

# Motives Of Pre-Trial Detention Required By The Interest In Investigating In Jordanian Law, Between Theory And Practice (Comparative Study With French Law)

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## **Abstract**

This research deals with the subject of arrest motives and causes of detention required by the interest of the investigation, which the Jordanian law expressly stipulated in stated article 114 of the Code of Criminal Procedure, which was introduced under the 2017 amendment and is competent to take the arrest decision. Despite the importance of this amendment, public opinion and the parties to the criminal case have confidence in the fairness of these decisions Jordanian law has become more compatible with international requirements. However, the formulation of these motives to justify the arrest was inaccurate, the law did not require a statement of the facts of the case and the indications and criteria that reinforced the judge's conviction in their existence, and this resulted in some sham gaps in the scope of the practical application. In a way that impedes achieving a balance between individual freedom and the interest of investigation and justice. Therefore, the idea of this research was crystallized to fill those gaps by analyzing the justifications for arrest, using the experience of French law and judiciary and the jurisprudence of the European Court of Human Rights, which will contribute to supporting criminal justice in Jordan.

**Keywords:** Detention, Arrest, Motives, Investigation Interest, Individual Freedom, Jordanian law, French law.

## **Introduction**

The Jordanian legislator, under the Code of Criminal Procedure before the 2017 amendment, stipulated the investigation interest motive to justify the extension of the detention and justify the release of the defendant. However, we note that the term (investigation interest) came loosely, elastic, and general grants wide discretion to the competent judge for his discretion in order to make the decision to arrest or decisions related

to it. It also limits judicial oversight over the fact and reality of this reason to justify the arrest. Therefore, with the aim of restricting the use of this procedure except in cases of necessity and with the aim of adding transparency to the arrest, its justifications, and allowing the imposition of effective judicial oversight on it. Therefore the Jordanian legislator added an amendment to the provisions of the first paragraph of article 1-114 of the Code of Criminal Procedure for

the year 2017 <sup>(1)</sup>, is according to the motives for the arrest <sup>(2)</sup>. In addition to detailing the requirements of the interest of the investigation in an accurate detail to deny ignorance, all these amendments aim to facilitate investigations and criminal procedures and to ensure that they proceed quickly to the pursuit of criminal justice and truth <sup>(3)</sup>. Also for avoiding anything that could hamper the investigation and make it long and complicated. Jordanian law has become more compatible with international requirements, especially article 1/9 of the International Covenant on Civil and Political Rights. Which emphasized that the arrest was informed by court provisions and legal guarantees <sup>(4)</sup>. Thus it ensures a balance between the interest of the state and society in revealing the truth and punishing the perpetrator on the one hand, and the freedom and interest of the individual on the other. Jordanian law has also become more respectful of the principle of "the presumption of innocence recognized in international conventions, agreements, constitutions, and national laws"<sup>(5)</sup>, which assumes that the accused is innocent until proven guilty by a final penal verdict.

The motives required by the investigation interest in Jordanian law are similar to the investigative motives found in article 144 of the French Code of Criminal Procedure. Which consists in preserving evidence of the crime and not losing it, preventing influencing witnesses or the victim or coercing them, and preventing the victim from communicating with his accomplices.

### **Research problem**

The problem of this study is manifested in the extent of the efficiency of the Jordanian penal legislature in formulating the motives for arrest required by the interest of the

investigation. Several questions emerged from this problem, which is as follows:

- 1- How successful is the Jordanian legislator in achieving a balance between the interest of the investigation and the interest of the individual and the protection of his freedom?
- 2- What is the appropriateness of the motives for arrest required by the interest of the investigation with the requirements of international covenants related to human rights?
- 3- What are the criteria used by the competent authority in choosing motives for arrest that are required by the interest of the investigation?

### **Research importance**

The importance of studying the motives for arrest that are required by the interest of the investigation from a practical point of view, given the novelty of the issue in the Jordanian Code of Criminal Procedure. Furthermore, the lack of studies that separated these motives and it showed the criteria on which it is based to assess its existence. Therefore, this study constitutes a qualitative addition as it will be a guiding guide for judges, academics, and those interested in this field to help them lay down the positions and principles that would help draw a road map around these motives, conditions, and criteria for their application. Thus, studying this will move this topic from the stage of dormancy in the Code of Criminal Procedure to the stage of practical application.

### **Research objectives**

- 1- Evaluating the efficacy of formulating the motives for the justifications for arrest required by the investigation interest in Jordanian law, while comparing that with French law, with an explanation of the weaknesses and strengths in each of them. This is to reach

the recommendations of the legislation more capable and efficient to achieve a balance between the interest of the defendant in protecting his freedom before proving his guilt on the one hand and the public interest to reveal the truth and punish the criminal on the other hand.

2- Indicating the criteria that help assess the presence of motives for arrest that are required by the interest of the investigation.

3- Indicating the extent to which Jordanian law is compatible with the motives for arrest that are required by the interest of the investigation with international requirements.

### Research Methodology

The researcher will follow the comparative analytical descriptive approach to study the topic of the motivations of the investigation interest, by comparing the position of legislation, the judiciary, and criminal jurisprudence in France with its counterpart Jordan to address this topic with referred to the position of international conventions and courts about it when necessary.

### Research plan

Based on the foregoing and with the aim of fulfilling the intended goals and objectives of this research and answering its questions. The motives for arrest required by the interest of the investigation were divided as follows:

**The first requirement:** arrest is the only way to preserve evidence of the crime and not lose it.

**The second requirement:** arrest is the only way to prevent influencing witnesses or victims or coercing them.

**The third requirement:** arrest is the only way to prevent the defendant from communicating with his partners.

**Fourth requirement:** arrest is the only way to prevent the defendant from making a decision and to ensure that he is brought to justice.

**The first requirement is arrest is the only way to preserve evidence of the crime and not lose it.**

The Jordanian legislator included this motive to justify the arrest in article 1-114 of the Code of Criminal Procedure, which states: "Arrest shall not be unless it is the only means of preserving evidence or physical features of the crime." as the French legislator also stipulated in the first line of article 144 of the Code of Criminal Procedure that arrest should be "the only means of preserving the means of evidence and material evidence of the crime necessary to reveal the truth." In practice, this motive is frequently used in Jordan to justify arrests for serious crimes such as felony <sup>(6)</sup>. The percentage of using this motive, according to the questionnaire that was used in the Amman city Public Prosecution, is 11.4% of the arrest decisions taken by the Public Prosecution. In France alone, according to the report of the Regional Observatory of Delinquency and Social Contexts, the use of this motive to justify arrest amounts to 69.20% of arrest decisions taken by the Public Prosecution Office <sup>(7)</sup>.

If we analyze the words used by the Jordanian and French legislators to formulate the motive of preserving the evidence of the crime and not losing it. We find that it indicates that the arrest of the defendant is in order to ensure the progress of the investigation and the search for the truth by preventing the defendant from tampering with the evidence of the crime and modifying it or interfering illegally in the investigation. In addition, he collected them in a way that serves his interests and removes doubt about

him <sup>(8)</sup> and prevents him from getting rid of it or hiding it because it proves his guilt. The motive of preserving crime evidence and not losing it may be used to justify arrest in specific types of crimes, especially those characterized by the use of cunning and guile methods such as corruption and fraud crimes <sup>(9)</sup>. Because the evidence for this type of crime is easy to hide and get rid of, the perpetrators will try to use their methods to get rid of the evidence that proves their guilt.

The adoption of both Jordanian and French laws with the motive of preserving evidence of the crime and not losing it to justify the use of arrest indicates that both of them adopted the regulations on the prospecting system in the pre-trial investigation stage. This is because they entrust the investigation authority to defend the members of society by any means it deems appropriate in order to achieve justice and reveal the truth. The investigation work is confidential, so the defendant has a weak chance of influencing the investigation and gathering evidence. However, if he attempts to do so or there is a risk that he will do so, his arrest will be resort as a precaution. Thus based on the introduction of the regulations on the prospecting system, the basic principle is that the justification of arrest to preserve evidence and prevent its loss is limited in terms of time, so it can be used only in the initial stages of the investigation <sup>(10)</sup> when the evidence of the crime has not yet emerged and the investigation authorities are still searching for it. The position of French law in adopting the regulations on prospecting system and with the motive of preserving evidence of the crime and preventing its loss contradicts the position of the European Convention on Human Rights in article 5. Which did not acknowledge the motives of the investigation as a justification for taking a measure restricting freedom. In addition, the European

Court of Human Rights, in its ruling, decided that: "The investigating authority does not always need the presence of the suspect in order to search for the truth" <sup>(11)</sup>. This indicates the tendency to adopt the accusative system and that arrest is not necessary if it is taken with the aim of investigation requirements, research, and exploration of evidence in order to reach the truth.

The origin is when the investigative judge resorts to this motive to justify his decision to arrest. He must be aware of the existence of evidence that helps reveal the truth and the crime was done by the defendant. There is a fear that he will tamper with this evidence and try to get rid of it. Several hypotheses may appear in this case. The first hypothesis is that he does not have enough time to carry out all the necessary investigations and collect the necessary evidence, so the decision is taken to arrest the defendant to prevent him from accessing this evidence before he reaches it. But this hypothesis may conflict with the condition of arrest that there is sufficient evidence against the defendant to take this action against him <sup>(12)</sup>. The second hypothesis is when the evidence against the defendant is located in places far from the place where the crime was committed. If leaving the defendant free, there is a possibility that this defendant will hide the evidence of his commission of the crime, or dispose of them and obliterate their features in order to mislead the investigation authority and the inability to attribute the crime to him. Such as the suspect hiding the pistol in the crime of murder, for example, or the weapon used to break and open the door in the crime of theft.

Finally, despite the importance of this motive to justify the arrest, the effectiveness of the arrest to preserve evidence of the crime and not lose it is not certain. Maybe the defendant can use other means to influence the

evidence of the crime and obliterate its features despite his arrest, such as resorting to his family and friends <sup>(13)</sup>. Therefore, the judge must take the necessary precautions to prevent this, such as security and precautionary measures inside the detention centers, such as preventing him from contacting his relatives or some people for a limited period. Sometimes, this motive may be misused to justify the arrest, so the investigative judge uses this motive without matching it with the truth and reality. At the same time, however, an arrest may be a means in order to gain access to new evidence and elements of evidence that the investigative judge supposes to exist. In this case, detention may be used to influence the suspect and withdraw his confession, especially when the investigative judge does not have sufficient evidence to convict and suspect him <sup>(14)</sup>. Therefore, we recommend that Jordanian law censor the use of this motive by obligating the investigative judge when it is used to justify the arrest. That to indicate the material facts and circumstances that reinforced his conviction that there is evidence to prove the crime and that there is a risk of its disappearance and loss if the defendant is not arrested and this is imposed by Article 144 of the French Code of Criminal Procedure.

**The second requirement is arrest is the only way to prevent influencing witnesses or victims or coercing them**

Jordanian law stipulates this motive in Article 1-114: "Arrest should be the only means to prevent coercion against witnesses or victims." Also, French law stipulates this motive in the second line of Article 144 by saying: "Preventing influence on witnesses or victims and their families." In practice, this motive is frequently used in Jordan to justify arrests in serious crimes of the type of felony,

and the percentage of its use, according to the questionnaire that was made in the Amman Public Prosecution, is 10.3% of the percentage of decisions arrest which was taken by the Public Prosecution <sup>(15)</sup>. Where the defendant contemplates exerting influence on witnesses by enticement or intimidation so that they refrain from giving their testimony or change their statements that include evidence that attributes to him the commission of the crime under investigation. Which may change the course of the case contrary to the truth <sup>(16)</sup>, the defendant may also seek to influence the victims so that they drop the complaint against him and waive their rights. This is frequent in some crimes of rape and abuse. Also, this motive is frequently used in practice in France, according to the report of the Regional Observatory for Delinquency and Social Contexts (ORCDS), the use of this motive to justify arrest amounts to 74.44% of the percentage of arrest decisions taken by the Public Prosecution Office <sup>(17)</sup>.

It is worth noting that this motive is used to justify arrest only in crimes that resulted in victims, meaning if the accusation against the defendant is a crime against the state, it is difficult to use this motive to justify arrest <sup>(18)</sup>.

French law differs from Jordanian law in that it expanded the scope of protection in the use of this motive to justify arrest, permitting its use not only to protect witnesses and victims from coercion that the defendant may exercise against them if he remains free, but also protects their families from this coercion <sup>(19)</sup>. Therefore, we recommend that the Jordanian legislator take this into account and expand the scope of protection for the family to justify the arrest. Because it usually uses coercion on the families of witnesses or victims in order to pressure them to influence and change their

statements or withdraw and drop the complaint.

The principle when using this motive to justify the arrest is that the arrest is the only means to be used to prevent the defendant from influencing witnesses or the victim or coercing them. In other words, if one of the alternatives to arrest is sufficient to achieve this purpose, then the arrest is not necessary. For example, electronic monitoring may be sufficient to know the movements of the defendant and prevent him from visiting the places where the victim or witnesses are in order to avoid affecting them. In the event of a breach of the terms of this control and the defendant's failure to comply with them, arrest is necessary. The productivity of using this motive to justify an arrest may not be certain. Even if he cannot exercise coercion on the victim or on witnesses himself. But he may be able to do so with the help of others, such as one of his friends or a member of his family. In the sense that the arrest does not necessarily fulfill the purpose assigned to it, which is to prevent the defendant from communicating with his partners.

The question that arises here; there is a specific criterion required to qualify an act that is considered coercion against witnesses or the victim and an influence on their will? What is the degree of seriousness required in the act practiced by the defendant against the witnesses or the victim, thus his act is considered coercion that justifies the detention and arrest of his freedom? The Jordanian and French legislators did not answer these questions. Moreover, they did not ask the public prosecutor or the liberties and investigation judge when using this motive to justify the arrest, statement to indicate the presence of evidence and indications that if the defendant was left free at liberty, he would exercise influence over the witnesses or the victim by coercion or intimidation. This

indicates that he leaves the matter of assessing the existence of influence on witnesses or the victim to the trial judge according to the circumstances and elements of each case separately. These elements may relate to the type of crime committed and its seriousness, which in practice play a major role in influencing the conviction of public prosecutors in Jordan <sup>(20)</sup>. These elements may also relate to the personality of the defendant and his criminal record. If he is a dangerous criminal with the case law of threatening, for example, the possibility of him influencing witnesses or the victims is present, and this is what public prosecutors take into account in Practically in Jordan <sup>(21)</sup>. The circumstances of the case also contribute to the formation of the judge's conviction that there is a risk of influence, as hearing witnesses more than once reduces the possibility of them being subjected to coercion by the defendant <sup>(22)</sup>. The judge can also infer from the confrontations that take place between the defendant and the victim or witnesses about the existence of this danger. For example, when the statements of the witness or the victim conflict with the statements of the defendant, the risk of coercion are present <sup>(23)</sup>. Also, if the defendant denies the accusation against him and accuses the victim of slandering him by directing this accusation to him, the risk of coercion is present and detention may be used to avoid it <sup>(24)</sup>. On the contrary, if the defendant admitted the accusation against him and admitted the harm inflicted on the victim by committing the crime against him, the risk of coercion against them is weak and may not be used to justify the arrest.

We note that the Jordanian legislator has given the public prosecutor the broad and loose authority to assess the extent of influence on witnesses and the victim in order to justify the arrest and assess the degree of

seriousness of this influence. This is without forcing him to state the real reasons and indications deduced from the circumstances of the case and which justify his conviction in this. Which may lead to the abuse of this motive by them, in violation of reality and the truth. Unlike the Jordanian legislator, article 144 of the French Code of Criminal Procedure obligated the competent judge when using this motive to justify the arrest prove the reality of the risk of influencing witnesses and the victim through the elements, facts, and circumstances of the case, and this is subject to judicial oversight.

**The third requirement: Arrest is the only way to prevent the defendant from communicating with his partners.**

This motive was taken into account by the law in article 114.1 of the Code of Criminal Procedure, which stipulates: "An arrest shall be made only if it is the only means of preventing the defendant from having any contact with his accomplices in the crime, accomplices or instigators of the crime." In practice, this motive is frequently used in Jordan to justify arrests in serious crimes of the type of felony, and the percentage of its use, according to the questionnaire that was made in the Amman Public Prosecution, is 6.1% of the decisions taken by the Public Prosecution <sup>(25)</sup>. The French legislature also adopts this motive to justify the arrest in the third line of article 144 of the French Code of Procedure: "Preventing collusion between the accused and his accomplices and those involved in the crime." According to the report of the Regional Observatory on Delinquency and Social Contexts (ORCDS) is 90.80% of the percentage of arrest decisions taken by the Public Prosecution <sup>(26)</sup>.

There are many objectives that the defendant aims to achieve through contacting

his partners, it may be to advise them and plan with them, whether to escape or to attempt to falsify the truth by concealing or manipulating evidence that is against their interest, or influencing the victim, his family, or witnesses with the aim of changing their statements in his favour, or refrain from making them. Finally, with the aim of all of them cooperating to search for false witnesses to strengthen their position in the case <sup>(27)</sup>.

There may be a doubt that the motive for preventing the victim access to his or her partners to justify the arrest decision suggests that the arrest is a security measure rather than an investigation. But in fact, the arrest based on this motive cannot be considered a security measure, since its use to justify the arrest is limited in time, only to the first investigative stages of the case, when there are reasons to believe that there are other accomplices suspected of participating in the crime under investigation and have not yet been identified or arrested <sup>(28)</sup>. Or that there is evidence proving that there is a real danger that leaving the defendant at large will contact these partners and that this communication will pose a threat to the investigation as it may mislead justice and negatively affect the speed of criminal procedures and access to the truth<sup>(29)</sup>. After a certain period of investigation, this motive becomes inappropriate to justify the arrest after several months during which all witnesses are heard and several confrontations are conducted <sup>(30)</sup>, and sufficient evidence is collected that points to the truth and the knowledge of the criminal. This was confirmed by the European Court of Human Rights in its ruling against France, saying, "The fear of collusion between the defendant and the partner in tampering with the evidence of the case is valid to justify temporary detention only at the beginning of the investigation. After that, this motive becomes reinforced in turn for justification,

especially after witnesses have been heard on several occasions, in addition to the fact that the possibility of using this motive to justify arrest increases when the defendant who is to be arrested is aware of all the facts of the crime<sup>(31)</sup>.

The French Court of Cassation authorized the application of this motive to justify the arrest even if the investigating judge did not identify those partners, i.e., even if it was impossible to identify those partners to whom the defendant would communicate and be complicit <sup>(32)</sup>. The investigative judge can estimate the existence of the risk of contact with the accomplices, using the circumstances of each case separately. For example, if the defendant attempts to disrupt the investigation and mislead justice and tries to contact his accomplices outside the prison in advance and search for them, then this danger exists. The investigating judge resorts to arresting when it is the only way to prevent the complicity of the defendant's partners, interlocutors, and instigators, i.e., if alternatives to arrest are insufficient to achieve the purpose. For example, the Prosecutor prevented the defendant from visiting specific places because of the possible presence of partners and avoided contact with them indirectly or directly. But he violated this prohibition, so it is permissible to resort to arrest to achieve this purpose. Sometimes, however, the productivity of using this motive to justify arrest is uncertain, in the sense that even if the detainee is found inside the walls of the detention centers and cannot physically communicate with his partners, he may be able to communicate with them, using other means that he acquires with his experience and mind, and from within the prison environment, especially as these methods develop parallel to the knowledge acquired by the authorities<sup>(33)</sup>, such as the collusion with his partners through the help of others, such as a friend or a family member. In other words,

the arrest does not necessarily serve the purpose assigned to it, which is to prevent the defendant from contacting his partners. However, to limit this, the judge may resort to subjecting the detainee to restrictions inside the prison for the public interest and to obtain the truth, such as the choice of persons to visit the detainee.

In order to ensure that this motive is not used arbitrarily to justify the arrest and to avoid its use in a false manner, contrary to reality and truth, the French legislator, in article 144 of the French Code of Criminal Procedure, imposes on the competent judge, when using the motive of preventing the victim from communicating with his partners to justify the arrest, the fact, and necessity of this motive is demonstrated by the elements, facts, and circumstances of the case, which indicate that there is a danger that the defendant will contact and collude with his accomplices to mislead justice and obstruct the investigation. The arrest was necessary to avoid that risk. The judge's judgment is subject to the control of the higher court. Unlike the French legislature, the Jordanian legislature gave the public prosecutor broad discretion to assess the risk of the defendant contacting his partners without requiring him to state the reasons for his conviction, which limits the judiciary's ability to monitor the realism and truth of this motive and prevent arbitrariness and racism in its use. In practice, the criterion of repetition plays a major role in forming the conviction of public prosecutors to assess the existence of the risk of contact with the defendant with his partners <sup>(34)</sup>, that is, the attempt by the defendant to contact his partners before, enhancing the judge's conviction to arrest the defendant to prevent him from repeating it. The criterion of the seriousness of the crime also contributes to strengthening the judge's conviction that this

danger exists <sup>(35)</sup>. The more serious the crime that is the subject of the investigation, the more probability the defendant will contact his accomplices, and the arrest based on this motive will be justified.

**The fourth requirement is that an arrest is the only way to prevent the defendant from escaping and to ensure that he is brought to justice.**

In order to analyze this motive, we will first detail its content, and then we will detail the criteria on which it is based to assess the risk of the defendant fleeing and not being brought to justice.

**First section:** The content of the motive for arrest is to prevent the defendant from escaping and to ensure that he is brought to justice.

This motive aims to ensure that the defendant is at the disposal of the investigator, in a way that guarantees the conduct of justice and access to the truth, and does not disrupt the investigation procedures. It also aims to ensure that the punishment is carried out against the criminal, that he does not escape and escape from him, and that the right of society is investigated from him, especially if the crime committed is very serious <sup>(36)</sup>.

This motive is stated in the fifth line of article 114-1 of the Code of Criminal Procedure of Jordan, which states: (The defendant was prevented from escaping). Article 111-2 also implicitly refers to this motive when it states: (But if the defendant did not attend or feared his escape, the public prosecutor may issue a subpoena against him). It is known that the interrogation is followed up by the execution of the summons, the result of which may be the arrest.

Article 144 of the French Code of Criminal Procedure provides that the purpose of the arrest should be to ensure that the

defendant is brought to justice, which is consistent with article 5, paragraph 1, of the European Convention on Human Rights. It also took this motive in Article 9-3 of the International Covenant on Civil and Political Rights, which states in the last two lines: "Detention of persons awaiting trial shall not be the general rule, but it is permissible to suspend their release on guarantees to ensure that they attend the trial at any stage from other stages of the judicial proceedings, and to ensure the execution of the judgment, when necessary. The Human Rights Committee also clarified that "detention pending investigation is legitimate under the article if it is legal and necessary in the particular case, in order to prevent escape, for example <sup>(37)</sup>. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Criminals referred to this motive to justify the detention of liberty before trial by saying they avoid the risk of escape, or that the course of justice will be seriously affected if they are released <sup>(38)</sup>.

The presence of the defendant personally is required at all stages of the criminal proceedings, with a view to hearing his statements, questioning him, and confronting him with the evidence against him. However, the importance of this presence varies from one stage to the next. During the trial phase, the presence of the defendant in person, so that he can attend court hearings, and to ensure that the sentence is carried out in the case of a conviction, especially if such punishment is deprivation of liberty, and to prevent his escape. In contrast to the trial phase in relation to the investigation and evidence phase, it is usually conducted without the presence and presence of the defendant and when the need arises for him to be present, to be heard and questioned, to be confronted with the evidence attributed to him or his partners or witnesses, and to

attend certain special investigative procedures such as questioning, inspection, and search.

The investigator shall issue a summons against him, and if he does not attend voluntarily, he shall replace it with a summons, and after completing the previous procedures, he shall be asked to leave <sup>(39)</sup>. However, if the investigation judge finds that leaving the defendant free at liberty poses a risk of his escape and his failure to attend the aforementioned penal procedures when needed, then issuing an arrest warrant against him and violating his freedom becomes justified. This is confirmed by Article V of the European Convention on Human Rights. Because his escape may obstruct the investigation and pose a threat to public security, especially if the defendant benefits from escape with the aim of committing new crimes.

The motive for securing the defendant's appearance in court has been criticized in the doctrine as insufficient to justify the arrest for several reasons,

beginning; The fact that the use of arrest as a means of carrying out punishment is not compatible with the fact that it is an exceptional measure and contrary to the principle of the presumption of innocence, a person cannot be deprived of his liberty merely on the grounds of possible conviction and escape from punishment <sup>(40)</sup>. In addition, modern means may be used in international law to carry out punishment for a criminal convicted in absentia, such as international conventions on extradition <sup>(41)</sup>. Also, according to this motive, the arrest becomes a precautionary measure and becomes among the ranks of the penalties <sup>(42)</sup>, since the hardship of escaping may be more than the hardship and pain of executing the

punishment because the individual is separated from his family and his business and loses his livelihood until the statute of limitations years ends for the punishment in which he is sentenced in absentia <sup>(43)</sup>.

Therefore, the freedom of the defendant may not be violated, but despite criticism of this motive, it is one of the most frequently used motives to justify the arrest. In practice in Jordan, this motive is the most used of the investigative authority to justify the arrest, especially if the defendant is a foreigner and his residence is illegal in the country. The percentage of its use to justify arrest by identification made in the Amman public prosecution was 9.6 % of the decisions taken by the public prosecution <sup>(44)</sup>. Also in France, it is common in practice to make decisions on arrest, according to the report of the Regional Observatory on Delinquency and Social Contexts, with 95.91 % of the arrests made by the Office of the Public Prosecutor using this motive to justify arrest <sup>(45)</sup>.

In order to strengthen the presumption of innocence of the defendant, to prevent the arbitrary use of this motive in justifying the arrest, and to avoid the use of such motivation in a manner contrary to reality, i.e. to resort to assessing the alleged danger of escape without justification, the investigating judge must, in the arrest warrant, refer to the facts and the legal and factual grounds on which his decision is based, namely his conviction that there is a danger of escape and the knowledge that the defendant is brought to justice. This is what was stipulated in Article 144 of the French Code of Criminal Procedure, as confirmed by the European Court of Human Rights in its judgment against France, by considering that the defendant's failure to attempt to escape when he was released indicates the lack of fear of his attempt to

escape later. This motive may not be used to justify his arrest <sup>(46)</sup>.

As for the Jordanian law, it is devoid of a text that obliges the public prosecutor to state the factual and legal elements based on the circumstances of the case, which generated the public prosecutor's conviction that there is a danger of escape. Which allows interpretation and interpretation and gives the public prosecutor wide authority with the possibility of abuse of this motive in a way that violates the presumption of innocence and weakens judicial oversight on this procedure.

**The second section:** Criteria for assessing the existence of a risk of escape and the knowledge of access to justice

There are several criteria that the competent judge can use to assess the risk of absconding and not being brought to justice, the most important being the personality of the defendant, his age, his practical situation, and his health <sup>(47)</sup>. The risk of escape is low for an older person without the help of others, a health-impaired person, a married person who is domiciled and has children, or who has a stable job to support and social activities. Also, the gravity of the defendant's charge, the amount of the defendant's legally prescribed sentence, and the gravity of the existing evidence attributable to him may constitute a reference for assessing the risk of escape <sup>(48)</sup>. Especially with the public prosecutors in Jordan <sup>(49)</sup>.

The greater the seriousness of the crime and the extent of the punishment, the greater the desire of the defendant to escape <sup>(50)</sup>, and the more certain and clear the evidence that attributes the crime to him, the greater the desire to escape from attending the

proceedings, and from the punishment prescribed for the crime, which diamond his freedom <sup>(51)</sup>. However, this criterion alone is insufficient to justify the risk of escape and arrest and must be supported by other criteria to justify the prohibition of liberty, as the European Court of Human Rights has emphasized <sup>(52)</sup>.

In addition, the criminal record of the defendant and its historical precedents are considered, if he attempted to escape in another case and was served with a habeas corpus, then the risk of a repeat escape is high, and this is what the investigating magistrates and this what the investigative judges in Jordan have taken into account in practice <sup>(53)</sup>. The investigating judge also takes into consideration the risk of escape if the defendant is a foreigner and his stay in the country is illegal. He has a high probability of escape, so the judge prefers to arrest him <sup>(54)</sup>, as the French Court of Cassation confirmed <sup>(55)</sup>. Consideration is also given to the fact that the defendant has a fixed and well-known residence in the country, the likelihood of his escape is low, but if that is not the case, the defendant is more likely to escape and not be brought to justice <sup>(56)</sup>. However, even if the defendant does not have a fixed and known residence or is a foreigner, the arrest is not justified if there are other alternatives to arrest to achieve the goal of ensuring his appearance in court and preventing his escape. Such as providing guarantees that guarantee his attendance whenever he is requested to do so, such as attaching a bond, submitting a work certificate, or proof of residence and place of residence, so arrest in this case is not necessary to avoid the risk of escape. This confirms the condition that the arrest is necessary and that it is considered the only

way to achieve one of the goals stipulated by law, which both Jordanian and French laws have adopted.

The Jordanian law also took this and explicitly stipulated in Article (114-3-b) that it is permissible to arrest it without respecting the other objective conditions of detention if the defendant does not have a fixed and known place of residence in the Kingdom, provided that he is released when he submits a guarantee that guarantees his attendance whenever he is requested to do so. Both Jordanian and French law are considered compatible with the international requirements confirmed and established by the European Court of Human Rights <sup>(57)</sup>. The Human Rights Committee also emphasized this by saying: "Just because the accused is a foreigner does not necessarily mean that he will be detained pending trial."<sup>(58)</sup>.

Moreover, a mere conjecture by a State party that an alien might leave its jurisdiction if released on bail does not justify pretrial detention under Article 9-3; Consequently, the State party must provide evidence to substantiate its concern that the accused will leave the country and the "inadequacy of bail and other alternatives to prevent escape" to justify the arrest. Many of the Public Prosecution's decisions related to arrest still use general and vague words for these reasons without reflecting the reality and reality of these reasons, which makes them convincing to justify the detention of the defendant's freedom before convicting him, such as the course of the case calls for that, or the circumstances of the case require that <sup>(59)</sup>. This was justified by some public prosecutors with the confidentiality of the investigation, so that if the public prosecutor separated the reason for the arrest, the legal and factual reasons for it, and the indicators and criteria that reinforced his conviction in it

This would expose matters that the defendant is not supposed to know and cause him to act in response, affecting the course of the investigation and obstructing the course of justice. For example, if the Prosecutor decides that the defendant will be arrested because there is evidence yet to be found and fears that it will be lost and tampered with, the defendant will know and seek to search for, destroy or tamper with such evidence.

In our view, this general justification reflects a major difference between theory and practice, in contravention of the 2017 amendment by adding the grounds for arrest and enabling the court of the first instance to exercise judicial control over this cause and its realism. As a result, this fact is not commensurate with international requirements.

## Conclusion

One of the most important safeguards surrounding an arrest is an infringement on the liberty of a person presumed innocent. Under the 2017 amendment to the Code of Criminal Procedure, the Jordanian legislature explicitly stated the reasons and motives for the arrest, including those required by the interests of the investigation. In the conclusion of this study, the researcher concluded that a set of conclusions and recommendations had been established, in which we would ask God for the public benefit of criminal justice in general and for the particular benefit of the complainant in certain cases of arbitrariness that she might face, It is as follows :

## Results:

- 1) Under the 2017 amendment to the Code of Criminal Procedure, the Jordanian legislator detailed the text of Article 114 on the requirements of the investigation interest, and this amendment constitutes a point in the interest of legislative progress

- in Jordan, as Jordanian law has become more compatible with international requirements regarding the briefing of arrest with court provisions and legal guarantees.
- 2) In the practical reality in Jordan, one of the most important motives required by the investigation interest, which are used to justify the arrest, are: to prevent the defendant from escaping and to ensure that he is brought to justice. Which indicates giving importance to the interest of the investigation when arresting the defendant. As for the motive of preventing the defendant from communicating with his partners, preserving evidence of the crime, and preventing influence on witnesses and victims, their use is limited in practice and is limited only to serious crimes such as felonies. In France, according to the 2019 Regional Monitor for Delinquency and Contexts, the most common motives used to justify arrest are to prevent the defendant from escaping, to ensure that he is brought to justice, and to prevent the victim from colluding with his accomplices.
  - 3) In justifying the arrest, the Jordanian legislature did not require the Public Prosecutor to state the material facts and the legal and factual elements that have strengthened his conviction of the existence of such motives, such as the risk of the disappearance and loss of evidence, the risk of influencing witnesses or victims, the risk of collusion with partners or the risk of escape and failure to bring justice. Accordingly, the Prosecutor's decisions only include one of these motives, without any detail, which limits the ability of the judiciary to control the factual nature of these motives and prevent arbitrariness and falsehood by using them. As a result, this impairs the balance between the interests of the investigation and the individual and the protection of his freedom, which is

incompatible with international requirements. Contrary to Jordanian law, article 144 of the French Code of Criminal Procedure obliges the judge, when justifying the arrest on one of the motives of the investigation, to state the factual and legal elements based on the circumstances of the case that have strengthened his conviction of these motives.

- 4) Jordanian law has narrowed the scope of protection in the use of defense to prevent the influence of witnesses and victims to justify the arrest, allowing it to be used only to protect witnesses and victims from the coercion that a defendant may exercise against them if he remains free, and not to protect his or her families from such coercion.

#### **Recommendations:**

- 1) Amending the text of Article 114 and obligating the judge, when justifying the arrest decision, to state the factual and legal elements based on the circumstances of the case and the indicators and criteria that reinforced his conviction that there is a danger from one of the motives required by the interest of the investigation, and that arrest is the only way to stop and avoid this danger. He was showing the facts and circumstances that indicate that there is evidence to prove the crime and that there is a danger that it will disappear or be lost. Or that there is a risk that the defendant will influence witnesses or the victims, or that there is a risk that the defendant will contact and collude with his accomplices in the crime. And that there is a risk that the defendant will flee and not be brought to justice.
- 2) Exercising effective control over the reasoning of the arrest based on the motives of the investigation interest, with its seriousness and integrity in its application to practical reality in order to achieve the goal of its existence, and narrowing the resort to this dangerous

procedure except in cases of necessity. Benefiting from the French and European judiciary, which is rich in decisions that imposed strict control over the reality of the justifications for arrest, and obtained the criteria on which to base their assessment.

- 3) Amending the motive for arrest related to the prevention of influencing witnesses or the victim or coercing them, by adding a word and their families, similar to what the French legislator did with the aim of expanding the scope of protection, because it usually uses coercion on the families of witnesses or victims to influence them and change their statements or withdraw the complaint And drop it in the interest of the defendant.

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## Attachments

**Table1: Percentage of use of arrest motives required by the interest of investigation in practice by public prosecutors in Jordan according to the questionnaires conducted by the researcher:**

Reason for arrest	Number of forms	Percentage (%)
Preserving evidence and not losing it	10	4.11%
Preventing influence on witnesses and victims	10	3.10%
Prevent collusion with partners	10	1.6%
Preventing the defendant's escape and ensuring that he is brought to justice	10	6.9%

**Table 2: The percentage of the use of arrest motives required by the interest of the investigation in practice by public prosecutors in France, according to the report of the Regional Observatory for Delinquency and French Contexts in 2019:**

Reason for arrest	Number of forms	Percentage (%)
Preserving evidence and not losing it	18	20.69%
Preventing influence on witnesses and victims	46	52.87%
Prevent collusion with partners	79	90.80%
Preventing the defendant's escape and ensuring that he is brought to justice	80	91.95%

**Table 3: The criteria used to estimate the motives for arrest required by the interest of the investigation in practice by the general civilians in Jordan according to the exams that the researcher took:**

Reason for arrest	Seriousness of crime	The character of the accused	Criminal record	Repetition
Preserving evidence and not losing it	30%	0	50%	0
Preventing influence on witnesses and victims	0	20%	0	40%
Prevent collusion with partners	20%	0	20%	30%
Preventing the defendant's escape and ensuring that he is brought to justice	40%	10%	10%	0