

Procedural Rights of the Accused during the Preliminary Investigation Phase in Light of Positive Law and International Obligations

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Abstract:

This article provides a comparative analysis of the procedural rights of the accused during the preliminary investigation stage under Iraqi law and international human rights obligations, particularly the International Covenant on Civil and Political Rights and the Nelson Mandela Rules, while drawing on Islamic jurisprudence as a foundational source. The importance of the research stems from the fact that this stage constitutes a critical juncture at which the presumption of innocence is especially vulnerable and pretrial detention may, in the absence of effective safeguards, become a custodial punishment imposed before conviction. The central research problem concerns the adequacy of Iraqi procedural provisions in giving effect to international standards, the points of convergence and divergence between the relevant normative frameworks, and the legislative gaps that impede the effectiveness of formal protection. The study adopts a comparative analytical methodology by examining the provisions of the Iraqi Code of Criminal Procedure alongside international instruments and their authoritative interpretations, including the General Comments of the Human Rights Committee, and by undertaking foundational comparisons with Islamic jurisprudence. The principal findings indicate that theoretical convergence in recognising the core rights does not produce equivalent effectiveness in implementation. Iraqi law suffers from a dual deficiency: the absence of an express procedural sanction, such as absolute nullity, for violations of the right to prompt notification or access to counsel; and the exclusion of the initial inquiry stage preceding appearance before the investigating judge from the scope of explicit safeguards, thereby creating a temporal gap that threatens the voluntariness of the accused's statements and the integrity of the interrogation. The study further finds that statutory time limits on detention are insufficient unless accompanied by prompt and periodic judicial review and effective procedures for challenging detention, so as to prevent its prolongation and transformation into anticipatory punishment. It concludes that genuine protection of personal liberty requires a legislative and institutional architecture that combines the rigour of domestic procedural law with the comprehensiveness of international standards within a unified oversight framework that safeguards human dignity from the first moment of arrest.

Keywords: Procedural Rights; Preliminary Investigation; Iraqi Law; International Obligations; Pretrial Detention.

Introduction

The preliminary investigation stage is the critical point at which the relationship is formed between the State's authority to enforce the law and the individual who remains protected by the presumption of innocence. It therefore becomes a principal arena for testing the legality of criminal proceedings and the extent to which they respect human dignity. From the first moment at which a person is arrested or otherwise

deprived of liberty, the presumed innocence attaching to that person is exposed to serious risk. Pretrial detention may become a custodial punishment before guilt has been established unless the activities of arresting and investigative authorities are subjected to strict statutory and judicial safeguards. Legal systems have consequently accorded particular attention to this stage and have surrounded it with mandatory procedural rules intended to protect the accused against excessive use of authority and the risk of arbitrariness.

Against this background, the present article analyses and compares the dimensions of the procedural protection afforded to the accused before trial through two principal normative frameworks. The first comprises international human rights obligations, foremost among them the International Covenant on Civil and Political Rights, as the universal normative framework establishing minimum standards of protection. The second is Iraqi positive law, represented by the Iraqi Code of Criminal Procedure, through which the study assesses how those standards are embodied at the national level. The article seeks to identify areas of convergence and divergence between these frameworks, determine the strengths and deficiencies of the national legislative system in light of international standards, and propose measures capable of strengthening procedural protection.

For methodological coherence, the article is divided into two principal sections, each addressing a fundamental procedural safeguard without which a fair trial cannot be secured: the right to prompt notification of the charge and the reasons for detention, and the protection of personal liberty against arbitrary arrest or detention. Each right is examined according to the same sequence, beginning with its basis in international instruments and proceeding to an analysis of its treatment under the Iraqi Code of Criminal Procedure. This approach facilitates the formulation of precise scholarly findings and practical recommendations for legislative reform and for strengthening judicial oversight of preliminary investigation procedures.

Section One: Procedural Rights of the Accused before Trial under International Instruments

International human rights instruments have played a leading role in formulating unified standards of criminal justice and have placed particular emphasis on the pretrial stage because of the direct threat it poses to the rights to liberty and security of person. This concern is embodied in a range of international instruments, foremost among them the International Covenant on Civil and Political Rights, which guarantees a body of defensive procedural rights. This section examines those rights in the logical sequence dictated by the nature of criminal proceedings. It begins with the right to be informed of the charge as the necessary gateway to all subsequent defences and safeguards, then addresses the protection of personal liberty against arbitrary arrest or detention, and concludes with the right of access to legal counsel as the principal operational safeguard against violations of the preceding rights. These matters are addressed in the following three subsections.

Subsection One: The Right to Prompt Notification of the Charge and the Reasons for Detention

Prompt notification of the charge lies at the core of the right to a defence. The accused cannot meaningfully exercise any procedural safeguard without knowing the nature of the charge and the legal and factual grounds for the deprivation of liberty. International instruments recognise this requirement and subject the right to conditions that extend beyond formal notification to effective and meaningful communication. This subsection therefore examines the treaty basis of the principle under Article 9(2) of the Covenant, the scope of the duty to communicate the material facts and legal characterisation of the charge, and the requirement that the accused be informed in a language he or she understands and be advised of the full range of defence rights.

Part One: The Treaty Basis of the Principle of Prompt Notification under Article 9(2) of the International Covenant on Civil and Political Rights

The Iraqi legislature treats notification of the charge as a fundamental procedural prerequisite to questioning. It requires an arrest warrant issued by the investigating judge to contain precise particulars, including the accused's name, surname, identity, distinguishing features, place of residence, occupation, the offence attributed to the accused, and the applicable statutory provision. These particulars protect the accused's right to know the legal and factual basis for the deprivation of liberty. The obligation extends further: before the first interrogation, the investigating judge must inform the accused of the charge so that the accused may prepare a defence and determine a legal position regarding the alleged conduct. The exact legal characterisation need not necessarily be final at the outset, because the investigation may reveal

circumstances requiring its amendment. The rationale for this requirement is to establish clear boundaries for the criminal proceedings by which both the investigative authority and the court are bound, while enabling the accused to examine the investigative records relating to the charge.¹

Islamic jurisprudence regards informing the accused of the allegation as a foundational condition for the validity of any measure affecting personal liberty. This position derives from the principles of justice and the preservation of human dignity underlying adjudication and claims in Islamic law. It is not confined to hudud or ta'zir matters, but extends to every measure that restricts liberty or compels a person to appear before a court. Under this conception, the accused may not be questioned or interrogated until informed of the nature and basis of the claim, thereby enabling a considered response, defence, denial, or admission. The principle is closely connected to the presumption of original innocence, which requires the claimant to define the subject matter of the claim precisely before the defendant is required to answer. Islamic jurisprudence grounds this requirement in the rules governing a valid legal claim, which require the subject and basis of the claim to be specified before the judge. This prevents the accused from being subjected to vague or protracted questioning that fails to identify the allegation clearly and makes notification a condition inherent in the exercise of judicial authority rather than a merely formal procedure.²

The principle of prompt notification in international human rights law derives directly from Article 9(2) of the International Covenant on Civil and Political Rights. Nowak interprets this provision as imposing an immediate positive obligation on the arresting authority.³ Article 9(2) provides that anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest and must be promptly informed of any charge. The provision establishes a precise temporal distinction: the reasons for arrest must be communicated at the moment of arrest, whereas notification of the charge is permitted a narrowly limited period described as prompt, without necessarily requiring absolute simultaneity, in recognition of the needs of the initial inquiry and the legal characterisation of the facts. This obligation forms part of the protection of liberty and security of person guaranteed by Article 9(1), making notification a condition for the lawfulness of continuing the deprivation of liberty rather than a subsequent formal safeguard. The treaty basis is also closely connected with Article 14(3)(a), which requires anyone charged with a criminal offence to be informed promptly and in detail, in a language understood by that person, of the nature and cause of the charge.⁴

A comparison of the three systems demonstrates that agreement on the substance of prompt notification does not eliminate significant differences in enforcement mechanisms and in the sanctions applicable to violations. Although Iraqi law specifies the information that an arrest warrant must contain, it does not attach an express procedural sanction, such as absolute nullity, to a breach of the duty to inform. The effect of such a breach on the validity of subsequent proceedings is therefore left to judicial interpretation, creating the possibility of inconsistent application among courts. Islamic jurisprudence, despite treating notification as a condition connected with the court's jurisdiction rather than as a merely ancillary safeguard, did not historically translate the principle into a codified enforcement mechanism ensuring independent institutional oversight; implementation remained largely dependent on the integrity and conscientiousness of the judge. By contrast, the international treaty framework is distinguished by a precise temporal distinction between notification of the reasons for arrest and notification of the charge. Its normative force, however, remains dependent on indirect international accountability mechanisms, and a violation will not ordinarily produce an immediate domestic procedural consequence unless national legislation expressly provides one. The effective operation of the principle therefore requires an integrated framework combining clear domestic legislation, a strict procedural sanction for non-compliance, and an effective oversight mechanism capable of converting a theoretical obligation into a tangible safeguard from the first moment of arrest.

¹ Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Legal Library, 2005), p. 118 [in Arabic].

² Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 96 [in Arabic].

³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl: N.P. Engel, 2005), p. 224.

⁴ Mohammed Mahmoud Tantawi, *Rights of the Accused under International Law Standards and Islamic Jurisprudence*, 1st ed. (Cairo: National Centre for Legal Publications, 2015), p. 74 [in Arabic].

Part Two: Scope of the Duty to Communicate the Material Facts and the Legal Characterisation of the Charge Justifying Detention

Iraqi law imposes an obligation that extends beyond merely naming the offence to providing a sufficiently precise account of the material facts constituting it, so that the accused can determine an informed position. Judicial practice has recognised that a preliminary investigation does not fulfil its purpose unless the accused is informed of the alleged act, its circumstances, and the time and place of its commission before being required to answer. Merely citing the applicable statutory provision without linking it to the underlying facts reduces notification to a formal act devoid of substantive meaning. The legal characterisation of the charge may change during the investigation as the evidence develops; accordingly, the investigating judge remains under a duty to inform the accused again whenever the legal characterisation changes materially, thereby avoiding confrontation with a factual allegation or legal description against which the accused has had no opportunity to defend. This obligation is especially important where the charge may justify detention, because the precision of the alleged facts provides the basis upon which the judge assesses both the gravity of the conduct and whether lawful grounds for detention exist. By contrast, an allegation lacking factual particularity creates a risk of arbitrary detention unsupported by a defined factual basis.⁵

In Islamic jurisprudence, the required statement by the claimant, or by the authority acting in that capacity, is not satisfied by a general designation of the alleged act. It must identify the incident itself in terms of time, place, and manner, because a claim is invalid where it is so indeterminate that it fails to disclose what is being asserted against the defendant. The accused may therefore neither be questioned nor deprived of liberty on the basis of an ambiguous description capable of multiple interpretations. This requirement rests on the proposition that the right to a defence cannot be exercised without knowledge of the specific facts. If the juridical characterisation of the act differs from that on which the inquiry began, the accused must be informed anew before being required to answer or confronted with evidentiary proof, in observance of the principle that a person may not be held to account for a matter of which he or she has not been informed. This rule applies with particular force to conduct said to justify restriction of liberty before adjudication, because factual ambiguity turns detention into a measure exceeding its lawful bounds, which depend on a clear and specific ground rather than general suspicion or conjecture.⁶

Under international instruments, the concept of a charge requiring notification under Articles 9(2) and 14(3)(a) of the International Covenant on Civil and Political Rights is not confined to the legal label of the offence. It includes the material facts on which criminal responsibility is alleged to rest and the legal basis of the accusation, enabling the person deprived of liberty to understand sufficiently the nature of the allegation and determine a legal response. Specialist commentary has consistently regarded notification that identifies the penal provision but omits the constituent facts as failing to satisfy the treaty requirements of promptness and adequacy, because the purpose of notification is to facilitate an effective defence rather than merely to provide formal notice that proceedings exist. Consequently, any subsequent material amendment to the legal characterisation of the facts, whether during detention or at a later stage of the investigation, requires renewed notification in the amended form. This requirement preserves continuity between the basis for the initial deprivation of liberty and the basis on which its lawfulness is ultimately determined.⁷

Close examination of the three frameworks reveals substantial convergence in purpose but a clear divergence in the extent to which implementation guarantees the content, rather than merely the form, of notification. Iraqi law permits the legal characterisation to be reformulated during the investigation without prescribing an express sanction for failure to notify the accused again when the change is material. This legislative omission creates a risk that detention may continue on the basis of an initially imprecise description that later changes without timely notice to the accused. Islamic jurisprudence appears

⁵ Ali Hamza Asal Al-Khafaji, "Preliminary Investigation," *Journal of Human Sciences, College of Education for Human Sciences*, vol. 22, no. 1 (2015), p. 421 [in Arabic].

⁶ Abdul Hamid Amara, *Safeguards of the Accused during Investigation under Islamic Law and Algerian Criminal Legislation* (Algeria: Dar Al-Mohammedia Al-Amma, n.d.), p. 88 [in Arabic].

⁷ Abdullah bin Mansour bin Mohammed Al-Barrak, *The Right of the Accused to a Defence under the Saudi Law of Criminal Procedure and International Instruments*, PhD dissertation (Riyadh: Naif Arab University for Security Sciences, 2008), p. 142 [in Arabic].

theoretically more exacting because it treats specification of the facts as a condition for the validity of the claim itself rather than as an ancillary procedural safeguard. Yet the absence of a contemporary institutional mechanism capable of translating that condition into effective oversight of detention means that its force remains closer to a normative framework than to an immediate practical remedy. The international framework, for its part, expressly links the adequacy of notification to the effectiveness of the right to a defence, but it remains dependent on non-coercive supervisory mechanisms that do not automatically determine the lawfulness of detention under domestic law. Effective compliance therefore requires the integration of the substantive precision demanded by Islamic jurisprudence, domestic procedural oversight, and the international standard of functional adequacy within a single legislative framework that transforms notification from a formality into a safeguard against detention based on an unstable or changing characterisation.

Part Three: Informing the Accused of the Charge in a Language He or She Understands and of the Full Range of Defence Rights

Iraqi law requires that informing the accused of the alleged offence be accompanied by effective notification of the full range of defence rights and not be limited to communicating the legal description of the act. Article 123 of the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, requires the investigating judge or judicial investigator to interrogate the accused within twenty-four hours of appearance, after verifying identity and informing the accused of the alleged offence. It also expressly recognises the right to retain counsel and, where the accused lacks the means to do so, requires the court to appoint counsel without charge. This obligation is closely connected with Article 19(4) and (5) of the Constitution of the Republic of Iraq of 2005, which declares the right to a defence sacred and guaranteed at every stage of investigation and trial and requires the State to provide counsel to an indigent accused in felony proceedings. The requirement of a language understood by the accused is especially significant where the accused does not understand Arabic or has an impairment affecting comprehension, because legal notification is not complete unless interpretation enables actual understanding rather than merely providing a formal reading of the text.⁸

In Islamic jurisprudence, justice requires that the allegation be communicated in a manner that conveys genuine understanding rather than words alone. Legal discourse in matters of claims is directed toward enabling the addressee to understand, not compelling a person to respond to what he or she cannot comprehend. The use of a language unknown to the accused therefore constitutes a defect affecting the validity of communicating the charge and requiring an answer. This principle entails a duty on the adjudicating authority to provide a means by which the accused can understand the facts, whether through a trustworthy interpreter or a simplified explanation removing uncertainty about the subject of the claim. It rests on the general rules requiring knowledge of what is claimed as a condition for a valid claim and for requiring the defendant to answer, deny, or admit. Nor is this facilitation confined to communicating the charge; it extends to informing the accused of the right to present a defence, produce evidence, and rebut the allegation, so that the accused is not left alone before the investigative authority without knowing the available means of response and confrontation.⁹

Article 14(3)(f) of the International Covenant on Civil and Political Rights expressly requires that an accused who cannot understand or speak the language used in court receive the free assistance of an interpreter. Interpretation is therefore an integral safeguard of the right to be informed rather than a merely incidental procedural convenience. Al-Awadi argues that failure to provide immediate interpretation deprives the communicated proceedings of any practical value.¹⁰ The Human Rights Committee further confirmed in General Comment No. 32 that this right extends to all essential oral and written proceedings necessary for the accused to understand the nature and basis of the charge, and that a violation impairs the substance of the fair-trial guarantee from its earliest stages. The right operates in conjunction with Article 14(3)(b),

⁸ Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Legal Library, 2005), p. 132 [in Arabic].

⁹ Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 103 [in Arabic].

¹⁰ Mohammed Faiq Al-Awadi, *Human Rights and the Accused during the Pretrial Stage* (Beirut: Al-Halabi Legal Publications, 2011), p. 178 [in Arabic].

which guarantees adequate time and facilities for the preparation of the defence and communication with counsel of the accused's own choosing. Informing the accused of the charge and advising the accused of defence rights thus form an indivisible structure: notification of the charge is insufficient unless the accused is also effectively enabled to exercise the means of defending against it.¹¹

Review of the three systems shows that the requirement of actual understanding of the charge and full awareness of defence rights constitutes a strong point of theoretical convergence, but marked differences remain in translating that requirement into an enforceable mechanism. Although Iraqi legislation recognises the right to counsel and the court's duty to appoint counsel where the accused cannot retain one, it does not expressly require the provision of a qualified interpreter for every accused who does not understand the language of the investigation. This leaves an essential element of effective notification dependent on judicial practice without a direct statutory rule governing it. Islamic jurisprudence provides a substantial normative foundation for genuine comprehension as a condition for the validity of questioning itself rather than as a subsidiary procedure. Yet that foundation has not developed into a contemporary institutional form requiring an accredited interpreter or uniform standards for determining whether actual understanding has been achieved, leaving the matter to the judge's assessment. The international instrument is more precise in combining the right to free interpretation with the right to adequate preparation of the defence within an integrated normative framework, but its practical effectiveness still depends on serious incorporation and implementation by national legislation. A genuine safeguard of comprehensible notification therefore requires the detailed protections of international law and the jurisprudential insistence on substantive understanding to be incorporated into national legislation that imposes a clear procedural consequence for non-compliance, thereby transforming notification from a weak ethical or procedural duty into a condition for the validity of the proceedings.

Subsection Two: Personal Liberty and the Prohibition of Arbitrary Arrest and Detention

Personal liberty is the rule, whereas detention is an exception that is permissible only under precise safeguards ent of repression. International human rights law has embodied this preventing its transformation into an instrument which is not confined to a "arbitrary arrest or detention," conception through the development of the notion of cation or proportionality, or used for breach of domestic law but extends to any measure lacking reasonable justification or purpose other than that for which it was prescribed. This subsection examines the concept and international judicial criteria of arbitrariness and then addresses the obligations of States Parties concerning lawful arrest and detention.

Part One: The Concept of Arbitrary Arrest or Detention and the Criteria for Its Determination under International Human Rights Law

as an autonomous concept "arbitrary arrest or detention" The Iraqi legislature does not expressly define Nevertheless, the structure of the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, implicitly prohibits it by strictly restricting the powers of arrest and detention through formal and temporal safeguards. detention of any person except pursuant to an order issued by a judge or court, Article 92 prohibits the arrest or day periods, renewable -or in circumstances expressly permitted by law. Article 109 limits detention to fifteen m prescribed sentence and, in any event, does provided that the total does not exceed one quarter of the maximum not exceed six months without authorisation from the competent felony court. Article 123 further requires the earance. four hours of app-investigating judge or judicial investigator to question the accused within twenty Detention that exceeds these periods, continues after the investigative necessity has ceased, or is extended without presentation to the competent judicial authority falls within the sphere of arbitrariness even if it was initially mpetent body. The lawfulness of the measure depends not merely on institutional competence, ordered by a co¹².but also on compliance with the substantive and temporal safeguards established to protect personal liberty

ty proceeds from the foundational principle that the In Islamic jurisprudence, protection of personal liberty human person is presumed innocent and free. Restriction of liberty through imprisonment or detention is sion, or strong permissible only on the basis of a clear lawful ground supported by admissible proof, a valid admis

¹¹ Human Rights Committee, General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (Geneva: United Nations, 2007).

¹²Jamal Mohammed Mustafa, Commentary on the Iraqi Code of Criminal Procedure (Baghdad: Legal Library, 2005), p. 118 [in Arabic].

¹⁶Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and Security of Person) (Geneva: Office of the United Nations High Commissioner for Human Rights, 2014), para. 12.

subject to an aggregate ceiling of one quarter of the maximum prescribed sentence or six months in all cases, and by permitting release on bail whenever the risk of flight or interference with the investigation is absent. Detention is an exceptional and restricted measure, not the ordinary rule governing an accused person before is thus an exception¹⁷.conviction

From the perspective of Islamic jurisprudence, the sanctity of the human person and the presumption of personal liberty authority exercising arrest or detention powers. A judicial innocence impose a substantive restriction on every authority may not restrict liberty except on a lawful ground established by admissible evidence or an unequivocal position and may be displaced only admission made by a legally competent person. Personal liberty is the default position by conclusive proof or, where certainty is unavailable, by strong evidence approaching certainty. Pretrial detention, detention is not prescribed as an end in itself; it is an exceptional measure dependent on an investigative necessity such as preserving evidence or preventing flight. The judge or competent authority must remain within the scope of the discretion conferred by Islamic law and may not expand it into arbitrary or unjustifiably prolonged detention. It is also responsible for ensuring dignified treatment and respecting the confinement. The arresting authority must preserve the physical and psychological integrity throughout detention, consistently with justice as the governing principle. The law safeguards, -oundation converges with positive purpose of judicial authority. In substance, this jurisprudential foundation¹⁸.although the procedural formulation differs

At the international level, Article 9 of the ICCPR imposes an express obligation on States Parties to ensure that no person is deprived of liberty except on grounds and in accordance with procedures established by law. It further requires immediate notification of the detainee and prompt appearance before a judge or other officer authorised by law to exercise judicial power. The provision also guarantees every person the right to institute proceedings before a court so that it may decide without delay on the lawfulness of detention and order release if the detention is unlawful. This is commonly described as the right to prompt judicial review. These standards require States Parties, including Iraq, to bring their domestic legislation into conformity with²⁰¹⁹.the minimum safeguards protecting personal liberty before trial into conformity with

A joint assessment of the three frameworks demonstrates that theoretical convergence between positive law, Islamic jurisprudence, and the international standard does not necessarily produce procedural legality, Islamic jurisprudential grounding, and the international standard equivalent enforcement. Iraqi law is formally precise in defining the conditions and maximum periods of arrest and detention, yet the decision during preliminary investigation remains largely within the authority of the investigating judge and lacks an immediate countervailing mechanism equivalent to the prompt judicial review required by Article 9 of the ICCPR. This creates scope for pretrial detention to become prolonged in Islamic jurisprudence, while morally and doctrinally firm in restricting pretrial detention to evidentiary or investigative necessity, does not itself provide the detailed procedural machinery of temporary legislative implementation. The deadlines and appeals found in positive law and therefore requires compliance with international instrument possesses strong normative authority, but its effect is constrained by the absence of direct enforcement against non-compliant States and consequently depends primarily on domestic-coercive enforcement against non-compliance. Genuine protection of personal liberty before trial therefore requires an integrated institutional framework combining the rigour of positive procedure, the depth of the jurisprudential safeguard, and the international standard comprehensiveness of the international

Subsection Three: The Right of Access to Legal Counsel from the First Moment of Arrest

Pretrial detention performs a dual procedural function. The presence of legal counsel from the earliest moments of the accused's detention is essential to protect against the unlawful extraction of a confession. On the one hand, it protects the accused from coercion; on the other, it safeguards the integrity of the investigation and strengthens the evidentiary record. Lawyers recognise this right against subsequent challenge. The United Nations Basic Principles on the Role

¹⁷Falah Karim Yousif Al-Janabi, *Procedures and Safeguards of Detention: A Comparative Study*, Master's thesis, Department of Public Law, Faculty of Law, Middle East University, Jordan, 2018, p. 45 [in Arabic].

¹⁸Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 29 [in Arabic].

¹⁹Office of the United Nations High Commissioner for Human Rights, *Human Rights and Pretrial Detention: A Handbook of International Standards* (New York and Geneva: United Nations, 2012), p. 45.

²⁰Mohammed Mahmoud Tantawi, *Rights of the Accused under International Law Standards and Islamic Jurisprudence*, 1st ed. (Cairo: National Center for Legal Publications, 2014), p. 96 [in Arabic].

and surround it with safeguards intended to make it effective rather than merely declaratory. This subsection's dual protective function, before considering the exceptional, examines the treaty basis of the right and counsel restrictions imposed on access to a lawyer in certain comparative legal systems

Part One: The Treaty Basis for the Presence of Counsel in Safeguarding the Integrity of Interrogation and Personal Safety' and the Accused

access to counsel derives first from the constitutional apex of the legal system. Under Iraqi law, the accused's right of defence is then elaborated in procedural legislation. Article 19(4) of the Constitution of the Republic of Iraq provides that while the right of defence is sacred and guaranteed, 'the right of defence is sacred and guaranteed' provides that Article 19(11) requires the court to appoint counsel, at State expense, for an accused charged with a felony or of the Iraqi Code (misdemeanour who has no lawyer. Giving effect to this constitutional principle, Article 123(b) of Criminal Procedure No. 23 of 1971, as amended, requires the investigating judge to inform the accused, before questioning, of the right to remain silent and the right to be represented by counsel. Where the accused cannot select, the court must appoint a lawyer without charging fees. Article 123(c) further requires the retain counsel investigating judge or judicial investigator to ascertain, before undertaking any investigative measure, whether regards this legislative framework as an important step towards Janabi-the accused wishes to retain counsel. Al Where the accused elects to retain counsel, that choice must be resolved²¹.ensuring fairness for the accused s a duty to inform the accused of before questioning begins. The statutory obligation therefore operates initially a the right, while actual attendance by counsel becomes mandatory once the accused expresses the wish to be²².represented. Prior notification is thus the procedural trigger through which the safeguard becomes effective

the perspective of Islamic jurisprudence, the presence of a person capable of assisting the accused in From presenting arguments and clarifying his or her position before the judge accords with the foundational requirement of and on a voluntary confession free from coercion. The accused is entitled that criminal inquiry rest on clear proof to be heard and to defend against the allegation before any determination is made. Agency in litigation and defence authorise another to present arguments and defences is recognised in Islamic jurisprudence, allowing a person to a before a judicial forum. This general principle assumes particular importance during interrogation, which directly considered admission or -lffects liberty and reputation, because assistance by a representative helps prevent an il a confession induced by psychological pressure. It is also connected with the objectives of preserving the person and human dignity. The accused should not be left alone before the investigative authority without assistance positions. Nevertheless, applying this general doctrine of agency to the specific 'e of balancing the parties'capabl circumstances of modern criminal interrogation remains a jurisprudential inference requiring further doctrinal²³.ade textual rule-consolidation rather than a ready

At the international level, Article 14(3)(d) of the ICCPR establishes the right of every person charged with a criminal offence to defend himself or herself in person or through legal assistance of his or her own choosing, to of this right where counsel has not been retained, and to receive legal assistance whenever the be informed interests of justice so require, without payment where sufficient means are lacking. In paragraph 34 of General Rights Committee clarified that the right to communicate Comment No. 32 (2007), the United Nations Human with counsel entails prompt access and must become effective from the moment of arrest, rather than only when nsable to equality between trial proceedings commence. Saeed further observes that free legal assistance is indispe This timing is crucial to the fairness of any later interrogation. The²⁴.the accused and the prosecuting authority same approach is reinforced by Rule 61 of the United Nations Standard Minimum Rules for the Treatment of (the Nelson Mandela Rules, A/RES/70/175), which guarantees prisoners adequate opportunity, time Prisoners

²¹ Al-Janabi, Jaafar Kazim, Rights of the Accused during the Preliminary Investigation Stage under Iraqi Law (Baghdad: Al-Sanhouri Library, 2018), p. 132 [in Arabic].

²² Al-Khafaji, Ali Hamza Asal, "Preliminary Investigation," Journal of Human Sciences, College of Education for Human Sciences, vol. 22, no. 1 (2015), p. 420 [in Arabic].

²³ Al-Ansari, Abdul Hamid Ismail, Rights and Safeguards of the Accused in Islamic Law and Positive Law, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 81 [in Arabic].

²⁴ Saeed, Abdel Moneim, International Protection of the Rights of the Accused (Cairo: Dar Al-Nahda Al-Arabiya, 2003), p. 145 [in Arabic].

and facilities to communicate with legal advisers without delay, interception or censorship and in full²⁵.confidentiality

hat the presence of counsel is not conceived as a matter of favour or These three foundations demonstrate t procedural convenience. It performs a core supervisory function related to the integrity of the interrogation and decisive difference among the systems s free will when making statements. The'the preservation of the accused lies not in recognition of the right itself but in the precision with which each identifies the moment at which the guish right arises and the mechanism by which it becomes operational. International standards clearly distin between immediate notification of the right and actual access to counsel from the moment of arrest, treating infringement of either component as directly affecting the fairness of the proceedings. Iraqi law adopts a broadly ing prior notification and then resolving actual representation according to the similar sequence by requir s choice before any investigative measure is undertaken. Its effectiveness, however, depends on 'accused in before the issue of representation has meaningful judicial supervision to ensure that questioning does not beg been determined. In Islamic jurisprudence, the general doctrine of agency is firmly established in litigation and -as a non defence, but further doctrinal development is required to link it expressly to the moment of arrest deferrable starting point. The safeguard therefore becomes effective only where a strict procedural connection is maintained between the moment the right arises and the arrest itself; otherwise, the interval between arrest and .of representation may be exploited to obtain statements in the absence of legal protection formal determination

Part Two: Exceptional Restrictions on Communication with Counsel in Certain Comparative Legal Systems

s not necessarily prevent the imposition of s right to counsel doe'Legislative recognition of the accused narrowly framed temporal restrictions in particular circumstances. Article 123(b) of the Iraqi Code of Criminal e court to Procedure No. 23 of 1971, as amended, grants the accused the right to retain counsel and requires th provide a lawyer without cost where the accused lacks the necessary means. Article 123(c) further requires the investigating judge or judicial investigator, before questioning, to ask whether the accused wishes to retain ed so requests, questioning must be postponed until counsel has been retained or counsel. Where the accus appointed by the court in felony and misdemeanour cases. The statutory qualification therefore concerns the e position in other categories of offences may operation of this guarantee in felonies and misdemeanours, while th leave a broader margin of discretion to the investigator. More significantly, the preliminary inquiry conducted scope of this before the accused is formally brought before the investigating judge remains outside the express safeguard, creating the possibility of a practical restriction on access to counsel during the first hours of police²⁶.custody

In Islamic jurisprudence, the fundamental entitlement to defend oneself through argument or evidentiary proof be postponed only where an evident necessity is connected with preserving the public right or preventing a may s immediate interest. The principle requiring the judge or 'more serious harm that outweighs the accused e and permit the presentation of a defence means that the accused s cas'competent authority to hear the accused should not be questioned or asked to make an admission without being enabled to state the defence personally or at both parties be heard on an equal through a representative. Justice, as the purpose of adjudication, requires th basis. Islamic jurisprudence does not categorically exclude a temporary delay in full access to a representative or where there is a concrete risk that the representative and the accused may collude to tamper with evidence defeat the administration of justice. Any such delay, however, must be strictly limited in time and based on a demonstrable procedural necessity rather than the unrestricted discretion of the judge or public authority. It may of preventing the accused from confronting the evidence or responding to an admission not continue to the point attributed to him or her before the judicial forum, since that would undermine the objective of justice upon which²⁷.the entire adjudicatory system rests

²⁵ Human Rights Committee, 2007, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, United Nations Office of the High Commissioner for Human Rights, Geneva, para. 34

²⁶ Salama, Mamoun Mohammed, *Criminal Procedure under Egyptian Legislation*, vol. 1 (Cairo: Dar Al-Nahda Al-Arabiya, 2005), p. 214 [in Arabic].

²⁷ Al-Ansari, Abdul Hamid Ismail, *Rights and Safeguards of the Accused in Islamic Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 33 [in Arabic].

onal dimension, the Human Rights Committee acknowledged in General Comment No. 32 on In the international Article 14 of the ICCPR that the right of the accused to communicate with counsel of his or her own choosing at any time, it recognised that the right may be restricted constitutes a fundamental safeguard of a fair trial. At the same time, in narrowly defined exceptional circumstances associated with the confidentiality of an investigation during its initial phase or with specific security considerations. Any restriction must be prescribed by law, proportionate to the aim pursued, and must not amount to a complete denial of legal representation throughout the proceedings. The Committee also stressed that such restrictions must remain subject to effective judicial supervision so that they do not become a substantial impairment of the right of defence. The exception is therefore governed by strict safeguards designed to prevent States Parties from interpreting or applying it expansively in a manner that substantially deprives the underlying right of its

Comparison of the three systems shows that, although restrictions on access to counsel are commonly justified by the need to protect the investigation and prevent interference with evidence, the degree of procedural discipline varies substantially. Iraqi positive law is relatively precise in linking postponement of questioning to the various substantive appointments or retention of counsel in felony and misdemeanour cases. Yet it leaves the preliminary inquiry stage outside the express guarantee, thereby creating a real preceding formal appearance before the investigating judge and a temporal gap during which communication with counsel may be restricted without automatic and immediate requirement that any oversight. Islamic jurisprudence is more firmly anchored, at the level of principle, in the restriction being justified by necessity, particularly where there is a risk of interference with evidence. It nevertheless lacks detailed procedural rules fixing the duration and practical modalities of any postponement, and therefore requires a general principle requiring careful legislative implementation. International standards provide the most methodical framework by requiring a legal basis, proportionality and effective judicial supervision. However, executing domestic guidance for States Parties rather than a directly self-imposed standard, these standards remain interpretative in nature, and their effectiveness consequently depends on national incorporation. The principal gap in protecting the accused is not so much in the poorly regulated interval between accusation and formal appearance before the investigative authority, which remains the least 'actual arrest and the accused' protected stage across the three systems.

Section Two: Procedural Safeguards for the Accused before Trial under Iraqi Law

The Iraqi Code of Criminal Procedure constitutes the national framework governing arrest, detention, and preliminary investigation. It is the point at which rights-based standards move from the sphere of international norms into the concrete operation of domestic law. This section therefore examines the extent to which the Iraqi legislature responds to internationally and jurisprudentially established safeguards by analysing, first, the rules governing arrest and detention; second, the safeguards applicable during preliminary investigation; and third, the mechanisms of judicial oversight over the lawfulness of detention and the legal responsibility arising from violations. These matters are addressed in three consecutive subsections.

Subsection One: Rules Governing Arrest and Detention under the Iraqi Code of Criminal Procedure

The Iraqi legislature has paid particular attention to regulating arrest and detention, seeking to balance the effectiveness of criminal procedure against the protection of the accused's fundamental rights. This is reflected in detailed provisions concerning notification of the charge, the duration and extension of detention, and the detainee's right to communicate with family and counsel. The following parts examine these three matters in order to identify both areas of conformity with rights-based standards and points at which the legislation or its application remains deficient.

Part One: Procedures and Content of Notification of the Charge in Light of Article 92

Article 92 of the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, serves as the primary formal safeguard governing the power of arrest. Al-Kubaisi regards the provision as an especially clear expression of the principle of procedural legality. It states that no person may be arrested or detained except pursuant to an order issued by a judge or court, or in circumstances in which the law otherwise permits arrest. The provision thus subjects deprivation of personal liberty to an order issued by a competent judicial authority. The required content of notification, however, is derived from Article 93, which immediately follows

²⁸ United Nations Human Rights Committee, 2007, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, Geneva, para. 34

and requires an arrest warrant to state the accused's name, identifying characteristics, residence, occupation, the alleged offence, the applicable statutory provision, the date of issuance, and the issuing authority's signature. Iraqi law therefore requires the charge to be stated in the arrest warrant itself rather than communicated only at a later stage. Article 94 further requires the person executing the warrant to show its contents to the wanted person before enforcement. The legislation consequently distinguishes between the duty to specify the charge in writing in the warrant and the duty to inform the arrested person of that charge upon execution.²⁹³⁰

In Islamic jurisprudence, informing the arrested person of the reason for arrest and the allegation directed against him or her derives from a general rule that liberty may be restricted only for an apparent and known cause. A person cannot reasonably be required to answer a matter whose nature remains unknown, because neither self-defence nor the production of exculpatory proof is possible without prior knowledge of the subject of the allegation. The judge must therefore state the basis of arrest so that the person concerned may present objections or evidence capable of disproving or mitigating the accusation. The position of an enforcement officer who is not a judge depends on the jurisdiction conferred upon that officer and the jurisprudential rules governing its exercise; the original authority of the judge cannot be equated with the derivative authority of an enforcement agent. In every case, the basis of the measure must be communicated in a manner sufficient to remove uncertainty and enable an informed response.³¹

At the international level, Article 9(2) of the International Covenant on Civil and Political Rights establishes an express guarantee that anyone arrested must be informed, at the time of arrest, of the reasons for the arrest and must be promptly informed of any charge. This formulation distinguishes between the immediate communication of the factual and legal basis for deprivation of liberty and the prompt communication of the formal criminal charge. Its purpose is to enable the arrested person to understand why liberty has been restricted and to challenge the measure effectively before a competent judicial authority. Notification must therefore be substantive rather than ceremonial and must convey information sufficient to permit the exercise of defence rights and judicial review.³²

This comparative assessment reveals that the three systems share a central proposition: restriction of personal liberty acquires legitimacy only when accompanied by a clear statement of its basis. The technical detail required by each system nevertheless differs in ways that affect the practical level of protection. Iraqi legislation specifies the written contents of an arrest warrant and requires disclosure upon execution, but it does not attach an express and automatic procedural sanction to incomplete notification. Islamic jurisprudence treats knowledge of the cause as inherent in the validity of the measure, yet leaves its implementation largely to the integrity and assessment of the competent authority. International law formulates the temporal and substantive duties of notification more precisely, but domestic effectiveness still depends on incorporation and enforcement. Effective protection therefore requires a clear statutory statement of the information to be provided, a prompt method of delivery, and a judicially enforceable consequence for non-compliance.³³

Part Two: The Authority Competent to Order Detention, Its Statutory Duration, and the Rules Governing Extension

Under Iraqi law, the authority to order detention is vested primarily in the investigating judge. The original text of the Iraqi Code of Criminal Procedure No. 23 of 1971 used the term "magistrate" before it was replaced by "judge" pursuant to Resolution No. 218 of 1979. Article 109 authorises detention for periods not exceeding fifteen days at a time and permits renewal where required by the investigation, provided that the total period does not exceed one quarter of the maximum sentence prescribed for the offence and, in

²⁹ Hassan Al-Kubaisi, *A Concise Guide to the Code of Criminal Procedure* (Baghdad: Dar Al-Thaqafa for Publishing, 2010), p. 87 [in Arabic].

³⁰ Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Dar Al-Kutub wa Al-Watha'iq, 2004), p. 96; Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, Arts. 93-94 [in Arabic].

³¹ Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 69 [in Arabic].

³² United Nations, *International Covenant on Civil and Political Rights* (Geneva: Office of the United Nations High Commissioner for Human Rights, 1966), Art. 9(2).

³³ Luqman Othman Ahmad, "The Right of the Accused to Prompt Notification of the Charge under Iraqi Legislation," *Al-Rafidain Journal of Law*, University of Mosul, vol. 22, no. 72 (2019), p. 255 [in Arabic].

all cases, does not exceed six months. Continued detention beyond six months requires authorisation from the competent felony court. Article 110 further regulates release, with or without bail, where the statutory conditions are met. These provisions make detention a judicially controlled exceptional measure rather than an administrative power exercisable without temporal limits.³⁴³⁵

In Islamic jurisprudence, the authority to detain a person accused of wrongdoing, or to impose the equivalent form of confinement before guilt is established, belongs to the judge or to an official properly delegated by the competent public authority. It remains an exceptional measure assessed strictly according to necessity. The underlying principle is that the human person is free and free from liability unless a legally cognisable basis justifies restriction. Detention is therefore permitted only where credible indications support the allegation and where release would create a concrete risk such as flight, interference with evidence, or harm to the administration of justice. Its duration must be limited to the persistence of that necessity; once the reason ceases, continued confinement becomes unlawful. The discretionary authority of the judge is consequently bounded by proportionality, evidentiary justification, and the duty to avoid punitive treatment before adjudication.³⁶

Under international instruments, Article 9 of the ICCPR establishes a normative framework for the authority and duration of detention by requiring that anyone arrested or detained on a criminal charge be brought promptly before a judge or another officer authorised by law to exercise judicial power. It further provides that pretrial detention should not constitute the general rule and that release may be subject to guarantees securing appearance for trial. International standards do not prescribe a single numerical maximum applicable to all legal systems; instead, they require prompt initial judicial control, periodic review, necessity, proportionality, and release when continued detention is no longer justified. The legality of detention must remain open to challenge before a court capable of ordering immediate release where the measure is unlawful.³⁷

Comparison of the three approaches demonstrates a material difference in the intensity of oversight, notwithstanding their common protective purpose. Iraqi law provides a relatively clear arithmetic mechanism for calculating maximum detention through Articles 109 and 110, but renewal may become routine where judicial reasons are not recorded and independently reviewed. Islamic jurisprudence imposes a substantive limit based on necessity and the continuing existence of a legitimate cause, but does not itself provide a single codified timetable or standardised appeal mechanism. International law gives priority to prompt and recurring judicial scrutiny rather than relying solely on a final maximum period. A more effective Iraqi framework would therefore combine its existing statutory time limits with reasoned renewal decisions, periodic review at short intervals, and a practical remedy through which the accused can challenge each continuation of detention.³⁸

Part Three: The Detainee's Right to Communicate with Family and Counsel during Detention under Mandatory Provisions

Legal protection of a detainee's communication with family and counsel is reflected in Article 123(b) of the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, which requires the investigating judge to inform the accused of the right to be represented by counsel and, where the accused cannot afford representation, to appoint counsel without charge. The provision is primarily directed to legal assistance and does not formulate an equally detailed autonomous right to notify or communicate with family immediately after arrest. In practice, such communication may be treated as an incident of humane treatment and the requirements of a lawful investigation, but the absence of a specific procedural rule identifying the time, method, and permissible restrictions leaves the right vulnerable to inconsistent application. The gap is

³⁴ Dhari Khalil Mahmoud, *Commentary on the Iraqi Code of Criminal Procedure*, vol. 1 (Baghdad: Dar Al-Kutub wa Al-Watha'iq, 2012), p. 215 [in Arabic].

³⁵ Abdul Amir Al-Uqaili and Salim Harba, *Principles of Criminal Procedure*, vol. 2 (Baghdad: Dar Al-Kutub for Printing and Publishing, 1980-1981) [in Arabic].

³⁶ Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000) [in Arabic].

³⁷ Mohammed Subhi Najm, "The Right of the Accused or Suspect to a Fair Trial under the Jordanian Code of Criminal Procedure," *Dirasat: Sharia and Law*, vol. 32, no. 1 (2005), p. 130 [in Arabic].

³⁸ Jaafar Kazim Jabr, "Pretrial Detention and Its Safeguards under Iraqi Law," *Journal of Legal Sciences*, University of Baghdad, vol. 35, no. 1 (2020), p. 151 [in Arabic].

especially significant during the first hours of custody, when contact with counsel and relatives can protect against incommunicado detention and undocumented coercion.³⁹

From the perspective of Islamic jurisprudence, maintaining kinship and family ties is a protected interest that is not extinguished merely because a person is detained in connection with an accusation that has not yet resulted in conviction. Detention is a temporary precautionary measure and not a punishment that severs the detainee's social and family relations. Communication may be restricted only where a demonstrable necessity exists, such as preventing collusion, concealment of evidence, or harm to another person, and any restriction must remain proportionate and temporary. The same rationale applies with greater force to communication with a representative who assists the accused in presenting a defence, because isolation that prevents access to assistance may undermine the voluntariness of statements and the fairness of the proceedings.⁴⁰

The mandatory international standards provide substantially greater detail. Rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) requires prisoners to be allowed, under necessary supervision, to communicate with family and friends at regular intervals through correspondence and available telecommunications and by receiving visits. In relation to legal counsel, Rules 61 and 119 require adequate opportunity, time, and facilities for confidential communication without delay, interception, or censorship, subject only to visual supervision where necessary. These provisions treat contact with the outside world not as a discretionary privilege but as an element of humane custody and an essential safeguard against abuse.⁴¹

The comparison reveals a clear disparity between the regulatory detail of international standards and the generality of Iraqi legislation in this specific field. The Nelson Mandela Rules distinguish communication with family from confidential access to counsel and identify the permissible forms and limits of supervision. Iraqi law expressly protects representation by counsel but does not comprehensively regulate immediate family notification, regular communication, confidentiality, or the grounds and duration of restrictions. Islamic jurisprudence supports preservation of family ties and access to assistance as consequences of dignity and justice, but requires contemporary legislative articulation to become institutionally enforceable. Legislative reform should therefore establish an express right to prompt notification of a family member, confidential and timely access to counsel, documented grounds for any restriction, and rapid judicial review of isolation or denial of communication.

Subsection Two: Safeguards of the Accused during the Preliminary Investigation

The preliminary investigation is the stage at which inculpatory and exculpatory evidence is formed, and it is the stage that poses the greatest risk to the rights of the accused if the prosecuting authority operates without oversight. Iraqi law has therefore entrusted supervision of this stage to the investigating judge as a neutral judicial authority, has prescribed procedural nullity for measures that violate defence rights, and has recognised the accused's right to remain silent. This subsection examines the role of the investigating judge and the sanction of procedural nullity, and then addresses the right to silence and the prohibition of coercion.

Part One: The Investigating Judge's Jurisdiction to Safeguard Personal Rights and Order Procedural Nullity

The supervisory role of the investigating judge under Iraqi law begins with established constitutional principles, particularly Article 19 of the Constitution of the Republic of Iraq of 2005, which protects human dignity and prohibits detention except in circumstances prescribed by law. Within this framework, the investigating judge exercises strict judicial authority to ensure the legality of measures affecting personal liberty. Article 218 of the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, expressly provides that a confession must not have been obtained through physical or moral coercion. The legislature thus

³⁹ Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Dar Al-Kutub wa Al-Watha'iq, 2004), p. 134; Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, Art. 123(b); Hussein Ali Al-Shammari, *Safeguards of the Accused during Preliminary Investigation: A Comparative Study of Iraqi Law and Islamic Jurisprudence*, master's thesis (University of Baghdad, 2016), p. 114 [in Arabic].

⁴⁰ Mohammed Mahmoud Tantawi, *Rights of the Accused under International Law Standards and Islamic Jurisprudence*, 1st ed. (Cairo: National Centre for Legal Publications, 2015), p. 145 [in Arabic].

⁴¹ United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), Resolution A/RES/70/175 (New York, 2015), Rule 58.

distinguishes between the exclusion of evidence, which deprives it of probative value, and procedural nullity, which affects the defective measure itself. Articles 195 to 206 regulate nullity and recognise two forms: absolute nullity, which concerns public order and cannot be waived, and relative nullity, which is established for the benefit of the parties. This legislative framework positions the investigating judge as the natural guardian of procedural safeguards, empowered to invalidate any act tainted by coercion or abuse by judicial police officers. It reflects a legislative preference for procedural legality and protection of the accused, although effective implementation requires resolute judicial action in practice.⁴²

The Islamic jurisprudential approach to preliminary procedures rests on the principle that a person is originally free from liability. This definitive principle places a strong protective barrier around the accused and requires the judge to scrutinise the lawfulness of interrogation and the grounds for pretrial detention. Although the schools of Islamic jurisprudence differ in the methods by which they derive subsidiary rules, they agree that an admission must be wholly voluntary and freely chosen and loses all evidentiary value if affected by any form of coercion, consistently with the principle of averting prescribed punishments in cases of doubt. Unlike positive law, which formulates specific procedural categories of nullity, Islamic jurisprudence deprives an abusive measure of any legal effect: the judge rejects what is founded on invalidity in accordance with the objectives of Islamic law in preserving life and intellect. This is not procedural nullity in the narrow positive-law sense, but a substantive ruling that corrupt evidence may not be relied upon, although jurists differ concerning the ancillary consequences. Judicial authority in this context is not confined by formal procedural rules; it is a substantive authority grounded in principles of justice, allowing the judge to reject any conduct that violates the dignity or inherent rights of the accused and to prevent precautionary procedures from becoming premature punishment.⁴³

Within the international human rights framework, procedural safeguards attain their greatest effect when judicial oversight is structured by mandatory standards. Article 9 of the International Covenant on Civil and Political Rights requires every person arrested or detained on a criminal charge to be brought promptly before a judge or another officer authorised by law to exercise judicial power, in order to prevent arbitrariness and ensure the legality of detention. This protection is complemented by the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): Rule 58 safeguards the prisoner's right to communicate with family and friends, while Rule 61 protects prompt and secure communication with legal counsel without improper interference or surveillance. The Universal Islamic Declaration of Human Rights likewise affirms the inviolability of human dignity and prohibits arbitrary restrictions on liberty. Together, these instruments impose a serious obligation on states to align domestic legislation with established international standards and to ensure that the investigating judge can intervene immediately to invalidate any measure that violates them.⁴⁴

A close analysis of the enforcement mechanisms protecting the rights of the accused before trial reveals a fundamental tension between the textual framework and procedural reality in both Iraqi positive law and Islamic jurisprudence, notwithstanding their different legal character. Under Iraqi law, despite clear constitutional provisions and detailed procedural rules governing degrees of nullity and exclusion of evidence, practice frequently encounters structural obstacles. The investigating judge may remain heavily dependent on reports prepared by security and executive bodies, weakening preventive oversight and converting it into ex post review that may be unable to remedy violations already inflicted on the accused's dignity. The problem is therefore not the absence of a legal power to invalidate, but the lack of complete operational independence enabling the judiciary to respond immediately to abuses by enforcement officers. Islamic jurisprudence, by contrast, possesses a coherent doctrinal structure that links legality inseparably with respect for human dignity and directly excludes any evidence tainted by coercion in accordance with the overarching objectives of Islamic law. Methodologically, however, a codified written procedural system cannot be compared as though identical to a broad jurisprudential tradition that, in some contemporary

⁴² Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Al-Zaman Press, 2004), p. 145 [in Arabic].

⁴³ Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 88 [in Arabic].

⁴⁴ Mahmoud Cherif Bassiouni and Abdel Azim Wazir, *Criminal Procedure in Arab Legal Systems and the Protection of Human Rights* (Beirut: Dar Al-Ilm Lilmalayin, 1991), p. 205 [in Arabic].

applications, lacks detailed procedural codification capable of transforming its general principles into binding procedures. Genuine enhancement of the accused's procedural safeguards therefore requires not merely additional legislation, but an institutional architecture ensuring independent and decisive judicial intervention from the first moment of arrest.

Part Two: Recognition of the Right to Silence and the Prohibition of Obtaining Confessions through Coercion or Deception

Recognition of the right to silence during the preliminary investigation is closely connected to the presumption of innocence and constitutes one of the principal pretrial procedural safeguards under Iraqi law. The Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, regulates interrogation through restrictions designed to preserve the accused's free will and prevent unlawful influence. Article 123 requires the presence of counsel during the interrogation of an accused person in felony cases and prohibits administering an oath to the accused, implicitly recognising the right not to answer. Article 127 reinforces this protection by prohibiting any unlawful means of influencing the accused, including physical or psychological coercion, promises, threats, or deception, and by rendering any confession obtained through such means inadmissible. This approach is consistent with Article 37(1)(c) of the Constitution of the Republic of Iraq of 2005, which expressly prohibits psychological and physical torture and excludes any confession obtained under coercion. The legislative framework performs a dual function: it protects the dignity of the accused and preserves the reliability of evidence. A confession is admissible only when it results from a free and informed will, thereby imposing a fundamental limitation on the investigating authority and preventing abuse of its powers.⁴⁵

From the perspective of Islamic jurisprudence, the right to silence is grounded in the general rules of proof, particularly the principles that an admission is binding only on the person who makes it, that it must be voluntary and free from coercion, and that a person is originally free from liability. The accused cannot be compelled to confess or forced to speak, because silence does not constitute evidence of guilt; the presumption remains intact unless the allegation is established by legally admissible proof. The prohibition of coercion in obtaining an admission is similarly well established. An admission made under pressure, fear, or deception is invalid because genuine consent, an essential condition for the validity of verbal legal acts, is absent. The judge's authority to question the accused is also constrained by the prohibition of methods that violate human dignity or cause physical or psychological harm. This reflects a careful balance between society's interest in discovering the truth and the individual's right to preserve human dignity. Islamic jurisprudence therefore prohibits not only overt coercion but also forms of moral influence that corrupt freedom of choice, a position that converges in substance with the modern conception of procedural legality.⁴⁶

At the international level, the right to silence forms part of the broader framework of fair-trial safeguards established by the ICCPR. Article 14 guarantees the right of every person charged with a criminal offence not to be compelled to testify against himself or herself or to confess guilt. This provision is a cornerstone of international protection against abusive interrogation methods and is directly connected to the prohibition of torture in Article 7 of the Covenant. The Nelson Mandela Rules reinforce this approach by requiring humane treatment of detainees and prohibiting pressure or coercion during questioning. International practice accordingly treats a confession as lawful evidence only when it is voluntary; violation of this principle requires exclusion of the evidence and may engage the responsibility of those involved. International jurisprudence demonstrates that the right to silence is not merely a procedural privilege, but a fundamental safeguard against abuse of authority and an essential component of the balance between effective criminal justice and protection of fundamental human rights.⁴⁷

The comparative analysis demonstrates structural convergence among Iraqi law, Islamic jurisprudence, and international standards in recognising the right to silence and prohibiting coercion. The practical

⁴⁵ Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Legal Library, 2005), p. 215 [in Arabic].

⁴⁶ Abdul Hamid Ismail Al-Ansari, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 143 [in Arabic].

⁴⁷ Mohamed Mahmoud Tantawi, *The Rights of the Accused in Accordance with the Standards of International Law and Islamic Jurisprudence*, 1st ed. (Cairo: National Center for Legal Publications, 2015), p. 98.

effectiveness of these safeguards, however, depends more on implementation than on formal recognition. Iraqi legislation clearly prohibits coercive methods and invalidates confessions obtained through them, but the central difficulty lies in proving that coercion occurred, especially within the closed environment of preliminary investigation. This may substantially weaken the practical value of the safeguard. Islamic jurisprudence offers a deep doctrinal foundation that is particularly strict in rejecting any suspicion of coercion and recognises an admission only under rigorous conditions of voluntariness. This broader theoretical protection nevertheless remains dependent on effective judicial methods of proof. International law adds a stronger deterrent dimension by linking exclusion of evidence to legal responsibility for torture, although its effectiveness still depends on state compliance. The comparison therefore shows that protection is not achieved by theoretical recognition alone, but through procedural controls capable of detecting coercion and preventing impunity, which remains the central challenge during the pretrial stage.

Subsection Three: Judicial Review of Detention and the Liability of the Violating Authority

Procedural protection is not complete merely because rights are recognised in legislation; it must also be supported by an effective supervisory mechanism capable of remedying violations and providing reparation. The Iraqi Code of Criminal Procedure designates the judiciary as the authority competent to determine the lawfulness of detention, grants the accused the right to challenge detention orders, and establishes disciplinary, civil, and criminal liability for serious violations committed by law-enforcement officials. This subsection therefore addresses two complementary dimensions: judicial review and the available means of challenging detention orders, followed by the legal basis of liability arising from departure from procedural safeguards.

Part One: Judicial Review of the Lawfulness of Detention Orders and the Available Means of Challenge

This part addresses one of the most exacting forms of pretrial procedural protection. The lawfulness of detention is not established merely because an order has been issued by an investigating authority; it also depends on effective judicial review capable of verifying the existence of a legal and factual basis for the measure. Iraqi law surrounds detention with a series of restrictions: it may be ordered only within the limits permitted by law and only to the extent required by the investigation, while liberty remains the rule and detention the exception. In this framework, the investigating judge performs a central role in reviewing the legal basis of the order, the existence of sufficient evidence supporting the accusation, and the proportionality of detention to the gravity and circumstances of the alleged offence, because any departure from these requirements directly affects the right to personal liberty. Judicial review is not confined to the moment at which the order is issued; it extends to the possibility of challenging the order through the procedures prescribed by law, thereby permitting reconsideration, modification, or termination of detention whenever its grounds cease to exist. The lawfulness of a detention order under Iraqi law is therefore not a merely formal question, but the result of an interaction between investigative authority and mandatory judicial supervision designed to prevent detention from becoming a disguised punishment before judgment.⁴⁸

Islamic jurisprudence approaches detention from the foundational rule that liberty is the norm and may be restricted only to the extent required by a legally recognised necessity and under the supervision of a judge who must balance the preservation of public order against the protection of human dignity. Even where detention is classified within the sphere of *ta'zir* or *siyasa shar'iyya*, it remains an exceptional measure governed by a disciplined public interest rather than by a desire to punish or accelerate punishment. Its legitimacy therefore depends on a strong suspicion or legally significant indication, not on unsupported conjecture or an unsubstantiated allegation. Continued detention is equally impermissible once its cause has disappeared or a genuine need for it no longer exists. Judicial oversight is especially important because Islamic jurisprudence binds the judge to justice and the prevention of harm; the judge may not approve detention that humiliates or exhausts the accused or compels a confession. Objection to detention accordingly takes the form of a petition to the competent judicial authority seeking its termination or mitigation whenever its unlawfulness or weak justification becomes apparent. Detention thus remains

⁴⁸ Al-Uqaili, Abdul Amir, and Salim Harba, *Principles of Criminal Procedure*, vol. 1 (Baghdad: Dar Al-Kutub for Printing and Publishing, 1980-1981), p. 92 [in Arabic].

subject to concurrent religious-legal and judicial control, rather than constituting an unrestricted power in the hands of the prosecuting or investigating authority.⁴⁹

International human rights instruments affirm that review of detention is not a procedural luxury but an indispensable safeguard against arbitrary deprivation of liberty. Article 9 of the International Covenant on Civil and Political Rights recognises every person's right to liberty and security of person, prohibits arbitrary arrest or detention, requires that an arrested person be brought promptly before a judge or other officer authorised by law to exercise judicial power, and guarantees the right to challenge the lawfulness of detention before a court. These provisions place judicial review of detention at the core of fair-trial protection rather than treating it as a subsequent formality. This protection is reinforced by the United Nations Standard Minimum Rules for the Treatment of Prisoners, which affirm that deprivation of liberty must not compromise human dignity and that pretrial detainees retain the presumption of innocence and must be treated differently from convicted prisoners. The same orientation is reflected in the Universal Islamic Declaration of Human Rights, which protects dignity and prohibits arbitrary arrest or detention. Internationally recognised avenues of challenge therefore require independent judicial review of the lawfulness of detention, providing effective control over investigative authorities and preventing continued custody without a valid legal basis.⁵⁰

A critical reading demonstrates that the lawfulness of detention under positive law and Islamic jurisprudence does not depend on legislative formulation alone, but on the capacity of judicial review to convert legal rules into tangible protection. Under Iraqi law, the effectiveness of safeguards remains dependent on the speed of intervention by the investigating judge, the clarity of the reasons for detention, and the availability of effective remedies that do not become paralysed by procedural delay or security considerations. Islamic jurisprudence displays a strong theoretical structure by treating liberty as the rule and detention as the exception; however, much of that force is lost unless translated into specific procedures governing the duration of detention, the mechanism of review, and the consequences of violation. The principal difficulty therefore lies not in the existence of a review principle, but in its binding character, practical effectiveness, and the independence of the reviewing authority. It is also essential to distinguish detention as a precautionary measure from its practical use as an instrument of pressure or anticipatory punishment. Where available remedies cannot halt the harmful effect immediately, protection arrives after the point of danger and the right to liberty remains surrounded by theoretical rather than genuinely enforceable safeguards. The relevant measure of success is therefore the judge's ability to invalidate unlawful detention at the proper time, not merely to declare its unlawfulness after the harm has already occurred.

Part Two: The Basis of Disciplinary, Civil, and Criminal Liability for Violating the Legal Safeguards Governing Detention

Under Iraqi law, disciplinary, civil, and criminal liability for violating the legal safeguards governing detention derives from the exceptional interference that detention creates with personal liberty. Detention acquires legitimacy only when ordered in accordance with the conditions established by the Constitution and the Iraqi Code of Criminal Procedure. Article 15 of the Constitution of the Republic of Iraq of 2005 provides that every individual has the right to life, security, and liberty and that these rights may not be deprived or restricted except in accordance with law and pursuant to a decision issued by a competent judicial authority. Any detention outside that framework therefore violates a constitutional principle rather than merely an administrative rule. At the procedural level, the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, bases detention on judicial authorisation and continuing review of its grounds, particularly through rules requiring the arrested person to be brought before the competent judge and permitting release or continued detention according to the needs of the investigation. Disciplinary liability arises where a judge, investigator, or judicial police officer breaches official duties or the requirements of procedural legality. Civil liability arises when fault, damage, and causation result from unlawful detention. Criminal liability is engaged where the conduct consists of depriving a person of liberty or maintaining detention without legal authority or beyond the limits permitted by law. A violation of detention safeguards

⁴⁹ Al-Ansari, Abdul Hamid Ismail, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed.

(Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 88 [in Arabic].

⁵⁰ Bassiouni, Mahmoud Cherif, and Abdel Azim Wazir, *Criminal Procedure in Arab Legal Systems and the Protection of Human Rights* (Beirut: Dar Al-Ilm Lilmalayin, 1991), p. 205 [in Arabic].

is therefore not merely a procedural defect but an abuse of a power that affects personal liberty in its most sensitive form.⁵¹

Under Islamic jurisprudential principles, the authority to detain an accused person before proof of the offence cannot be based on unrestrained suspicion. It must rest on a narrowly defined precautionary necessity supported by a legally significant indication, limited to the extent required, and supervised by a properly constituted judicial authority, because the human person is presumed free and protected from liability until a lawful ground is established through valid procedure. Pre-judgment detention is not understood as premature punishment, but as a temporary precautionary measure intended to preserve the rights of others and prevent flight or interference with the subject matter of the claim where serious indications exist. It must remain subject to the prohibitions of harm, coercion, and its conversion into a means of extracting a confession. Violation of these limits gives rise to several forms of responsibility. Abuse of jurisdiction warrants disciplinary accountability as a breach of the trust inherent in public office; harm caused by detention without valid justification requires compensation for material or moral injury; and detention accompanied by manifest aggression, ill-treatment, or coercion exceeds an error of judgment and becomes an unlawful assault requiring legal accountability. The distinctive feature of this approach is that detention is justified not by the power of the authority itself, but by its conformity with the objectives of justice; its legal basis disappears once necessity ends or precaution becomes arbitrariness.⁵²

In international human rights law, liability for violating the legal safeguards governing detention is determined by combining the prohibition of arbitrary deprivation of liberty with the obligation to provide an effective remedy and reparation for the resulting harm. Article 9(1) of the ICCPR recognises every individual's right to liberty and security of person and prohibits arbitrary arrest or detention. Article 9(2) requires that an arrested person be informed of the reasons for arrest; Article 9(3) requires prompt appearance before a judge or other officer authorised by law to exercise judicial power; Article 9(4) guarantees the right to challenge the lawfulness of detention; and Article 9(5) expressly recognises an enforceable right to compensation for victims of unlawful arrest or detention. In addition, Article 2(3) obliges States to provide an effective remedy whenever rights recognised in the Covenant are violated. International responsibility therefore does not stop at a theoretical acknowledgement of unlawfulness; it requires the State to establish an effective remedial mechanism capable of terminating the violation and repairing its consequences. A breach of detention safeguards accordingly produces a dual legal effect: an individual right to challenge the measure and obtain compensation, and an institutional obligation on the State to maintain an accountability system capable of preventing impunity for arbitrary detention.⁵³

Taken together, these three levels demonstrate that the true value of liability for violating detention safeguards lies not merely in the ability to characterise conduct as unlawful, but in the legal system's capacity to convert that characterisation into direct and structured consequences. Iraqi positive law recognises constitutional protection of personal liberty in principle, yet that protection weakens whenever violations remain confined to a procedural defect that may be practically overlooked without clear personal accountability for those who initiated, ordered, or knowingly tolerated the measure. The distinction among disciplinary, civil, and criminal liability is not an abstract classification, because each performs a different function: disciplinary liability protects the integrity of public office, civil liability repairs individual harm, and criminal liability responds to grave assaults on liberty. If these spheres are conflated, the deterrent capacity of the entire system is weakened. Islamic jurisprudence is more categorical in treating liberty as the rule and in linking the legality of detention to temporary necessity and the prevention of harm. This gives liability both an ethical and a functional dimension, but effective implementation still requires evidentiary and supervisory mechanisms preventing the principle from dissolving into unfettered discretion. Pretrial protection reaches its practical limit only when a violation of detention safeguards reliably triggers multiple levels of

⁵¹ Constitution of the Republic of Iraq of 2005, Official Gazette of Iraq, Baghdad, Article 15; Jamal Mohammed Mustafa, *Commentary on the Iraqi Code of Criminal Procedure* (Baghdad: Legal Library, 2005), p. 283 [in Arabic].

⁵² Al-Ansari, Abdul Hamid Ismail, *Rights and Safeguards of the Accused in Islamic Law and Positive Law*, 1st ed. (Cairo: Dar Al-Fikr Al-Arabi, 2000), p. 87 [in Arabic].

⁵³ United Nations, *International Covenant on Civil and Political Rights*, United Nations Treaty Series (New York, 1966), Articles 2(3) and 9(1)-(5); Hussein Jamil, *Human Rights and Criminal Law* (Cairo: Institute of Arab Research and Studies, Department of Legal and Sharia Studies, 1972), pp. 156-164 [in Arabic].

accountability, rather than becoming a formal observation in the investigation file, and when compensation and invalidation of the procedural consequences are accompanied by the possibility of holding responsible anyone who used detention outside its lawful purpose.

Results

1. The findings derived from the comparison between the Iraqi legal system and international instruments demonstrate that theoretical convergence in recognising procedural safeguards does not amount to equivalence in their practical effectiveness. Although Iraqi law precisely defines the conditions of arrest and the permissible duration of detention, its implementation remains largely dependent on the individual discretion of the investigating judge, without an immediate countervailing review mechanism equivalent to the judicial review guaranteed by Article 9 of the International Covenant on Civil and Political Rights. This gap may allow pretrial detention, in practice, to become a deprivation of liberty imposed before guilt has been established. International standards, while providing a precise normative framework, likewise remain dependent on effective domestic implementation because they lack direct coercive enforcement mechanisms. Genuine protection of personal liberty therefore cannot be achieved through textual harmony alone; it requires an institutional architecture that integrates the rigour of domestic procedural law with the comprehensiveness of international standards within a coherent system of judicial oversight.
2. Analysis of the content of notification of the charge at the arrest stage shows that the principal gap between Iraqi law and the international standard does not concern the existence of a duty to state the charge, since Articles 93 and 94 of the Iraqi Code of Criminal Procedure expressly settle that issue. Rather, the gap lies in the degree of temporal precision. The ICCPR requires notification promptly at the moment of arrest, whereas Iraqi law merely links disclosure to the execution of the arrest warrant without prescribing an explicit maximum period. This omission creates an interval during which liberty may remain restricted without adequate disclosure of the reasons, thereby weakening the accused's ability to challenge the measure immediately and reducing notification to a formal condition rather than an effective safeguard. Legislative intervention is therefore required to close this gap in conformity with Article 9 of the ICCPR and General Comment No. 35.
3. The provisions governing access to legal counsel further show that the integrity of interrogation and the voluntariness of the accused's statements depend on a precise determination of when the effective right of access arises. International standards attach this right to the moment of arrest itself, pursuant to paragraph 34 of General Comment No. 32 and Rule 61 of the Nelson Mandela Rules. Iraqi law, however, leaves the preliminary police-inquiry stage preceding the accused's appearance before the investigating judge outside the scope of an explicit safeguard. This creates a temporal gap that may be exploited to obtain statements in the absence of legal oversight and is inconsistent with the requirements of a fair trial, which demand access to defence assistance from the first restriction of liberty. Because statements obtained during this stage may continue to influence the course of the proceedings, initial judicial-police measures should be subjected to immediate review capable of preventing the absence of counsel from being used as a means of pressure.

Recommendations

1. The Iraqi legislature should amend Article 94 of the Iraqi Code of Criminal Procedure by adding a provision requiring the executing authority to provide the arrested person, in writing and in a language that he or she understands, with the reasons for arrest and the charge within twenty-four hours of the actual restriction of liberty. This amendment would remedy the absence of an express temporal limit. Empirical research should also assess the effect of delayed notification on the effectiveness of the defence and the lawfulness of detention in light of the standards articulated in Human Rights Committee General Comment No. 35. Such measures would transform notification from a formal step into an effective supervisory safeguard enabling an immediate challenge before detention is prolonged without sufficient justification.
2. The detained person's right to prompt and confidential access to legal counsel should be guaranteed from the first moment of deprivation of liberty, consistently with Rule 61 of the Nelson Mandela Rules. Article 123 of the Iraqi Code of Criminal Procedure should therefore be amended to require judicial police officers to inform the detainee immediately upon arrest of the right to contact a lawyer and to provide an effective opportunity to exercise that right without delay or surveillance. Future empirical

studies should evaluate the degree of compliance by investigative authorities and the consequences of denial of counsel for the validity of subsequent proceedings. This reform would close the temporal gap that presently permits the period preceding formal interrogation to be used to obtain statements without defence oversight.

3. A system of prompt and periodic judicial review of pretrial detention should be established that goes beyond the aggregate time limit prescribed by Article 109. Legislative amendment should require the investigating judge to submit the detainee's file to a collegiate judicial panel every thirty days for a reasoned determination whether detention should continue or release on bail should be ordered. Comparative studies should examine the effectiveness of such review in reducing prolonged detention and increasing justified release decisions, with reference to Article 9 of the ICCPR and successful comparative practices of continuing judicial oversight. This mechanism would provide an effective safeguard against the conversion of pretrial detention into premature punishment inconsistent with the presumption of innocence.

4.

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