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Substantive Constraints on Security Agencies in Cases of Unlawful Arrest under the Iraqi Legal System

Ruhollah Akrami¹, Hussein Yaseen Taher², Ali Hilu Ali³

Abstract

This study analyses the substantive constraints imposed on security agencies in cases of unlawful arrest under Iraqi law, aiming to protect human rights and prevent abuse of power. Arrest is a serious procedure that restricts personal liberty, a right safeguarded by the Iraqi Constitution and domestic legislation. The law sets specific conditions under which this right may be limited, balancing the state's authority to punish with the individual's right to freedom. An arrest carried out without legal justification constitutes an unlawful infringement on personal liberty and is criminalised to protect individuals from arbitrary detention. Article 322 of the Penal Code punishes any public official or person entrusted with a public service who arrests, imprisons, or detains a person without legal basis with imprisonment for up to seven years or detention. This research focuses on the legal and procedural controls governing arrests, highlighting safeguards designed to protect individuals from unlawful detention. The study finds that Iraqi legislation provides clear constraints to prevent unlawful arrests, but challenges in enforcement reduce their effectiveness. It recommends enhancing judicial oversight, updating laws to comply with international standards, establishing independent monitoring bodies, and providing human rights training for security personnel.

Keywords: Unlawful Arrest, Security Agencies, Human Rights, Substantive Constraints.

Introduction

The right to personal liberty is one of the fundamental rights enshrined in the Constitution and national legislation. This right may not be infringed upon except in accordance with legal safeguards designed to prevent the abuse of power. In this context, arrest represents one of the most prominent areas where violations may occur at the hands of security agencies, thereby necessitating the imposition of clear constraints and controls to limit the arbitrary exercise of authority. These substantive constraints serve as conditions and guarantees that must be fulfilled when carrying out any legal procedure related to the arrest of an accused person. The recognition of rights and public freedoms in constitutional documents and legal texts constitutes a vital safeguard against the abuse of power by the authorities. The executive authority may not violate the Constitution or the laws that complement it with respect to the rules and controls governing rights and freedoms. Otherwise, such actions would be unlawful and contrary to the principle of legality, which requires that authorities abide by the law and not contravene its provisions. This principle is essential for achieving a balance between the broad powers granted to public authorities and the fundamental rights and freedoms of individuals, as well as for protecting

¹ Associate Professor, Criminal Law and Criminology, Faculty of Law, University of Qom, Qom, Islamic Republic of Iran, Email: r.akrami@qom.ac.ir

² Public law, Criminal Law, Iraq, Email: drhusseing81@gmail.com

³ Ph.D. Candidate, Criminal Law and Criminology, Faculty of Law, University of Qom, Qom, Islamic Republic of Iran, Email: akhazraji855@gmail.com



1444 Substantive Constraints on Security Agencies in Cases of Unlawful individuals from tyranny and arbitrary authority.

Accordingly, security personnel are obliged, in the performance of their duties, to operate strictly within the bounds of the law. They may not exceed or violate these limits on the basis of their official positions. No person may be arrested, imprisoned, or detained without legal justification or without compliance with legally prescribed procedures. Any such acts would constitute a clear violation of human rights and personal freedoms. The Iraqi legislator has prescribed criminal penalties for anyone who effects an arrest without lawful cause.

The significance of this research lies in its focus on the substantive constraints imposed by laws and legislation on security agencies in the execution of arrest procedures. These constraints are crucial for ensuring respect for human rights and achieving a balance between the requirements of maintaining public security and the protection of individual freedoms. Another important aspect of this study is the role of security agencies as entities responsible for uncovering the truth, investigating crimes, collecting evidence, and apprehending perpetrators—functions that must be performed lawfully and within the framework of legal rules that criminalise any violation or disregard of these rights. Defining the role of security agencies thus provides a vital guarantee for the protection of public freedoms and also offers protection for security personnel themselves from potential criminal liability.

The problem of this study whether the substantive constraints imposed on security agencies are adequate for protecting human rights. It examines the extent to which security agencies comply with these constraints when exercising their legally conferred powers and identifies legal solutions in cases of legislative deficiency or inadequacy. Furthermore, it highlights the reality that many security personnel are unaware of these constraints, leading to the misconception that their powers are absolute, or they fail to apply the law correctly, with negative consequences for human rights.

Furthermore by focuses on the substantive constraints related to the offence of unlawful entry into a dwelling. It adopts an analytical-descriptive method, analysing the legal provisions of Iraqi legislation, which prescribes penalties for arrests carried out without lawful cause. The scope of the study is limited to the substantive constraints on security agencies under the Iraqi Penal Code No. 111 of 1969.

The Nature of Unlawful Arrest

Human rights and personal liberty are among the most important rights enjoyed by individuals and must not be infringed upon or violated as long as individuals comply with the rules laid down by legislation and law. However, these rights may be restricted or violated in the public interest, and this infringement may take the form of arrest where sufficient evidence exists against the individual.

To clarify the concept of arrest, it is necessary to define it both linguistically and legally in the first subsection, and to address its characteristics in the second.

Definition of Arrest in Legislation

The Iraqi legislator has not provided a definition of arrest, leaving this to jurisprudential and judicial interpretation, and has sufficed with setting out its rules, the authorities empowered to issue and enforce it, the procedures preceding and following it, and the cases in which an arrest warrant may be issued. However, some Arab legislations have provided definitions of arrest, including the Kuwaiti legislator in Article 48 of the Kuwaiti Code of Criminal Procedure and

Trials No. 17 of 1960, defining arrest as: “The apprehension of a person and bringing him, even by force, before the court or investigator pursuant to an order issued thereby, or without such an order in cases provided for by law.” Similarly, the Yemeni Code of Criminal Procedure No. 13 of 1994 defined arrest in Article 96 as: “The apprehension of a person and bringing him before the court, the public prosecution, or judicial officers in cases prescribed by law.”

At the international level, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1975, defined arrest as: “A measure of investigation in criminal proceedings which consists of taking a person, by compulsion, into custody for a short period on the basis of lawful authority and with the aim of bringing him before the competent authority to decide on the continuation of custody or release.”

Definition of Arrest in Case Law

Iraqi courts have not defined arrest, whereas the Egyptian Court of Cassation defined it as: “A set of purely temporary precautionary measures aimed at establishing the identity of the accused and conducting a preliminary investigation of him; these measures usually involve the detention of suspects and placing them in a location for a few hours sufficient to collect the evidence from which the need for and legality of pre-trial detention can be inferred.” It is clear from this definition that arrest means preventing the accused from exercising freedom of movement and bringing him, against his will, before the judiciary or competent authorities in accordance with the law. It is a temporary precautionary measure.

Characteristics and Nature of Arrest

After presenting the definitions, we clarify the characteristics and nature of arrest:

First: Characteristics of Arrest:

1. A Procedural Act of Investigation:

The arrest warrant is primarily issued by the investigating judge or the court, except in cases of flagrante delicto offenses, where it may be issued by the judicial police officer, pursuant to Article (43) of the Code of Criminal Procedure. For non-flagrante delicto offenses, Articles (49) and (50) apply. The police station officer holds the authority equivalent to that of the investigator, including arresting the accused and preventing entry and exit from the crime scene. Article (92) of the same law stipulates: "No person shall be arrested or detained except pursuant to an order issued by a judge or a court or in cases permitted by law" .

2. Compulsory Restriction of the Arrestee's Freedom:

The accused is prevented from moving, even for a short period, and the law permits the use of force in cases of escape or resistance, according to Article (108) of the Code of Criminal Procedure: "If the accused resists arrest or attempts to flee, the authorized person may use appropriate force..." .

The purpose is to ensure the accused's presentation to the authority and to prevent escape or tampering with evidence. The 2005 Iraqi Constitution, in Article (20/13), mandates presenting the investigation papers within 24 hours, extendable once only. Article (123/a) of the Code requires the interrogation of the accused within the same period .

3. A Legally Restricted Procedure:

It must be issued in writing by a judge or a court and must include the accused's details, the

alleged crime, and the signature of the issuing authority . From the foregoing, it is evident that arrest is a serious procedure requiring strict adherence by security agencies to legal safeguards and must only be executed under lawful authorization, given its infringement on personal liberty. This procedure is surrounded by legal and constitutional guarantees, such as Article (1) of the Constitution: "Every individual has the right to life, security, and liberty, and these rights shall not be deprived or restricted except in accordance with the law and pursuant to a decision issued by a competent judicial authority". The law also specifies the conditions for issuing and executing arrest warrants and considers any breach punishable under Article (322) of the Penal Code No. 111 of 1969, as amended: "Any public official or person charged with public service who arrests, imprisons, or detains a person outside the conditions stipulated by law shall be punished by imprisonment not exceeding seven years or detention."

Arrest is deemed unlawful if not based on an order from a competent authority or if conducted outside the legal circumstances, and those who participate therein are held accountable . Therefore, arrest is a serious procedure that necessitates strict compliance by security agencies with the relevant legislation and its safeguards to protect human rights and prevent misuse of authority or violation of rights under its guise .

Second: The Legal Nature of the Crime of Unlawful Arrest

Criminal jurisprudence has diverged on the legal nature of the arrest order: whether it constitutes an investigative procedure or an evidentiary procedure. Opinions are divided into two main theories:

1. The Substantive Theory:

Procedures carried out by a judicial police officer (member of the judicial enforcement body) in flagrante delicto, including arrest, are considered investigative procedures because they involve an infringement on personal liberty, regardless of the authority exercising them or their formal nature .

However, this criterion is not without problems, as there exist procedures such as detention, stop-and-frisk, and seizure performed by the judicial police officer in flagrante delicto, which are evidentiary procedures despite infringing upon liberty. Conversely, there are investigative procedures that do not infringe on liberty, such as summons to appear, which are classified as investigative procedures, demonstrating the limitation of this criterion , .

2. The Formal Theory:

This theory distinguishes between investigative and evidentiary procedures based on purpose and legal form, rather than the element of infringement upon liberty or coercion. Arrests executed by the judicial police officer in flagrante delicto are considered evidentiary procedures rather than investigative, as their objective is to apprehend crime elements and evidence, while the verification of the crime's occurrence and attribution falls within the authority of the investigating body .

Moreover, the coercive nature of arrest does not confer upon it the status of an investigative procedure; it must be issued by the competent investigating authority, otherwise, it loses this status .

Hence, an arrest order is, by nature, an investigative procedure carried out by the investigating judge or the judicial investigator under the supervision of the investigating judge, pursuant to

Article (51/A) of the Iraqi Code of Criminal Procedure, with an exception permitting the judicial police officer to undertake certain necessary investigative actions under specific conditions . Article (43) imposes on the judicial police officer the duty to notify the investigating judge or judicial investigator immediately upon becoming aware of a flagrante delicto offense and to take the necessary investigative measures. Additionally, Article (52/A) grants the authority to undertake investigative procedures by delegation from the investigating judge, alongside the broad powers conferred upon the police by the legislator in Articles (49-50) . Accordingly, the arrest order is fundamentally an investigative procedure and is exempt from evidentiary procedures.

2- Elements of the Crime of Unlawful Arrest

According to Abdul Qadir Auda (2019), For the commission of any crime, three elements must be present : the legal element, meaning the existence of a legal provision that prohibits the act and prescribes a penalty for it; the material element, which refers to the conduct constituting the crime, whether an act or an omission where the law imposes a duty to act; and the moral element, which is the perpetrator's awareness of the nature of his act and his intention to commit it. These elements are indispensable for any crime; if any one of them is absent, the crime either does not exist or takes on a different legal characterization .

While crimes are generally committed by any person who engages in criminal conduct, certain crimes — including those infringing on rights and freedoms — can only be committed by persons holding specific statuses, such as public officials or persons entrusted with a public service. The crime of unlawful arrest is only realized when its elements, as stipulated in Article (322), are fulfilled: the legal, material, and moral elements, which will be addressed in turn.

The Legal Element of the Crime of Unlawful Arrest

A crime is an unlawful act, and it derives this character from its conformity to a legal provision that criminalizes it and prescribes a penalty, in accordance with the principle of no crime and no punishment except by law. For example, assault on life falls under the provisions criminalizing homicide; however, the act becomes lawful when justified by a cause of justification, such as lawful self-defence .

Islam preceded positive laws in establishing the principle of legality, as reflected in the Qur'anic verse: "And We never punish until We have sent a messenger" . The Iraqi Penal Code affirms this principle in Article (1): "No penalty shall be imposed for an act or omission except on the basis of a law that criminalizes it at the time of its commission...". This principle serves as a fundamental safeguard to protect individual freedoms from arbitrariness, enabling individuals to know whether their conduct is lawful or criminal.

The legal element is composed of two components:

1- Conformity of the Act to a Legal Provision

The existence of an explicit and clear provision criminalizing the act or omission is a fundamental component of the legal element . When the legislator criminalizes conduct, it is to protect a legally protected interest, provided that the provision is clear and not inferred by analogy or implication . The Iraqi legislator criminalized unlawful arrest and specified its penalty in Article (322): "Any public official or person entrusted with a public service who unlawfully arrests, imprisons, or detains a person in cases other than those prescribed by law shall be punishable by imprisonment for a period not exceeding seven years or by detention."

2- Absence of a Cause of Justification

When a cause of justification exists, the act becomes lawful and is not punishable, as justification negates the criminal character of the act when it occurs under circumstances permitting it . Arrest is not considered a crime if carried out by a public official in execution of a legal duty or a lawful order from a superior .

The law identifies two situations:

- Permissive (Article 102 of the Criminal Procedure Code): Arrest without a warrant is permitted in cases of flagrante delicto, escape of an accused, apprehension of an armed person in violation of the law, or a person found intoxicated or mentally disturbed causing disorder .
- Mandatory (Article 103): Arrest is mandatory upon the issuance of a judicial order, discovery of an illegal weapon, existence of evidence of an intentional crime, or assault on a person entrusted with a public service.

The Material Element of the Crime of Arrest

The material element encompasses all that constitutes the essence of the crime and has a physical nature perceptible to the senses. The law does not recognize crimes without a material element, as it represents the external manifestation of the crime that brings it into existence . It is the act through which the crime is completed; no crime exists without it, and no individual is held accountable for any conduct unless such conduct is criminalized by law and constitutes an infringement on a right deemed worthy of protection by the legislator. The presence of the material element is thus a prerequisite for the existence of a crime, in accordance with the principle of no crime and no punishment except by law — without the material element, the legislator may not intervene to impose punishment .

Article (28) of the Iraqi Penal Code defines the material element as “a criminal conduct by committing an act criminalized by law or refraining from an act required by law” .

The Iraqi legislator has criminalized assaults on a person’s right to personal security (the right to move freely and return), due to the seriousness of these acts and their violation of human rights and freedoms guaranteed by the constitution to safeguard rights, freedoms, and human dignity. This is enshrined in the core of Article (322) of the Penal Code, which states: “Any public official or person entrusted with a public service who arrests, imprisons, or detains a person in cases other than those prescribed by law shall be punishable by imprisonment for a period not exceeding seven years or by detention...”

In light of the foregoing provision, it is clear that the material element in the crime of arrest is represented by the infringement on an individual’s personal freedom through the criminal conduct manifested by the act of arrest, detention, or both. This act must be unlawful and committed by a person holding the status of an official or a person entrusted with public service — which, for the purpose of this study, refers to members of the security apparatus. The following points will address these elements in detail:

First: Material Facts of the Crime

We clarify the material facts of the crime by focusing on the act of arrest and its unlawfulness:

The Act of Arrest:

The act of arrest is the criminal conduct, meaning the voluntary behavior undertaken by the

perpetrator with a criminal intent. It is a voluntary physical action . In the crime of arrest, the criminal act is represented by the arrest, detention, or both together. Arrest means forcibly seizing an individual, restricting their freedom, and preventing their movement without their consent or will, regardless of the duration of the arrest .

Legislation aims to avoid prolonging the duration of the arrest due to its negative effects. The Iraqi Constitution (Article 19/13) stipulates that the investigation papers must be presented to the judge within 24 hours of the arrest, and the suspect must be interrogated within this period, after which release or detention is decided . Likewise, Article 123(a) of the Code of Criminal Procedure mandates interrogation of the suspect within 24 hours of the arrest. This demonstrates that exceeding this period constitutes arbitrary arrest, and respecting rights is a constitutional and international fundamental principle . The law does not require that the arrest occur in a specific place; it may take place publicly, privately, or even in the home. The place of detention may be fixed or mobile, such as a vehicle. The legal consequence is deprivation of the individual's freedom of movement .

The means of arrest are not specifically defined by law; they may involve deceit, threat, or merely an unlawful order issued without authorization from competent authorities. Article (322) stipulates that the crime may be constituted by the act of arrest alone, detention alone, or both combined. Arrest may occur without detention, such as releasing the arrested person immediately, and detention may occur without arrest, such as holding someone in their home or a police officer detaining another officer at the station .

Hence, the crime is established only if the arrest is unlawful. A lawful arrest is one carried out based on an order from a competent authority or within the performance of duty, such as an arrest by police under a judicial order or the commitment of a mentally ill patient to a hospital pursuant to a medical order.

Unlawfulness of the Arrest

For the crime of arrest to be established, the arrest must be unlawful, meaning it falls outside the cases permitted by laws and regulations. A lawful arrest is one carried out based on an order issued by a competent authority within the limits of its powers; such an act is considered lawful and is not punishable . The law grants public officials discretionary authority to perform their duties under specified conditions and purposes; if these are violated, the arrest becomes unlawful.

According to Article 102 of the Code of Criminal Procedure stipulates cases in which an arrest may be made without a judicial order, such as in *flagrante delicto* offenses, flight of the accused, sentencing to deprivation of liberty, or if the person is in a state of intoxication or causing public disturbance . In these circumstances, security authorities or individuals bear no criminal liability.

Furthermore, Article 103, however, obliges the police and judicial officers to arrest certain individuals, such as those subject to arrest warrants, those carrying weapons unlawfully, suspects in committing felonies or intentional misdemeanors, or persons assaulting judicial officers during the performance of their duties . Arrests under these circumstances are lawful, and the executors bear no criminal responsibility. Outside these cases, or if security personnel exceed their powers or fail to release the detainee after the issuance of a release order, the arrest or detention is unlawful and entails criminal liability.

If a security officer mistakenly believes that the act of arrest falls within their jurisdiction when it does not, the act remains unlawful—for example, arresting a person by mistake due to a name similarity or pursuant to an unlawful order . Nevertheless, the legislator partially exempts liability in cases of good faith where the actor acts on reasonable grounds and appropriate precautions, pursuant to Article 40 of the Penal Code, which allows non-punishment of the official if they believed the legality of their act or were executing an order that must be obeyed . However, proving bad faith is practically difficult in courts.

Second: The Status of the Perpetrator and the Exploitation of Public Office

For the crime to be established, the perpetrator must be a public employee or an individual entrusted with a public service. The following explains these two concepts, as well as the exploitation of public office in the commission of the crime.

The Status of the Perpetrator:

As a general rule, a crime is committed by the individual who performs the criminalised act. However, certain crimes, such as the crime of unlawful arrest, require a specific status . Article (322) stipulates that the perpetrator must be a public employee or a person entrusted with a public service, as they represent state authority at the time of committing the crime.

In criminal law, the concept of a public employee is broader than that in administrative law, as it aims to protect public interests . The Penal Code does not provide a precise definition of a public employee, but legal scholars have defined it as an individual working for the state or the socialist sector, whether permanently or temporarily .

Legal doctrine relies on an objective criterion that focuses on the activity performed by a person for or on behalf of a public entity, regardless of the legal nature of the underlying relationship . In criminal law, the term public employee encompasses anyone assigned by the state to perform a public activity—whether permanent or temporary, paid or unpaid—including members of the judiciary, police, military forces, and de facto employees . By contrast, in administrative law, the concept is confined to those employed on a permanent basis in a public utility managed by the state or a legal person governed by public law .

The administrative legislator has not provided a comprehensive and exclusive definition of a public employee but has instead offered various definitions across civil service and disciplinary laws . For example, the Civil Service Law (103/1931) defines a public employee as “every person entrusted with a position in the government in return for a salary...”. Law (24/1960) defines it as “every person entrusted with a permanent position included in the official staffing of employees”. Similarly, the State Employees Discipline Law (14/1991) defines a public employee as “every person entrusted with a position within the staffing of the ministry or entity not associated with a ministry”. Under Decision (150/1987), even workers are considered public employees .

The administrative judiciary defines a public employee as anyone performing governmental work or work for a public interest, regardless of their title . It is thus apparent that administrative law adopts a narrower concept of a public employee, as its purpose is to regulate the relationship between the employee and the state in terms of rights and duties. Defining a public employee comprehensively remains difficult due to the multiplicity of laws and the evolving concept of public service .

As for an individual entrusted with a public service (mukallaf bi-khidma ‘amma), the legislator

clearly defines this in Article (19/2) of the Penal Code as “any public employee, worker, or person assigned a public duty in the service of the government, its official or semi-official departments, or its affiliated entities. This includes heads of authorities, arbitrators, experts, and others who perform a public service, whether for pay or without pay, and the description does not lapse upon termination of service if the act occurred during the period of holding such a status.” Unlike a public employee, this status does not require permanence or stability in the position; it suffices that the person has a temporary connection with the government.

Accordingly, the perpetrator in the crime of unlawful arrest must be a representative of authority, whether as a public employee or as a person entrusted with a public service, in any official or semi-official entity, or in utilities, institutions, or companies in which the state holds a stake, or anyone authorised by the state to perform a public service to ensure the functioning of public utilities.

Exploitation of Public Office in the Commission of the Crime:

It is not sufficient for the perpetrator to merely be a public employee; the unlawful act must have been committed through reliance on their office, authority, or influence. The crime is realised when the perpetrator exploits their position or the powers and means afforded to them by virtue of it.

The unlawful conduct may take the form of an act that is, in itself, legally valid but is used as a pretext for the crime, such as arresting a person outside the legally prescribed circumstances, or issuing an arrest warrant in cases where the law does not permit it . An act is considered lawful if it is based on a legitimate cause, complies with the law, and is performed in good faith to achieve its lawful objective. However, when the perpetrator exceeds their authority, the act becomes an assault reliant on the power of office.

The unlawful conduct may also consist of an act that is inherently illegal and outside the scope of official duties, yet takes advantage of the fear inspired by official authority, the trust of citizens in representatives of authority, the obligation of subordinates to obey, or other means made available by the office .

Therefore, it is not required that the act occur during or because of the performance of official duties; it suffices that the crime was committed by exploiting the material or moral capabilities provided by the office, whether during official working hours or outside them, and regardless of place or time, as long as the perpetrator relied on the actual power or means afforded by the office to achieve their criminal purpose.

The Moral (Mental) Element

A crime is not merely a material entity performed by the perpetrator; it is also a psychological construct, as established in various legal systems . The moral element represents the psychological foundation underlying the material aspects of the crime and governs them. It constitutes the internal, mental dimension of the criminal act . There can be no liability for the criminal result unless the criminal behaviour is linked to the mental state of the offender . Hence, the significance of the moral element emerges in defining the scope of criminal responsibility.

The moral element plays a fundamental role in criminalisation; no crime exists without it, as it is the legislator’s means of determining who is criminally responsible. No individual can be held accountable for a crime unless there is a connection between its material components and their mental state. The material act of a crime alone is of no concern to the legislator unless it

originates from a person who is accountable and subject to punishment. Justice requires that punishment is imposed only upon one whose mental state is connected to the material aspects of the crime; otherwise, the objectives of deterrence and rehabilitation would fail .

The form of the moral element is determined by the extent to which the individual's mental state controls the material elements of the crime. If the individual's mind is directed towards committing a fault in its general sense, it constitutes the essential basis of criminal responsibility. This fault may be intentional (criminal intent) or unintentional .

The crime of unlawful arrest, as set out in Article (322) of the Iraqi Penal Code, is an intentional crime. The perpetrator intentionally commits the act of arrest or detention, fully aware that they are unlawfully depriving the victim of their liberty without legal justification. The motive is irrelevant .

This crime requires general criminal intent; it cannot occur through unintentional fault because it demands intent. If the arrest results from negligence or lack of caution, even with good faith, the crime is not considered intentional . Conversely, if the intent is malicious—for instance, if a law enforcement officer intentionally arrests the wrong person out of enmity—criminal liability is established .

If a law enforcement officer believes in the lawfulness of their action based on a procedurally defective arrest warrant or due to ignorance of its invalidity, genuinely believing in the validity of the procedure, the criminal intent is negated . Thus, good faith negates intent, whereas bad faith—where the perpetrator deliberately seeks to harm another—establishes criminal intent.

This distinction lies between unintentional fault and intent. If only fault is present, the intent is considered innocent; whereas if intent exists, liability arises for an intentional crime. This assessment falls within the jurisdiction of the trial judge. Accordingly, the analysis focuses on criminal intent, which consists of knowledge of the crime's elements and a will directed towards achieving or accepting its consequences . The Iraqi legislator defines intent as “the perpetrator's direction of their will to commit the act constituting the crime, aiming at the criminal result that occurred or any other criminal result” . In criminal intent, the perpetrator's will is directed towards committing the act constituting the crime and bringing about the result punishable by law . Intent consists of two elements: knowledge and will .

First: Knowledge

Knowledge means awareness of the elements necessary to constitute the crime. Without it, criminal liability cannot be established . For intent to exist, the offender must know all the elements constituting the crime as defined by its legal model .

In the crime of unlawful arrest, the offender must be aware of the nature of the conduct they are undertaking, recognise that it constitutes an assault, and understand its illegality and compliance with legal conditions . The belief in the lawfulness of the act negates intent, whether based on a mistake of fact—such as mistaking identities—or a mistake of law .

However, intent is not negated if the belief stems from ignorance of criminal provisions, as ignorance of the law does not exempt one from liability under Article (37/1) of the Iraqi Penal Code . Therefore, claiming ignorance or misinterpretation of the Penal Code provisions is not acceptable as a defence to negate criminal intent .

The offender must also be aware of the criminal result and the violation of protected rights (85).

Thus, intent requires that the offender knows the right being violated, the danger posed by their conduct, and the illegality of their act.

Second: Will

Will is an essential element alongside knowledge. It is a mental activity directed at achieving the elements of the crime . It is an activity arising from awareness and understanding and aimed at achieving a specific objective. It is not enough for the will to be directed at the act alone; it must also be directed at the resulting consequence . Will is based on the awareness of the nature of the act and its consequences, as well as on the individual's capacity to choose and control their behaviour.

In the crime of unlawful arrest, the will must be directed at both the act constituting the crime (arrest or detention) and its result (the violation of liberty) . If the act is committed under physical coercion or in a situation of legal necessity, criminal intent is not established. Similarly, if the act results from negligence or lack of foresight, intent does not exist. In this crime, criminal intent is not affected by motives, as they do not form part of its elements nor negate it .

Penalty for Unlawful Arrest

Punishment is defined as “a sanction imposed in the name of society, pursuant to a judicial ruling, upon whoever is proven responsible for the crime” . It is “a sanction that entails infliction of suffering, determined by the legislator in the Penal Code, and imposed by the criminal judge pursuant to a ruling upon whoever is proven responsible for the crime and is deemed fit for it.” From this, it follows that society alone has the right to demand the imposition of punishment upon the person proven to have committed the crime, through the institutions representing society, and according to the procedures and conditions specified by law.

Thus, punishment, as clarified in these definitions, is a sanction prescribed by law. No punishment may be imposed unless provided for by law, and a judge may not invent and impose a punishment that the law does not provide for . Similarly, it cannot be imposed without a judicial ruling. As a sanction, it is subject to the general rules of criminalization and punishment. According to the Penal Code, punishments take three principal forms: principal penalties, accessory penalties, and complementary penalties.

Principal Penalty for the Crime of Unlawful Arrest

A principal penalty is one that, on its own, fulfils the purpose of punishment. It may be imposed independently without being coupled with another penalty, and it applies only if pronounced by the trial court with its extent specified where divisible . The Iraqi Penal Code enumerates these penalties in Article (85), which states:

“The principal penalties are: 1- Death penalty, 2- Life imprisonment, 3- Temporary imprisonment, 4- Rigorous imprisonment, 5- Simple imprisonment, 6- Fine, 7- Detention in a reformatory for delinquent youths, 8- Detention in a reform school.”

As for the principal penalty for the crime of unlawful arrest, the Iraqi legislator categorises it as a felony, punishing its commission in the basic form under Article (322) of the Penal Code with imprisonment for a term not exceeding seven years or with detention. The article provides:

“Shall be punished with imprisonment for a term not exceeding seven years or with detention any public official or person entrusted with a public service who arrests, detains, or holds a person in the circumstances provided for by law...” Therefore, the principal penalty for the

crime of unlawful arrest is imprisonment for a term not exceeding seven years or detention.

The legislator further aggravated the penalty, providing for imprisonment up to ten years or detention if committed by a person wearing an official uniform, falsely assuming an official capacity, or producing a forged warrant . The legislator thus distinguished between the penalty for unlawful arrest committed by individuals and that committed by representatives of public authority.

Accessory Penalty for the Crime of Unlawful Arrest

An accessory penalty follows the principal penalty by operation of law, without the need to mention it in the judgment . This crime attracts an accessory penalty because if the offender is sentenced to imprisonment for the crime of unlawful arrest, certain accessory penalties attach automatically by law. These include deprivation of the following rights and privileges :

1. The functions and services the offender previously held.
2. The right to vote or stand for election in representative bodies.
3. Membership in administrative or municipal councils, or in companies or management thereof.
4. Acting as guardian, trustee, or agent.
5. Ownership, publication, or editorship of any newspaper.

The Iraqi Military Penal Code No. (19) of 2007 (as amended) also prescribes accessory penalties such as dismissal, discharge, placement on half-pay list (for officers), and deprivation of seniority. These may be mandatory or discretionary depending on the type and extent of the principal penalty . Article (15), paragraph one, of the Military Penal Code mandates dismissal upon conviction for the death penalty, life imprisonment, or temporary imprisonment, while paragraph two allows discretionary dismissal upon conviction for detention .

Discharge, regulated by Article (17) of the Military Penal Code, applies exclusively to officers. Paragraph one mandates discharge if an officer is sentenced to detention exceeding one year; paragraph two allows discretionary discharge for detention not exceeding one year. Article (20) provides for reduction of rank for warrant officers and non-commissioned officers: paragraph one mandates reduction if sentenced to detention exceeding one year, while paragraph two allows it for detention under one year .

The Internal Security Forces Penal Code No. (14) of 2008 (as amended) similarly provides for accessory penalties, including mandatory and discretionary dismissal, and mandatory discharge . Article (38)(1) mandates dismissal by operation of law upon final conviction for:

1. Crimes punishable by death or imprisonment;
2. Terrorism and crimes against state security;
3. Crimes involving dishonour;
4. Sodomy or sexual intercourse crimes.

Paragraph two provides for discretionary dismissal upon final conviction with detention exceeding two years. Article (39) mandates discharge upon final conviction with detention, resulting in removal from office throughout the sentence period .

For categories other than military personnel and internal security forces, the legislator addressed dismissal in the Law on Discipline of State and Socialist Sector Employees No. (14) of 1991. Article (8/8) prescribes dismissal as a disciplinary penalty for employees convicted of a felony related to their function, whether sentenced to imprisonment or detention.

From the above, it is clear that as the offender in unlawful arrest relies on their official capacity, stripping them of this capacity by way of an accessory penalty significantly enhances protection of rights and freedoms, in addition to the general deterrence sought by punishment.

Complementary Penalty for the Crime of Unlawful Arrest

A complementary penalty, like an accessory penalty, is secondary. However, it differs in that it must be expressly imposed by the court in its ruling; it does not apply automatically, but must be pronounced and specified by the judge, and associated with a principal penalty. The crime of unlawful arrest may attract complementary penalties, as its principal penalty is imprisonment or detention. These apply to offenders sentenced to life or temporary imprisonment, or to detention exceeding one year.

Complementary penalties may include deprivation of one or more of the following rights for no more than two years from the completion or termination of the sentence for any reason. Article (100) of the Penal Code provides:

- 1- Holding certain public offices and services, specified and justified in the judgment.
- 2- Bearing national or foreign decorations.
- C- Bearing arms.

Another complementary penalty is confiscation, meaning the state seizes the offender's property or transfers ownership without compensation. Confiscation is thus a pecuniary, in rem penalty targeting specific property. Article (101) of the Penal Code provides:

“... The court may, upon conviction of a felony or misdemeanour, order confiscation of items seized which were derived from the crime, used in its commission, or prepared for use therein, without prejudice to the rights of bona fide third parties.”

This provision contemplates two types of confiscation: general confiscation, stripping the offender of all or part of their assets (e.g., half, third, or quarter), being the harshest financial penalty; and special confiscation, targeting property used in, derived from, or constituting the object of the crime (such as drugs or unlicensed weapons) (106). This penalty is generally discretionary in the absence of a specific statutory requirement (107). The judge is not obliged to impose it and may do so at their discretion based on the circumstances.

Conclusion

Having completed this research by the grace and guidance of God, we reached several findings and recommendations outlined as follows:

Findings

1. The Iraqi legal system emphasizes the protection of fundamental rights and freedoms, particularly the right to personal liberty and security, by imposing substantive restrictions on security agencies in the exercise of their functions, seeking a balance between the state's duty to protect society from crime and individuals' rights against security agencies.

2. The legislator identified three forms of crimes against personal security: arrest, detention, and imprisonment, each of which constitutes a distinct offence.
3. Arrest is a temporary measure that may not be extended under any circumstances due to its adverse effects on the accused. The legislator limited its duration to no more than twenty-four hours, considering any extension as abuse of authority, demonstrating concern for human rights principles.
4. The crime of unlawful arrest requires no specific intent; general criminal intent suffices.
5. The offender's official capacity (as a public official or entrusted with a public service) is integral to the legal model of this offence.
6. Where security agencies act in the belief that their arrest was lawful, provided good faith and reasonable grounds exist, the legislator considers this a justification precluding criminal liability.
7. The legislator permits law enforcement to use force in effecting an arrest where necessary, as per Article (108) of the Code of Criminal Procedure.
8. The penalties for unlawful arrest include principal, accessory, and complementary sanctions.
9. Despite the legal provisions limiting the powers of security agencies, a gap exists between the law and practice, as some violations occur due to weak oversight and accountability mechanisms.
10. Iraq's security and political conditions significantly influence compliance with legal restrictions, with heightened security challenges sometimes cited to justify breaches in legal procedure.

Recommendations:

1. Revise Article (40) of the Penal Code to require security agencies (public officials) to bear the burden of proving the lawfulness and reasonable grounds of their belief.
2. Amend Article (103) of the Code of Criminal Procedure to limit warrantless arrests for misdemeanours to offences of a certain gravity with defined penalties.
3. Amend Article (108) to specify the felony and serious misdemeanour offences justifying the use of force in arrests.
4. Avoid unnecessary force in arrest operations by law enforcement, ensuring proportionality and refraining from firearms use where alternatives exist, in line with the principle of personal liberty.
5. Urge security agencies to enforce force-use regulations, conduct impartial investigations into incidents endangering life or dignity, and prosecute offenders in line with legal safeguards, including prohibitions on arbitrary arrest and the right to humane treatment.
6. Establish independent oversight bodies to monitor law enforcement compliance with legal standards, receive public complaints, and ensure effective accountability.
7. Ensure continuous training of law enforcement personnel in human rights and legal standards governing their conduct.

8. Support the role of the media and civil society in monitoring law enforcement and exposing legal breaches, contributing to the rule of law and respect for rights and freedoms.

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1458 *Substantive Constraints on Security Agencies in Cases of Unlawful*

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