

# Guarantees of the accused in the preliminary investigation (Comparative study)

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## Introduction

The purpose of writing this research is to shed light on an important topic in criminal trial procedures, it is the guarantees of the accused in the preliminary investigation, despite the fact that this topic has been explained by great and giants of jurists and commentators on penal laws in the Western and Arab world. In fact, there is not a single book of the penal assets explanations books, if it does not include a full and interesting explanation of this topic. Also, dozens of doctoral theses, master's theses and diploma research have been written in this field, the ink has not yet run out and the paper has not dried in it. However, the researcher, with all humility and pride, would like to present a very important topic, because it is related to human rights enshrined in all divine and man-made traditions on the one hand, its attachment to the special liberties with which peoples fought, it struggled a lot to enact her constitutions on the other hand, our Arab peoples are still struggling for that. Also, this topic is very important from two different perspectives as well, one of them is that the accused has been covered by many legal and constitutional rules that prevent him from being considered a “committee of the criminal act except after the evidence and evidence against him and his conviction for that have occurred”. Then came a rule and principle (the accused is innocent until proven guilty), which was stipulated in all the constitutions and laws of the civilized world, it was also what prompted the researcher to focus on this topic from the perspective of every human being exposed to accusation, How if I become? Or whoever reads the researcher's research is accused?. We are all susceptible to that, if we had no criminal inclinations, How many innocent people have been accused of no fault of their own?. All these reasons and views in the views made the researcher to search for the human being, when he finds himself accused, the researcher believes that everyone should

know the legal guarantees of the accused during the initial investigation.

Therefore, the research consists of two sections:

**The first topic:** deals with the guarantees of the accused during interrogation, which contained three requirements:

**The first:** was to enable the accused to see the accusation against him and all available evidence against him, and to inform him of his rights.

**The second:** was the right of the accused to appoint a lawyer to defend him and to remain silent when questioning.

**The third:** it was not permissible to pressure the accused, torture him, or use any form of coercion during his interrogation.

**The second topic:** included the guarantees of the accused after the interrogation, in which the researcher talked about three requirements:

**The first:** was to enable the accused to view all investigative transactions during his absence or arrest.

**The second:** was that the accused is subject to the supervision of the Public Prosecution and is not arrested until after being questioned.

**The third:** was guarantees the accused upon arrest.

## The first topic

### The guarantees of the accused during his interrogation

Interrogation is an important evidentiary procedure. Addressed by the investigator to the accused (defendant) himself, to find out the truth and arrive at a confession from him that proves

the accusation against him, or to find evidence that refutes it.

The interrogation is important in knowing the circumstances of the case and its parties, the interrogation has a dual nature, as it is by means of an interrogation method with the accused (the defendant) taken by the investigator, in order to obtain evidence to help him discover the crime, it was any interrogation on the other hand and on the other hand a means of defense that gives the accused the opportunity to defend himself, prove his innocence, refute the accusation against him, present evidence for that if he is innocent, or reduce his responsibility by clarifying the circumstances of his perpetration of the crime and the reasons that prompted him to commit it if he was guilty (Dr. Hassan Al Jokhdar, Explanation of the Code of Criminal Procedure, 1st Edition, Dar Al Thaqafa Library for Publishing and Distribution, Amman, 1992, p. 378).

Khawla bint Hakim returned to dialogue with the Messenger (peace be upon him) and discussed him freely, saying:

I have children from him, if I hold them to him they are lost, and if I hold them to him who are hungry.

The Greatest Messenger (may God bless him and his family and companions) said:

I do not see you except that you are forbidden to him, because shows, before his ruling in the Qur'an came, was a divorce" before Islam (Prof. Dr. Mustafa Ibrahim Al-Zalami, Guarantees of the Accused in Islamic Sharia, 2nd Edition, Erbil, 2001, p. 10.).

Because of the importance of interrogation, most of the criminal laws in the countries of the world, if not all of them, including the Egyptian, Iraqi and Lebanese criminal procedure laws, have established guarantees for the accused (the defendant or also called the "complaint") to secure his rights and not to waste human rights and to accuse and condemn innocent people because the legal rule states that The accused is innocent until proven guilty and for the importance of this issue, we have referred to him in this modest research and addressed it with three requirements:

**The first requirement:** Enabling the accused to see the accusation against him and all available

evidence against him, and to inform him of his rights.

**The second requirement:** The right of the accused to appoint a lawyer to defend him and to remain silent during interrogation.

**The third requirement:** It was not permissible to pressure the accused, torture him, or use any form of coercion during his interrogation.

### First requirement

#### **Enabling the accused to see the accusation against him and all available evidence against him and inform him of his rights:**

The accused (the defendant) was previously unaware of the accusations attributed to him, and after the historical development of criminal principles, this led in the first place to securing his knowledge of the actions of the accused, and the crimes based on him, and this is extremely important, because of the right of the accused (the defendant) To defer to the answer so that he can think carefully about what his response should include, lest his presentation of statements that lead to his freedom or expose him to suspicion.

It was noted that this development in guaranteeing the rights of the accused constitutes part of the legal procedures that aim to undermine the pillar and pillars of secrecy in the preliminary investigation, as his interrogation is not associated with secrecy, whether with regard to what is attributed to him or against him, by attending all investigation procedures except for hearing witnesses according to Article (70). From the Syrian criminal origins (Wafiq Ahmed Al-Aswad, A Brief Practical Brief on Criminal Procedure, 1966-1997, p. 404).

In order for the defendant to be able to defend himself, he must be informed of the accusation against him before being questioned, which must be completed by the investigator or the court.

When the accused (the defendant) appears before him for the first time, the investigative judge must prove his identity, inform him of the acts attributed to him, and request an answer for them (Article 69/1) Syrian fundamentalism.

In conciliatory and preliminary cases, the memorandum of invitation to attend the trial must include the criminal facts attributed to the defendant. When the trial begins, the court clerk reads the referral decision and the seizure papers, if any, and the attorney general and the personal claimant or his representative clarifies the facts of the case and then interrogates the defendant (Article 191). The indictment decision issued by the referral judge referring the accused to the criminal court, which indicates the accusation, must be notified to him (Article 160). (Dr. Hassan Al-Jaw Khadar, a previous source, p. 381.).

Hence, Article 76 of the Lebanese Code of Criminal Procedure, which requires the investigating judge to inform the defendant of the crime and the crimes attributed to him, summarizing their prevention and informing him of the evidence available to him or of the suspicions against him.

It suffices for the defendant to be informed of what has been attributed to him and to summarize the facts (orally), meaning that the investigating judge is not obligated to inform the accused (the defendant) of these matters (in writing). the defendant) in detail “with what is being brought against him, but he is also”, and in turn, a reason for the defense, which would enable the accused (the defendant) to respond to the allegation.

In order for the scales to be equal, the investigative judge exercises his rights against the accused (the defendant), and gives the latter the right to defend himself before the court, a mechanism was necessary to enable the accused to confront the prosecution.

This mechanism was represented and represented in the duty to inform the accused of the crime attributed to him and to summarize its facts to him, and to inform him of the evidence available in his destination, as well as the suspicions against him. All this in order to enable the defendant to refute it and defend himself.

This duty, which is placed on the investigative judge, in the field of informing the defendant of the crime attributed to him and summarizing its facts, extends (only) to the facts mentioned in the “request paper” or “in the complaint with the status of a personal prosecution” or in the additional request paper. It does not extend to

other incidents, due to the fact that the investigative judge places his hand on the file (objectively) Inrem. (Elias Abu Eid, The principles of criminal trials between text, jurisprudence and jurisprudence, a comparative study, vol. 4, i 1, 2006, pg. 32).

Article 60 of the Lebanese Code of Criminal Procedure stipulates in this regard: ((The investigative judge shall control the public prosecution in an objective manner. He may interrogate as a defendant every suspect in the commission of the crime, whether he is an actor, partner, interfering or instigator, without stopping at That is on the prosecution's claim.

If, during the investigation, he discovers acts of a crime that are not correlated with the alleged act, he shall refer the file to the Public Prosecutor in order to claim these acts. But if the discovered acts are coherent with the alleged act, he is not required to investigate in a prior allegation.

## **The second requirement**

### **The right of the accused to appoint a lawyer to defend him and to remain silent during interrogation:**

The accused, in the past, did not have the right to establish a representative for him, but the modern criminal principles laws have included this right, including the Syrian Code of Criminal Procedure, which included in the first paragraph of Article 69 of it: (When the defendant appears before the investigating judge, the judge proves that His identity and informs him of the acts attributed to him and asks him to answer them, notifying him that “he has the right to not answer them except in the presence of a lawyer, and this warning is recorded in the investigation report. If the defendant refuses to set up a lawyer or does not attend a lawyer” within twenty-four hours, the investigation is conducted independently of him.

It is clear from this that the interrogation of the accused goes through two stages in the first, in which the accused appears before the investigative judge in a fundamental manner “and informs him of the accusation against him and informs him that he has the right not to answer the questioning except in the presence of

an agent with him. Twenty-four hours and if he refuses, he will be questioned.

As for the second stage, which follows the twenty-four-hour period granted by law to the accused (the defendant), he established an attorney who was “interrogated in his presence. Warn the accused (the defendant) that he has the right not to respond to a lawyer, and that he must be recorded in the investigation report.

In the event that the accused (the defendant) is insolvent and cannot appoint a lawyer to defend him, the investigative judge assigns the president of the Bar in order to choose a lawyer to defend the accused. And in Syria, the slandered lawyer.

The attorney, regardless of whether he is paid or delegated, attends the interrogation session of the defendant, and he does not have the right to answer him, and he may not speak except with the permission of the judge.

The Syrian law specified the right of the accused (the defendant) to seek the assistance of one attorney, in order to ensure the regularity of the investigation and to avoid its prolongation.

There are cases specified by the Syrian Code of Criminal Procedure in which it is permissible to interrogate the accused (the defendant) before summoning his representative, in case of fear of losing evidence, as stipulated in the third paragraph of Article 69 of the Syrian Code of Criminal Procedure:

((In case of speeding due to fear of losing evidence, the defendant may be questioned before his lawyer is invited to attend)) (Tawfiq Ahmed Al-Aswad, a previous source, pp. 404 et seq.).

The accused (the defendant) may not appoint someone to defend him other than lawyers who are permitted to plead before the courts pursuant to Article 61 of the Law regulating the Lebanese legal profession, and the second paragraph of Article 76 of the Lebanese Code of Criminal Procedure, which warns of the right to the assistance of a lawyer during interrogation (duty) on the investigative judge, because it is one of the conditions for the validity of the interrogation, even if the defendant expresses his desire not to appoint a lawyer and seek the assistance of him, meaning that the duty of the investigative judge, in this regard, is

independent of the decision of the accused (the defendant).

It suffices to get the alert once. So that if the defendant retains this right and does not intend to appoint a lawyer for him, the investigative judge is freed from this duty if the defendant appears without an attorney (Elias Abu Eid, previous source, p. 37).

It follows from the aforementioned that the investigation judge must follow the following rules:

A. The judge must warn the accused of his right to appoint a lawyer when questioning him, and if the accused is financially insolvent,” the judge is obligated to appoint a lawyer to defend him.

B. If the accused (the defendant) waived his right to appoint a lawyer for him during the interrogation, this does not forfeit the right to appoint a lawyer after this session.

C. The agent must be invited to attend all investigation procedures, with the exception of testimony.

The lawyer has the right to contact his client by virtue of the law in respect of the principle of the right of defense and the investigative judge does not have the right to prevent the agent from communicating with his client even if the judge decides to prevent contact with him, as the legislator granted the investigating judge the right to isolate the defendant (the accused) for a period of ten days, renewable for one time, but this does not apply The agent must, and this is what Article 72 of the Syrian Criminal Procedure Code stipulates when it states:

((The investigative judge has the right to decide to prevent contact with the arrested defendant for a period of ten days, renewable once.

This prohibition does not include the defendant’s lawyer, who can contact him at all times, regardless of any watchdog)).

We believe that the guarantees of the accused to appoint a lawyer during the interrogation in the preliminary investigation contained in the penal codes of Arab countries, although they are OK, they did not rise to the role of the lawyer in defending the rights of his client in primitive (civil) lawsuits and other lawsuits.

### **The third requirement**

**It was not permissible to pressure the accused, torture him, or use any form of coercion during his interrogation.**

Pressuring the accused during the interrogation process in order to forcibly withdraw his confession by torturing or threatening him or using various forms of coercion is one of the oldest methods that were used historically during the process of interrogating the accused, and which still in some countries adopts this approach in interrogating the accused in security cases. Some of the countries of the world have prohibited the use of force, torture and other forms of coercion in interrogation, and Islamic law was the forerunner in this field, because blasphemy after oath is not held accountable for a person if it is done under pressure, torture, threats, and blasphemy are among the major sins, and the Qur'an stipulates that in the Almighty's saying (Whoever disbelieves in God after his oath, except for one who is forced and whose heart is reassured by oath) (Surah An-Nahl- Verse: 106).

If the infidelity is under the pressure of threat and torture is not relied upon and does not have any effect, then the lack of reliance on the testimony of the accused taken from him by threat or torture is a fortiori (Dr. Mustafa Ibrahim Al-Zalami, previous source, p. 13).

It was followed by man-made laws which stipulated that the interrogation be conducted in isolation from forms of pressure and material or moral influence on the will and freedom of the defendant.

Most of the world's constitutions, if not all of them, have prohibited torturing any human being physically "or morally" or treating him in humiliating treatment, as stated in the Syrian constitution in Article 38/3 of it, and the Syrian Penal Code in Article 391 of it punishes anyone who extracts from another person a confession of force. Accordingly, it is forbidden to interrogate the accused (the defendant) by using means of violence against him, or methods of anesthesia and hypnosis, or by threatening and threatening him, or swearing by him the legal oath (Dr. Hassan Al-Jokhadar, previous source, p. 382).

Article 77, first paragraph of the Lebanese Code of Criminal Procedure, stipulates that the

investigative judge "must make sure that the defendant gives his statement away from all external influence, whether moral or material." Because the interrogation as an investigative procedure may It leads to the confession of the accused (the defendant), and when this confession must be made of a free will, away from all forms of coercion, coercion and influencing the confessor's freedom (Elias Abu Eid, previous source, pg. 48).

Because the lesson in the interrogation is to discuss the accused (the defendant) in detail and confront him with the evidence and suspicions against him in order to reach the truth. Therefore, the legislator imposed a set of guarantees for the accused not to remove a confession from him by force contrary to the truth.

### **The second topic:**

#### **the guarantees of the accused after his interrogation**

The accused also has guarantees during the interrogation that the legislator has been enacting in observance of public freedoms and human rights and made them fixed rules in the penal laws. After that, it was necessary to enact guarantees for the accused (the defendant) other than those enacted during the interrogation, which are guarantees after the interrogation, which the researcher sees by studying and highlighting them for what It is of importance from an investigative and humanitarian point of view. The researcher dealt with a study and presented three demands that the researcher considers important in the guarantees of the accused after the interrogation process, which are:

**The first requirement:** Enabling the accused to view all investigational transactions during his absence or arrest.

**The second requirement:** That the accused be subject to the supervision of the Public Prosecution and not be arrested until after being questioned.

**The third requirement:** The guarantees of the accused upon arrest.

We will take it up one by one.

### **The first requirement:**

#### **Enabling the accused to see all investigational transactions during his absence or arrest**

Most of the penal laws of the countries of the world allow the accused (the defendant), his representative, other litigants and parties to the case to be informed of the investigative actions and procedures as a guarantee of the guarantees of litigation and investigation. The case informs them of the investigative transactions that took place in their absence or during the arrest of the accused (the defendant) in the cases in which the legislator allowed the investigating judge to conduct the investigation independently of the litigants and their agents in this regard, as stated in Article (70/3).

Of the Syrian Code of Procedure, and these two cases are as follows:

1. In the case of urgency: as is the case in witnessed crimes, or when there is a fear that evidence will be lost.
2. In the case of necessity: when the investigating judge decides that the necessity of revealing the truth requires conducting the investigation in isolation from the litigants and their agents, as if their presence would lead to the obliteration of the truth. (Hasan Al-Jokhadar, a previous source, pg. 408).

Article (82), the second paragraph of the Lebanese Code of Criminal Procedure, also included this important principle and guarantee when it stipulated that ((the defendant, the personal claimant, the person responsible for money and the guarantor, or their representatives, may attend the investigation work, except for the hearing of witnesses. Each of them must be informed A note summoning him at least twenty-four hours before the investigative work he is dealing with, otherwise the work being conducted in his absence will be void.”

(corresponds to the provisions of Article 102, first paragraph of the French Criminal Procedure).

And that this guarantee for the accused (the defendant) perpetuates the principle of publicity through investigation on the one hand, and achieves an important guarantee for the litigants

by enabling them to attend investigation work on the other hand, which enables them to be assured of the integrity of these procedures, and opens the door for them to challenge any procedure they consider flawed. or abuse.

Although the Lebanese legislator has secured the litigants, including the accused, the right to attend the investigation work, he excluded from the procedures hearing witnesses (Elias Abu Eid, previous source, p. 113).

The lesson from this lies in the fact that the testimony before the investigating judge is performed in secret, i.e. in the absence of the litigants and their agents, for fear of the litigants' influence on the witness or his living ones with what he will say about his information about the crime. In any case, the researcher believes that informing the accused of the litigation procedures After his interrogation and during his arrest, it is one of the important guarantees that the legislator approved to enact.

### **The second requirement:**

#### **The accused shall be subject to the supervision of the Public Prosecution and not be arrested until after being questioned.**

One of the important guarantees that the legislator drew for the accused in most penal laws is the speed of his interrogation and not to arrest him until after his interrogation. He is brought with a subpoena, so the judge will interrogate him within twenty-four hours of putting him in custody. That is a legitimate impediment. The Public Prosecutor requested another investigative judge, the head of the first instance court, or the magistrate to question him. If after all that it is not possible to interrogate the defendant, the Public Prosecutor will order his immediate release as stated in Syrian law, and if the accused is arrested under a subpoena and has remained in custody for more than twenty-four hours, without being questioned or taken to the Public Prosecutor, his arrest is considered an arbitrary act. The employee responsible for the crime of deprivation of liberty stipulated in Article 358 of the Syrian Penal Code (Hasan Al-Jokhadar, previous source, p. 420).

The investigative judge is also obligated by law not to arrest the accused except after questioning him.

### The third requirement:

#### Guarantees upon arrest

The old legislation did not know the system of arrest, so the accused of committing a crime remains at large, and his opponent must present evidence, and the judge, after reviewing the arguments of the opponents, must rule according to what he sees and decides, and according to him and according to the accusative system that we referred to, he did not know the arrest system and as a result of historical development The centralization of power in the hands of the state and the expansion of its functions, so that it exercised the right of accusation against suspects in the hands of its representative. The system of arrest was found out of necessity in order to fear the escape of the accused, and Islamic law defined arrest during the reign of the second Caliph Omar Ibn Al-Khattab (may God be pleased with him) when he bought a house and made it a place to arrest people. If the condition of the accused is unknown to the judge, then he is imprisoned until his case becomes clear, from which this system is followed in Iraq and the Arab and Islamic countries, and it has been enacted in all man-made laws (Dr. Salim Ibrahim Harba and Professor Abdul Amir Al-Akaili, Explanation of the Code of Criminal Procedure, Part One, Second Edition 2010, pg. 147).

Because this system poses risks to the accused and restricts his freedom, it has made a series of guarantees for him, including:

#### **First: The supervision of the Public Prosecution:**

The law requires the investigative judge to seek the opinion of the Public Prosecution when arresting the accused, and that is good “for the course of justice as stated in the text of the first paragraph of Article 106 of the Syrian Code of Criminal Procedure, which states: ((After interrogating the defendant or in the event of his escape, the investigative judge can issue against him An arrest warrant if the act ascribed to him is punishable by “detention or a more severe penalty, and he must seek the opinion of the Public Prosecutor in the matter.” (Tawfiq Ahmed Al-Aswad, previous source, pg. 426).

#### **Second: Observing the rules of assets in the arrest warrant:**

The rules stipulated by the law must be observed by the investigating judge with regard to arrest, and otherwise the accused has the right to file a complaint against him (Tawfiq Ahmed Al-Aswad, previous source, pg. 427).

#### **Third: Considering the period of detention as part of the sentence, and providing treatment, food and comfortable housing for the accused when he is arrested.**

In the event that the accused (the defendant) is detained pending investigation, whether for a continuous period, or if he was arrested and released, and then returned to detention, all those periods shall be deducted from the sentence imposed for the same case. In the case of multiple penalties, the period of detention shall be deducted from the lesser penalty if several penalties are issued against the accused in one case. Food, drink and comfortable housing must be provided to the detainee, taking into account human rights, because the purpose of the arrest is fear of changing the features of the crime and not the physical punishment of the accused, as well as treatment must be given. The accused was transferred to the hospital when necessary, and his residency there was considered as part of the detention period, and this is what the Iraqi legislator went to (Salim Al-Harbeh and Abdul-Amir Al-Akaili, previous source, p. 150).

### Conclusion

After the researcher dealt with the subject of the research related to the guarantees of the accused in the preliminary investigation, he is summarized by the following results:

**First:** With regard to the guarantees of the accused during interrogation, the Iraqi, Lebanese and Syrian legislators in question have agreed when it stipulates the right of the accused to appoint a lawyer. his confession.

**Second:** The researcher believes that the role of the lawyer in the investigation stage is ineffective and ineffective, as is the case in other civil cases, and that the legislator needs to draw up a greater role for the lawyer.

**Third:** The researcher sees the necessity of explicitly stipulating the laws to provide for the

needs of a decent life for the accused upon his arrest, and he also sees the importance of the research he researched for the reasons mentioned in the introduction.

### **List of references and sources**

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