified by the notary public in the court, after the competent court signs and estimates this guarantee and then attaches it to the file. In the event that the accused does not appear at the court sessions, his sponsor will be summoned in order to pay the bail amount.

#### Second: Judicial Control of Arrest:

Censorship is a necessary procedure and without it, detention becomes an arbitrary measure that results in the waste of the rights of individuals and affects their personal freedom, as personal freedom is one of the most sacred human rights stipulated by most legislation in its constitutions, so the origin is that the accused is innocent until proven guilty by a final judgment issued by the court, and this capacity does not disappear until after the issuance of this decision<sup>44</sup>. Censorship must be impartial and free from any influence.

##### 1) Automatic judicial oversight:

In the sense that the judge exercises control on his own, this case when the case enters the possession of the judge, that is, if the prosecutor considers that the investigation procedures require the continuation of the detention of the accused for more than twenty-four hours, he must ask the justice of the peace to extend the detention, for a period not exceeding fifteen days, and the judge must ensure that the legal conditions for issuing the arrest decision are met, and the magistrate judge may renew his detention again, provided that it does not exceed in total. If the detention of the accused continues for a period of six months, his detention may not be extended and he must be released immediately unless he is referred to the competent court, and this is stipulated in Articles (120, 119) of the Palestinian Code of Criminal Procedure.

1. Judicial oversight at the request of the accused:

This situation is only if the arrested accused submits a request to the court, since the Palestinian legislator did not adopt the principle of the defendant's right to appeal against the arrest decision, as the arrest decision is not considered one of the decisive decisions in the conflict and therefore it is not subject to appeal or cassation, and this is confirmed by the provisions of articles (347 and 324) of the same law mentioned above. However, the legislator allowed the appeal of the order issued in the application for release on bail, whether by acceptance or rejection, to the court that issued the order. Based on the above, I believe, as a researcher, that it would have been better to include the arrest than the exception, which allows the appeal of decisions that are not final, thus enabling the person arrested and affected by this procedure to appeal the arrest decision because it violates personal freedom.

---

<sup>44</sup> Sorour, Ahmed Fathy mediator in criminal proceedings

## **Conclusion:**

### **conclusions and recommendations**

During my study of the subject of pretrial detention, I reached the following conclusions:

1. Although all constitutions stipulate that personal freedom is not violated, the arrest procedure violates the personal freedom of the individual, and yet we cannot do without it, because it helps us to reveal the truth and reach the person who committed the crime.
2. The aim of the arrest procedure is to strike a balance between the interest of society in punishing the perpetrator of the crime and the interest of the individual in protecting his or her rights and personal freedom.
3. The purpose of the arrest procedure is to prevent the accused from tampering with the evidence and prevent him from escaping in order to preserve the integrity of the investigation and achieve justice.
1. The study of the guarantees of the accused in criminal proceedings is one of the most vital topics, enabling us to identify everything that the accused enjoys and to state his position on this charge

### **Recommendations**

- Provide for medical examinations of the arrested accused to ensure the safety of his body from any attacks that may have occurred on him during the investigation
- Stipulating that the task of investigation shall be entrusted to a competent and impartial judicial authority so that it is free from influences that lose its impartiality
- The Palestinian legislator should use one term to indicate arrest, as he used the terms arrest and the term pretrial detention, and it is better to use the term arrest in order to distinguish imprisonment as a punishment and imprisonment as a precautionary measure.
- The Palestinian Code of Criminal Procedure must stipulate that it is permissible to appeal or appeal against the arrest decision issued by the prosecutor.
- The Code of Criminal Procedure should include provisions granting the right to compensation to any person who has been arrested and detained without a legal reason and arbitrarily.

### **Sources and references:**

#### **I. References:**

- 1) Al-Dirawi Tariq Mohammed (2005): Guarantees and rights of the accused in the Code of Criminal Procedure (a comparative study).
- 2) Amin, Mohamed Saleh Hussein (1980) The Role of the Public Prosecution in the Public Prosecution in Comparative Law (PhD Thesis), Cairo University.
- 3) Abdel Nawab 'Moawad (2004) pretrial detention science and work Dar Al-Fikr University: Alexandria.
- 4) Hafez Magdy Moheb (1998). Pretrial detention in accordance with the events of amendments to the Code of Criminal Procedure in the light of jurisprudence and judicial rulings.
- 5) Skiker, Mohamed Ali: Pretrial Detention, New University House, Alexandria.2007.
- 6) Hillel, Faraj Alwani (2007) Pretrial detention.

- 7) Sorour, Ahmed Fathy (1985) mediator in the Code of Criminal Procedure Dar Al-Nahda: Cairo.
- 8) Abdel Moneim, Soliman (1999) Invalidity of the criminal procedure New University Publishing House: Alexandria.
- 9) Tharwat, Jalal (2003) Systems of Criminal Procedure New University House.
- 10) Khuwain, Hassan (1998) Guarantees of the accused in the criminal case during the preliminary investigation stage (a comparative study) Dar Al Thaqafa for Publishing and Distribution: Amman
- 11) Soldier Abdel Malik (1976) Criminal Encyclopedia, Part II, Cairo: Egyptian House of Books Press.
- 12) Hamad, Amin Mustafa (2005): Problems of Pretrial Detention, Dar Al-Nahda Al-Arabiya, Cairo.
- 13) Tantawi, Ibrahim Hamed: pretrial detention, study of the texts of Egyptian and French legislation and some Arab legislation, Dar Al-Fikr University.
- 14) Murr ' Mohamed Abdullah (2006): Pretrial detention, Dar Al-Fikr Al-Arabi, Alexandria.
- 15) Al-Halabi, Muhammad Ali Al-Salem Ayyad: Guarantees of Personal Freedom during Investigation and Inference, Second Edition, Kuwait
- 16) Salama, Ismail (1983): Pretrial detention (a comparative study).
- 17) Obeid, Raouf (1989): Principles of Criminal Procedure in Egyptian Law, Dar Al-Jeel Printing
- 18) Al-Kilani, Farouk lectures on the Jordanian Criminal Trial Status Law and content, eighth edition Al-Farabi.
- 19) Harja, Mustafa Magdy (1992) Practical problems in pretrial detention and release University Press: Beirut.
- 20) Al-Awji, Mustafa (2002) Lessons in Criminal Procedure Al-Halabi Human Rights Publications: Beirut.
- 21) Abdel Fattah, Qadri: Criteria for pretrial detention and alternative measures (a comparative study) Dar Al-Nahda Al-Arabiya.
- 22) Alyan, Mamdouh (2003) Al-Wajeez in explaining the Palestinian criminal procedures, Nablus.
- 23) Omar Sharif: pretrial detention (comparative study)
- 24) Abdel Moneim, Soliman (1999): Invalidity of the criminal procedure in Alexandria

**Second: Laws:**

1. Penal Code No. 16 of 1960.
2. Palestinian Code of Criminal Procedure No. 3 of 2001.
3. Egyptian Code of Criminal Procedure No. (50) of 1950.

**Third: Agreements:**

1. International Covenant on Civil and Political Rights, 16 December 1966.
2. Universal Declaration of Human Rights of 1948

**Fourth: Researches:**

- 1) Ali, Mohammed (2007) Pretrial detention in the Palestinian Code of Criminal Procedure (a comparative study) Master Thesis: An-Najah National University.

2) Al-Ahmad, Ahmad (2008) The accused is his guarantee and rights in interrogation and detention (pretrial detention) in the Palestinian Code of Criminal Procedure (a comparative study) Master Thesis: An-Najah National University.