

Guarantee of the accused in the interrogation in Iraqi law and Islamic Sharia

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ضمانات المتهم في الاستجواب في القانون العراقي والشرعية الإسلامية

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Abstract:-

Interrogation has an important position in the preliminary stages of investigation because it is a method to achieve the truth and judge the accused. The discussion and interrogation of the accused include two cases: Either he voluntarily confesses to the accusations and as a result, he will be punished, and this is one thing. It means that achieving justice causes the offender not to escape from the law, as well as fear and deterrence for those who think like him and intend to do what this deviant has done, and in addition, society will be safe. We find that there is a competent authority that prosecutes, confronts and punishes the offender, but if the accused does not know the crime to which he is charged, he cannot defend himself and rejects the evidence that confronts him with the guarantees of Sharia and the law. It also includes achieving justice by not punishing an innocent person and preventing him from taking revenge by the victim or his relatives, and this investigation distinguishes between interrogating the accused and responding him to the competent authorities in each of these cases. Legal and legal guarantees are mentioned in detail, and Islamic Sharia has been ahead of man-made laws in terms of time and content in the guarantees.

Key word: Guarantee of the accused, Iraqi law, Islamic Sharia.

المخلص:

إن الاستجواب يحتل مركزاً هاماً من بين إجراءات التحقيق الابتدائي؛ لأنه وسيلة للوصول إلى الحقيقة وابتناء الأحكام عليه بعده حيث أن مناقشة المتهم واستجوابه لا يخل من حالتين إما أن يعترف بالتهمة الموجهة إليه طوعاً، وبالتالي معاقبته، وفي ذلك تحقيق للعدالة بعدم إفلات المجرم من قبضة الحق والقانون، وأيضاً فيه تخويف وترديد لمن يفكر مثله وينوي القيام بما قام به هذا الشخص المنحرف، وعلاوة على ذلك يكون المجتمع في مأمن حينما يرى أن هناك سلطة مختصة تتابع المجرم وتواجهه وتعاقبه، وإما أن لا يعترف بالتهمة المنسوبة إليه، ويدافع عن نفسه، ويفند الأدلة التي تواجهه من خلال الضمانات التي منحتها الشريعة الإسلامية والقانون، وفي ذلك أيضاً تحقيق للعدالة بعدم معاقبة الشخص البريء، والمحافظة عليه من التعرض للانتقام من قبل المجني عليه أو ذويه، وفي هذا البحث التفريق بين استجواب المتهم ومساءلته والجهات المختصة بكل واحد منهما، وفيه ذكرت الضمانات الشرعية والقانونية بصورة مفصلة، وفيه أن الشريعة الإسلامية سبقت القوانين الوضعية من حيث الزمن والمضمون في الضمانات .

الكلمات المفتاحية: ضمانات المتهم، القانون العراقي، الشريعة الإسلامية.

Introduction

Interrogation is considered as one of the most important issues in determining the fate of the accused, because his conviction and acquittal are generally subject to the results issued by the competent authority in the interrogation process and he recognizes the results issued through his defense or personal lawyer. The lawyer informs him in detail about his right to know the charges before the interrogation and to provide ample opportunity for what he wants to testify, and the negative aspect for him if he cannot deny the charges and the inability to answer convincingly to the questions faced with that are intended to be answered. The importance of interrogation is not limited to the accused, but extends to the whole of society, because without interrogating the accused and punishing the criminals, and with the high role of interrogation in the life of individuals and society, it cannot have a happy life and security and stability in society through law or Islamic sharia.

Man-made laws in general and Iraqi law in particular focus on interrogation and surround the accused person who was made with a strong cover of guarantees. This investigation is an excuse for the interrogation to proceed in the right direction, i.e, to clarify the truth and identify the perpetrator of the crime by not resorting to illegal means for his forced confession, and to express the weakness of the accused in the interrogation with the competent authority. It also prevents him from imposing something on him while he does not acknowledge it, as it is a process in the past as well as now.

In the past, in our time, in some dictatorial regimes, all kinds of physical and psychological torture were used to confess. We have chosen this issue for the following reasons:

Interrogation is a central procedure in the preliminary stages of investigation, as it is the main point on which the verdict is invoked, either in favor of the accused to prove his innocence or to convict the accused.

1. The importance of interrogation plays an important role in reducing crimes, strengthening security and stability, and achieving justice in society.

2. Insufficient attention in research and writing by the authors to this vital and important issue without which no lawsuit can be filed.

The problem of the investigation is in the legal dimension, and we understand from the Iraqi law, that the legislator did not pay attention to the definition of interrogation and did not specify a specific form and number. The time of interrogation of the competent authority, which could lead to a prolongation of the interrogation of the accused and as a result adversely affect the soul and reputation of the accused, has not been paid attention; also, the Iraqi legislature also did not oblige the competent authority to inform the accused that he has these conditions and the right to remain silent and refuse to answer before interrogation. There is a mistake between the interrogation and the question of the accused according to the scholars, and in the jurisprudential dimension, the problem is that this issue does not have a specific title, although there are many examples of narrations from Prophet and the rulings of the Prophet (peace and blessings of Allaah be upon him) and the Companions (Allaah be pleased with them), but they are scattered and numerous, they must be researched and collected.

Purpo

The purpose of the research is to answer the questions that arise during it, the most important of which is what is the legal basis of interrogation? What are the sharia and legal guarantees for the accused during the interrogation? What are the consequences of non- interpolating or doing it without fulfilling its conditions? And many other questions.

Method:

In this study, we rely on the "analytical approach" by analyzing the legislative and jurisprudential texts and the amending texts of Iraqi Law 23 of 1971, and we also rely on the "comparative approach" between Islamic Sharia and Iraqi law.

The interrogation in Iraqi law and Islamic Sharia

To understand the issue in all its aspects, we decided to divide this research into three parts. After this introduction, we have dedicated the first condition to the definition of interrogation from a

lexical and idiomatic point of view and its difference with the question from the accused. The second is the guarantee of the accused in Iraqi law and the third condition is the guarantee of the accused in Islamic law, and then we end the investigation with a clear conclusion, which contains the most important findings and recommendations⁽¹⁾.

The first part of the interrogation of the accused and its guarantees:

The first thing: the lexical and idiomatic definition of interrogation:

Literary definition of interrogation:

It was answered, and the source is the answer, and the name is the answer. He says: He answered the question, it is said that he heard badly, then he answered badly, answer and answer means that God has answered his prayer, answer and answer: Conversation and people answered: They answered each other.

Interrogation in the term:

The Iraqi legislature has not defined interrogation because it is its habit to refuse to provide definitions of legal terms, and assigned it to legal experts and not specifying a specific form for it, but jurists have defined it with definitions. Include:

That is: interrogating the accused and discussing the facts of the case he is accused of committing, confronting various evidences and hearing his defense about that accusation⁽²⁾.

It is defined as: asking the accused about the charge or charges against him and the evidence against him and his question about his defense⁽³⁾.

Ahmed Abul-Rousse defined it as: the accused confrontation with the charge against him, asking him to express his opinion on it, and then discussing it in detail, in the evidence of the case, whether it is evidence or denial, as an attempt to expose the truth⁽⁴⁾.

The importance of interrogation

Interrogation plays an important role in the preliminary stages of the investigation, because it is a useful way to get to the truth. Debating the accused in the evidence of the charge either leads to

the confession of the accused, and then leads to his conviction and trial, or the rejection of accusations of accused by the accused and the rejection of accusation of the accused, evidence against him, and consequently his acquittal or release.

The importance of interrogation lies in its seriousness, as it may bind the accused tightly and make him mentally exhausted, with numerous questions being asked, which lead him to statements that are not in his favor, although they may be untrue.

Through these definitions, it seems that the purpose of the interrogation is twofold: first, to try to gather evidence that the accused was involved in the charge against him and second, to gather evidence that the accused was innocent of the charges against him in the past, when the purpose at that time was to convict the accused. The accused can now deny the charge against him or confess that he committed the crime for which he was accused. The confession made must be satisfactory, but other stages of the investigation must be completed. Since he could lie in his confession, therefore, the Iraqi Court of Appeals, in decision dated 1/30/1978, sentenced the criminal court of Babol, which had sentenced the accused to life imprisonment, on the basis of its verdict based on the confession of the accused against the investigating judge, who denied the confession that he had brought the women to his family and tortured them for the fear of him. After reviewing the decision of the above court, the appellate court decided to cancel his sentence due to lack of sufficient evidence and release him, as it was concluded that the facts of the case contradicted this confession and the testimony of witnesses at occurring crime showed that the accused did not testify by participating in the crime, and the victim's wife did not mention the injured woman in her testimony that the accused was watching the criminals, and another witness who knew the accused testified that he was not seen with her. In addition, the attached medical report showed that the defendant's stable vision was poor and that his health condition was so poor that he was unable to commit the crime, as it was stated in the defendant's confession, and this shows us this confession as evidence of conviction is not admissible if the confession was false and proved to be false, because it contradicted the facts and testimony in the case file⁽⁵⁾.

The difference between interrogation and asking the accused

The purpose of the interrogation of the accused is merely to direct the accusation and to confirm what he says about it, without discussing it and without confronting the evidence against him. This is because the interrogation of the accused is one of the methods of gathering evidence and not one of the methods of investigation, and it can be carried out by the interrogator as a member of the judicial police, as provided in Article (43) of the law. "If the accused informs a member of the judicial police about a crime, I must inform the judge," the Code of Criminal Procedure states. The public investigation and prosecution is immediately transferred to the scene, records the victim's statements and informs the accused orally. About the charges against him..."⁽⁶⁾.

In the case of interrogation, this is one of the methods of investigation through which the interrogator proves the identity of the accused and discusses the charges against him in detail in order to reach his confession that he either confirms it or denies it and the occurrence of the crime and its attribution to the accused, at the same time, it gives the accused the opportunity to defend himself⁽⁷⁾.

Second issue: Guarantee of Interrogation in Iraqi Law:

According to the importance of interrogation in the preliminary investigation, the Iraqi legislature informs the accused of several basic guarantees while being interrogated.

First: Interrogation of the accused by the investigating judge.

The law restricts the interrogation of the accused to the judge and the interrogator, and no one else is allowed to do so, such as a judicial officer who does not have the right to directly interrogate the accused, but some investigative measures may be taken under Article 43 of the Code of Iraqi Criminal and Judicial Procedure and when a crime is observed, and the police officer, during the investigation process under Articles (49 and 50) of the Code of Criminal Procedure, have the right to present to the investigating judge the procedures that he has performed.

This guarantee was approved in the Constitution of the Republic of Iraq in 2005 in paragraph (b) of Article (37): "If a preliminary investigation is carried out," no one may be arrested or interrogated. "Investigated by judges and interrogators under his supervision, and in the absence of the judge, and the need for immediate action by the interrogator or the person in charge of the investigation. The case should be presented to any judge in or near your region; To review the necessary measures, this method is permitted in Article 51 (d) and states: "The files of the cases mentioned in paragraphs (b) and (c) shall be submitted to the competent investigating judge as soon as possible, and the decisions and procedures prescribed therein shall be in accordance with the decisions and actions taken by the investigating judge⁽⁸⁾.

Second: The accused must be interrogated within twenty-four hours of his presence. Article (123/ a) of the Iraqi Code of Criminal Procedure states: "A judge or interrogator must interrogate the accused within twenty-four hours..."

Third: informing the accused of the crime attributed to him. Article (123/ a) of the Iraqi Code of Criminal Procedure stated: Informing the accused of the crime attributed to him and its consequences

An important guarantee for a fair trial for the accused is that he is aware of the charges against him. So that he can defend himself... ".

He must record his statements about it, citing the evidence needed to refute it, and he can appeal to the accused if necessary to clarify the truth.

Fourth: Informing the accused of the charges against him, before starting the investigation with him for the first time before the judge, according to Article (123) of the Code of Criminal Procedure⁽⁹⁾.

Fifth: The right to silence

This means that the accused has complete freedom to respond and refuse to do so, as well as to confess or deny⁽¹⁰⁾.

Article (126) of the Iraqi Code of Criminal Procedure No. 23 of 1971 states: "(a) The accused shall not take an oath unless he is a witness against the other accused. B. Defendant should not be forced to answer questions unless at his own request.

Article (128/ a) of the previous law states that the accused is free to sign the minutes in which his statements were recorded, because he stipulates that the statements of the accused to be recorded and signed by the judge or the interrogator in the minutes. The accused and the judge or interrogator, and if he refuses to sign, it must be proved in the file. "

The insertion of this text by the Iraqi legislature is an extraordinary and useful task. Because it is expected that the accused will sometimes be forced to make statements that he does not want to confess against himself, and by this result, he can return what he was forced to say against himself in spite of force. That he does not sign a file that contains the things he was forced to do.

Article 127 of the same law also states: "It is not permissible to use any illegal means to influence the accused to obtain a confession. Illegal means may include abuse, threats of harm and temptation, promises and threats, the effect and use of drugs, toxic substances and narcotics.

The Law on the Administration of Iraqi Affairs for the Transitional Period confirms this article in Article (15), which states: "Torture in all its forms, physically and mentally and in all cases, as well as professional and inhuman cruel treatment is prohibited, and no confession obtained under duress or inhumanely is not accepted as evidence in court. Torture or intimidation for any reason or in any other criminal procedure is prohibited."

Article (179) of the Iraqi Code of Criminal Procedure states: "The court may question the accused as much as it deems fit to reveal the truth and present evidence before or after the charge against him. Refusing to answer proved as evidence against him.

From the above, it seems that the Iraqi legislature is silent at all stages of the criminal case and refuses to respond to the accused, but without requiring the investigating authority to warn the accused of this right.

It is worth mentioning that in the note of the interim authority of the coalition, this obligation was added by adding paragraph b) in Article (123) of the Iraqi Code of Criminal Procedure, which states: Inform the accused from the matter. "B. Before conducting an

investigation with the accused, the investigating judge must inform the accused of the matter. For example: he has the right to remain silent and no presumption against him can be deduced from the exercise of this right⁽¹¹⁾.

In paragraph (h) of the above note, it was stated that: "The phrase refusal to respond as evidence against the defendants mentioned in Article 179 is canceled", while Article 179 does not include such a statement⁽¹²⁾.

Sixth: Non-using illegal means against the accused⁽¹³⁾.

The Iraqi legislature has banned all illegal methods for interrogating defendants used to obtain the defendant's confession, but he must be safe and avoid outside influences, as the defendant can easily be forced to speak, he can hardly be forced to tell the truth. Therefore, when the accused is exposed to the effects, he loses his will and spoils his confession. All forms of prohibited effects can be limited to two types:

1- According to Article (127) of the Iraqi Code of Criminal Procedure, physical coercion states: "The use of any illegal means to influence the confession of the accused is not allowed and abuse and threat of harm are among the illegal means." Physical coercion involves attacking the accused with physical force that does not have the freedom of choice of the accused or affects him /her relatively and he /she cannot resist it. Poor living conditions, confinement in dark cells, preventing family confrontation, giving drugs and hypnotizing the accused, and a statement issued by the accused as a result of one of the above are not considered, as in Article (218) of the Law The Code of Criminal Procedure in Iraq as follows: The interrogation form must not have been issued as a result of physical or moral coercion, promise or threat "⁽¹⁴⁾. In addition, what was stated in Article (37/ c) of the Iraqi Constitution in 2005, which provided: "All forms of mental and physical torture and inhuman treatment are prohibited, and no confession obtained through coercion, intimidation or torture is acceptable, and the injured person may demand for compensating any material or moral damage affected him or her according to law."⁽¹⁵⁾

2- Moral coercion: It is a threat made by the interrogator to influence the will of the accused to force him to confess against him.

Moral coercion arises from the accused threatening to harm or assault him or her family, from tempting him or her, and from making promises and threats. Thus, the accused is affected, which weakens his will, and the statements made by him are ignored and nothing is proven, and also as the accused, the defendant's swearing that he is truthful in his confession is not permissible, as Article (126/ a) of the Iraqi Code of Criminal Procedure states: "No defendant shall take an oath unless he is a witness against the other defendants."⁽¹⁶⁾

Seventh: Responding to the defendant's requests regarding witnesses and other documents⁽¹⁷⁾.

If the judge found that the accused is testifying against another accused in the same case, he should record his testimony and the case of each of them is different from the other case, because no one is allowed to combine the two characteristics of charge and testimony in one case. Then he begins to listen to him and writes his statements in accordance with the law of compilation of testimony in accordance with Articles (58, 67) of the Iraqi Code of Criminal Procedure that it is stated in Article (58): "Investigations starts by writing the testimony of the plaintiff or informed, then by the testimony of the victim, other prosecution witnesses, and anyone the litigants request to hear their testimony. " They should provide their information if it is useful for the investigation and testimony of persons who inform the judge or interrogator that they have information about the incident. Article (67) states:" If a witness is ill or something prevents him from attending, then the judge or interrogator must go to his place to testify "⁽¹⁸⁾

Third condition: interrogation in Islamic Sharia and its guarantees:

First: The legitimacy of interrogation in Islamic Sharia:

The noble Islamic Shari'a, through the hadiths of the Messenger of God (pbuh) and the narrations narrated from the companions and successors after him, is full of the idea of interrogation and its content. And if it is not named with this name, the interrogation has been seen in the action of the Messenger of God (pbuh). It is narrated from Sahl ibn Sa'd that a man came to the Prophet (pbuh) and said that the woman who mentioned his name had committed adultery. Therefore, the Prophet (pbuh) ordered anyone to

interrogate him to interrogate a woman accused of committing adultery. He said, "Yunes, go to this woman, and if she confesses, stone her."⁽¹⁹⁾ It is the order of the Messenger of God to interrogate the woman and ask about the veracity of the accusation leveled against her.

Because the Prophet (ﷺ) told him: If he confesses, the confession is only the result of interrogation. He also warned his comrades of the need to interrogate and discuss the accused in order to find out the truth. It is narrated from Imam Ali (AS) that he said:

بعثني رسول الله (صلى الله عليه وآله وسلم) إلى اليمن قاضياً، فقلت يا رسول الله ترسلني وأنا حديث السن لا علم لي بالقضاء ؟ فقال: إن الله سيهدي قلبك ويثبت لسانك، فإذا جلس إليك الخصمان فلا تقضين حتى تسمع من الآخر كما سمعت من الأول فإنه أحرى أن يتبين لك القضاء، قال: فما زلت قاضياً، وما شككت في قضاء بعد⁽²⁰⁾.

You send me while I am young and unaware of the judgment. The Prophet said: God will guide your heart and strengthen your tongue. Whenever two parties are sitting in front of you, do not judge until you hear both of them, this is more appropriate for you to clarify the judgment. Imam Ali (AS) says: Since then, whenever I was a judge, I have never doubted any judgment.

The evidence is that Imam Ali (AS) interrogated women to find out the truth.

Thus, it is clear that the provisions of the glorious Islamic Shari'a are surrounded by the laws involved in interrogation. During interrogation, the defendant protects him with many guarantees from the fear he experiences and allows him to have the opportunity to discuss the evidence and charges against him to show us that the legal guarantees of interrogation of Islamic jurisprudence in terms of time and content of many legal guarantees, which were full of positive laws related to the subject, have surpassed which is closer to its practical aspect theoretically and academically.

Third issue: Guarantee of the accused in interrogation in Islamic jurisprudence

There is evidence in the hadiths and the rulings of the Prophet (ﷺ) and his companions that the accused has the right to defend himself and reject the evidence against him, so no verdict should be issued

or a punishment should be imposed. Until after the interrogation is over.

Interrogation in Islamic law has several guarantees, including: Interrogation by the competent authority

The interrogation of the accused is allowed only by a person who conducts the preliminary stages of investigation. And what has been proven in Islamic Sharia is that the investigation was carried out by two parties, the governor of complaints and the government official⁽²¹⁾.

Which of the following is a matter of Shari'a policy to determine the authorized authority to conduct an inspection? Therefore, it has been said: "It is the right of the police governor to investigate evils such as alcohol, cannabis and similar cases and to block its excuse"⁽²²⁾

The accused should be found out of what the accused is accused.

The investigating authority may conceal the charge from the defendant for a period of time on the pretext that he has received the defendant's confession about the crime attributed to him, and the lack of informing due to the delay. His interrogation during this period has a negative effect on his mental state, and so he feels tired, confused and scared, and says what he does not want to do, but the great Islam rejects this method, because it is considered psychological torture, the effect of which may be greater for some people than physical torture. Therefore, it is not permissible for the investigating authorities to arrest and punish the accused without charge, and to treat the arrested person as the real perpetrator of the crime he is accused of, because the accused is innocent until proven guilty⁽²³⁾. Therefore, it can be said that this method is not the right of research reference. For the following reasons:

- 1- We mentioned above that the purpose of this method (interrogation) is not only to prove the accusation against the accused and convict him in this regard, but also the real purpose is to recognize his innocence, so it is necessary to give the accused enough time to deal with the accusation against you⁽²⁴⁾.

- 2- Islam forbids the torture of an accused whose guilt has not been proven, the arrest of the accused, his non-interrogation and his lack of knowledge of the delay in interrogation, because torture may affect his deteriorating mental condition⁽²⁾.
- 3- Islamic Sharia has allowed the arrest of the accused if necessary, so it must be estimated and the delay in the interrogation of the accused is a matter beyond the punishment of Sharia. However, speeding up the decision of the accused is desirable in the Islamic judiciary⁽²⁵⁾.

The right of the accused to remain silent during interrogation

We mentioned above that interrogation is not only a means of investigation to obtain the accused's confession, but also a means of defense. Therefore, the best weapon in the hand of the accused is to repel the charges against him, and in this case, the interrogator has no right to force the accused to speak and answer his questions, and the right to refuse to answer and choose silence is a fixed right of the accused in all stages of the case- and we will explain it in its place, God willing, especially if the accused feels that his words will lead to his conviction. He may be one of those people who is not able to defend himself, or if he is charged, his color changes, or he is shocked, or he shows signs that he has committed a crime during interrogation and according to the Prophet () - "Evidence is for the plaintiff"⁽²⁶⁾.

Scholars have also mentioned the following:

- 1- What the Prophet (pbuh) did in the story of Mu'izz al-Ghamdiyyah when they came to the Prophet (pbuh)- turned away from them by confessing his sin, and taught them to withdraw the confession, but they refused.

The Prophet (pbuh) imposed the hadd on them, and if they withdrew their confession, he did not set the hadd punishment on them, for the Prophet (pbuh), who is the legislator. Not only did he not force them to confess, but he ordered them to take it back, and this is with those who have admitted their sin, so what about those who have not proved their guilt and confessed?⁽²⁷⁾.

2- Denying the inalienable right is one who denies and thus defends his right, and one who denies should not be forcibly dealt with. Denial is a way of defending one's actions and silence is considered as defending self and it should not be used as a sign of condemnation. On the other hand, the plaintiff can reclaim his right with solid evidence⁽²⁸⁾.

Hence, Islamic law gives the accused the right to refuse to comment and remain silent during his investigation, because the judicial authority has no right to force him to break his silence, and his silence should not mean confession as a presumption of conviction⁽²⁹⁾.

The principle of equality and its role in achieving justice

Equality between the opposition is one of the basic principles of the judiciary in Islamic Sharia, and its implementation is a great guarantee for the accused, and many legal texts have indicated this great principle, and God has mentioned it in many verses. The Almighty says in the Holy Quran

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۚ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا⁽³⁰⁾

God firmly commands you to return the trusts to their owners and to judge fairly when you judge among the people. Certainly, [The command to restore trust and justice in judgment] goodness is what God preaches to you; Undoubtedly, God is always Hearer and Seer. Avoiding injustice on the part of the judge is to first understand the case, then not support any of the opponents, know God's judgment, and determine the eligible individuals.⁽³¹⁾

قال رسول الله ﷺ: (إن الله عز وجل قد أذهب عنكم عبية⁽³²⁾ الجاهلية وفخرها بالآباء...).⁽³³⁾

The Messenger of God () said: Indeed, God has removed the prejudice of ignorance and pride to your fathers from you.

It is clear from the above that the interrogation panel should not differentiate between the two opponents, whoever they are, and consider the rights of the accused and treat him as an innocent person because his guilt has not yet been proven.

The right of the accused to defend himself

The meaning of the right of the accused to defend is to prevent the accusation against him from being established. The use of the right is one of the necessities of human society and enables him to prove the cases contrary with the evidence at his disposal. Because if he cannot and is not allowed to use his right, the accidental feature, which is the charge, needs evidence to prove it, and the absence of the opposite cases becomes a fixed feature without evidence. For that, and this is something that is rejected and contrary to the rule agreed, that "the principle is innocence" and the exercise of the rights of the defense is not considered as one of the rights of the defendants alone if they wish to act. And if he wants to, he does not act on it, but it is a kind of right that is mixed with duty, and this is one of the duties of sufficiency and right for him. It also has many benefits for the whole society, which include understanding the truth, consolidating justice, defending and preventing injustice, and therefore the criminal does not escape and is not safe from punishment, and he and other criminals don't dare to commit this crime. Again, if the plaintiff claims his right and his case is pursued in the judicial authorities as well as for the payment of the accused by the plaintiff and the annulment of his case. For this reason, Islamic Sharia guarantees the right to defend the accused, and the scholars have inferred from the following:

From Ibn Abbas who quoted Imam Ali (AS) who said:

عن ابن عباس، عن عليٍّ، (عليه السلام) قال: بَعَثَنِي رَسُولُ اللَّهِ ﷺ رَسَالَةً، فَقُلْتُ: يَا رَسُولَ اللَّهِ: تَبْعَنِي وَلِنَا غُلَامٌ حَدِيثُ السِّنِّ؟ فَأُسْأَلُ عَنِ الْقَضَاءِ وَلَا أَكْذَرِي مَا أُجِيبُ، قَالَ: (مَا يُدْمِنُ تِلْكَ أَنْ أَذْهَبَ بِهَا أَلْمَأُؤُتُ) قَالَ: قُفْ: وَإِنْ كَانَ وَلَا بُدَّ، أَذْهَبُ أَتَا، فَقَالَ: (اتَّطَلَّقُ فَأَقْرَأُهَا عَلَى النَّاسِ، فَإِنَّ اللَّهَ تَعَالَى يُبْدِثُ لِسَانَكَ، وَيَهْدِي قَلْبَكَ) ثُمَّ قَالَ: (إِنَّ النَّاسَ سَيَنْقَاضُونَ، فَإِذَا أَتَاكَ الْخَصْمُ مَانٌ، فَلَا تَقْضِي لِوَاحِدٍ حَتَّى تَسْمَعَ كَلَامَ الْآخَرِ، فَإِنَّهُ أَجْدَرُ أَنْ تَعْلَمَ لِمَنِ الْحَقُّ) (٣٤)

You send me while I am young and unaware of the judgment. The Prophet said: God will guide your heart and strengthen your tongue. Whenever the two parties are sitting in front of you, do not judge until you hear the words of both of them. It is better for you to know who has the right in order to clarify your judgment.

The right of the accused to bring a lawyer

The accused has the right to defend self alone. As long as it is his right; If he wishes, he can hire someone to represent litigation instead of him, and the scholars are allowed to assign attorney in the

dispute, whether the client is a man or a woman. In the case of fraud in his litigation, he can fire his lawyer. And just as unpaid advocacy is allowed, so getting fee is allowed, for litigation, they have to make a contract with each other, in which they have to set a fee for a set period of time and for a set time.⁽³⁵⁾

Sarakhsi even pointed out that the confession of the dumb person should not be taken seriously and confirmed within the limits, and he said that because confessing it in adultery and theft needs to be said clearly, but the reference is not acceptable because the limits may predict suspicions on the same suspicion, they cannot show their reference, because they cannot indicate everything with a gesture, and this is unacceptable because if we impose the hadd, hadd with suspicion is not permissible⁽³⁶⁾.

By analogy with the above, it is clear that the confession of the accused that is unable to answer is not valid. Undoubtedly, the purpose of the defendant is to get a lawyer to defend his rights, which their lawyer knows better and knows all the obstacles and problems. These include: "Taking care of interests, meeting needs, and avoiding embarrassment from people. Ability, competence, and experience in one person may be more than the other, and one may have the right, but he is unable to provide reasons and not be able to explain his problem well, and his opponent to be more aware of the arguments, so he should introduce another person to defend himself and the right to be reached the rightful person"⁽⁴⁾.

If the accused takes a person to defend himself, this is not something that is forbidden by the Shari'a, but he supports him and asks him to do so with the following evidence:

1- This principle is considered as agency and it has been proven by the Qur'an, Sunnah, consensus and rationality⁽³⁷⁾.

2- Almighty God says in the Qur'an

(فَإِنْ كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَنْ يُبَيِّنَ لَهُ وَظِيمًا لِلْإِدْلَالِ) ^(٣٨)

If the person in charge of the right is an idiot or incapable, or he cannot write [for some reason], his guardian should write with justice⁽²⁾. If this affair of God is in the obligation to pursue the financial rights of people who are weak in the mentioned aspects, it has more authority over the lawsuit and filing a criminal lawsuit.

1- It has been narrated from Umm Salma (Allah be pleased with her) that the Messenger of God (pbuh) said:

(إِنَّكُمْ تَحْصِلُونَ، وَلَعَلَّ بَعْضَكُمْ أَنْ يَكُونَ أَحْلَنَ بِرُحَّتِهِ مِنْ بَعْضٍ، فَأَقْضِيَ لَهُ عَلَى نَحْوِ مِمَّا أَسْمَعُ مِنْهُ، فَهَنْ قَطَعْتُ لَهُ مِنْ حَقِّ أَخِيهِ شَيْئًا، فَلَا يَأْخُذْهُ، فَإِنَّمَا أُقْطِعُ لَهُ بِهِ قِطْعَةً مِنَ النَّارِ)^(٢٩).

It means: "Indeed, I am human and you present your disputes to me, and maybe some of you are wiser than others in stating the reason, and I will rule in his favor as I hear, so if, I ruled for someone based on apparent reasons that it belonged to his Muslim brother, so that he would know that it was a piece of the fire of Hell that I had given him." This hadith shows some facts, including:

The first fact: that if the judge issues a verdict that is contrary to the truth, then the truth remains the same and the judge's verdict cannot change it ⁽²⁾⁽⁴⁰⁾.

Second Fact: Anyone who knows that he has been unjustly judged should not accept that accepting punishment is illegal and forbidden, and thus exposes himself to divine punishment in the Hereafter, and this ruling includes all those who are like this without exception, whether he is the boss, or the main function, or the agent. Therefore, when it becomes clear to the defendant's lawyer that his client is a liar, he should withdraw from the case. As it is mentioned in the hadith of Ibn Umar, he said: The Messenger of God - () - said:

(مَنْ أَعَانَ عَلَى حُصُومَةٍ بِظُلْمٍ لَوْ يُعِينُ عَلَى ظُلْمٍ - لَمْ يَزَلْ فِي سَخَطِ اللَّهِ حَتَّى يَنْزِعَ)^(٤١)

Whoever helps the oppressor or contributes to injustice will remain in the wrath of God until he stops helping him.

Third Fact: In editing the file and presenting it skillfully, it has a great impact and importance that cannot be denied. It may sometimes lead to hiding the truth and showing a lie in the form of truth, and thus it leads to an unjust judgment, and the Prophet (ﷺ) warns us by saying this.

(إِنَّكُمْ تَحْصِلُونَ، وَلَعَلَّ بَعْضَكُمْ أَنْ يَكُونَ أَحْلَنَ بِرُحَّتِهِ مِنْ بَعْضٍ، فَأَقْضِيَ لَهُ عَلَى نَحْوِ مِمَّا أَسْمَعُ مِنْهُ، فَهَنْ قَطَعْتُ لَهُ مِنْ حَقِّ أَخِيهِ شَيْئًا، فَلَا يَأْخُذْهُ، فَإِنَّمَا أُقْطِعُ لَهُ بِهِ قِطْعَةً مِنَ النَّارِ)^(٤٢)

It means: "Indeed, I am human and you present your disputes to me, and maybe some of you are wiser than others in stating the reason, and I will rule in his favor as I hear, so if for someone based on apparent reasons, I ruled to a right that it belonged to his Muslim

brother, so that he would know that it was a piece of the fire of Hell that I had given him."

So long as kindness wants this big role. That is, if they want to reveal the truth and invalidate the falsehood, at least one lawyer is needed. Because at that time, the issue of cooperation in honesty and piety is proposed, it may not be necessary in some cases and times, as if the manifestation of the truth depends on it, and thus it becomes clear that the rule of using the defense attorney to defend him, whether for compensation, whether or not without compensation, is permissible and is not prohibited by the Shari'a.⁽⁴³⁾

1- And what has been narrated from Abdullah ibn Ja'far ibn Abi Taleb- God be pleased with both of them - said: "Ali ibn Abi Taleb- God Almighty be pleased with him- hated arguing, so if there was a dispute, Aqeel ibn Abi Talib had appointed for it, when Aqeel grew up and I was appointed⁽⁴⁴⁾.

And Zaydiyya allowed: Attorney in litigation, whether it is for defense or for litigation, and in case of dissenting opposition or the absence of the client and attorney for a known fee is correct.⁽⁴⁵⁾

Imamiyya says: Attorney in litigation is valid because each of them does not finish the lawsuit and the defendant can appear and sit if a judge summons him to a dispute with the plaintiff and appoint a person in court. Dispute, whether his opponent is satisfied or not, if the plaintiff wants to quarrel, he must quarrel with the defendant's lawyer, and the defendant may respond by himself or his lawyer, and he himself does not have to answer, and the plaintiff has the same rights as we gave to the defendant⁽⁴⁶⁾.

According to the above, it became clear to the researcher that attorney in litigation is fixed and permissible under Islamic law, and that the accused is not barred from this right, but the judge should facilitate this for the accused and enable him to do this.

The accused can appeal the verdict against him:

Appealing is the request of appeal in the judgment of a court for the reason that if it is suspected that the judgment is legally incorrect to remove suspicion⁽⁴⁷⁾. This right is also mentioned in Islamic law for the two parties of the dispute, the plaintiff and the accused, and the

scholars have deduced this from what Ali ibn Abi Talib (Allah be pleased with him) quoted:

بَعَثَنِي رَسُولُ اللَّهِ ﷺ إِلَى الْيَمَنِ، فَأَنْتَهَيْتُنَا إِلَى قَوْمٍ قَدْ بَنَوْا رُبِيَّةً لِلْأَسَدِ، قَبَيْنَا هُمْ كُنْكَالٌ يَبْدَأُفْعُونَ إِذْ سَقَطَ جُلٌّ، فَعَلَّقَ بِرَأْسِهِ، ثُمَّ عُلِّقَ رَجُلٌ بِرَأْسِهِ، حَتَّى صَارُوا فِيهَا أَرْبَعَةً، فَجَرَحَهُمُ الْأَسَدُ، فَأَنْتَدَبَ لَهُ رَجُلٌ بِحَرْبَةٍ فَهَمَّ، وَمَاتُوا مِنْ جِرَاحَتِهِمْ كُلُّهُمْ، فَهَامَ أَوْلِيَاءُ الْأَوَّلِ إِلَى أَوْلِيَاءِ الْآخِرِ، فَأَخْرَجُوا السَّلَاحَ لِيَقْبِلُوا، فَأَتَاهُمْ عَلِيُّ رَضِيَ اللَّهُ عَنْهُ عَلَى تَقِيَّةِ ذَلِكَ، فَقَالَ: تَرِيدُونَ أَنْ تَقَاتِلُوا وَرَسُولُ اللَّهِ ﷺ حَيٌّ؟ إِنِّي أَقْضِي بَيْنَكُمْ فَضَاءً إِنْ رَضِيتُمْ فَهُوَ الْفَضَاءُ، وَإِلَّا حَزَرَ بَعْضُكُمْ عَنْ بَعْضٍ حَتَّى تَأْتُوا النَّبِيَّ ﷺ فَيَكُونَ هُوَ الَّذِي يَقْضِي بَيْنَكُمْ، فَقَدْ عَدَا بَعْدَ ذَلِكَ فَلَا حَقَّ لَهُ، أَجْمَعُوا مِنْ قَبَائِلِ الَّذِينَ حَضَرُوا الْبَرَزَ رُبْعَ الدِّيَةِ، وَثُلُثَ الدِّيَةِ وَنِصْفَ الدِّيَةِ وَالْأَوَّلُ الرُّبْعُ، لِأَنَّهُ هَذَا مِنْ هَوْنِهِ، وَلِلثَّانِي ثُلُثُ الْغَنِيِّ لِلثَّلَاثِ نِصْفُ الدِّيَةِ فَأَتَوْا، أَنْ يَرْضَوْا، فَأَتُوا النَّبِيَّ ﷺ وَهُوَ عِنْدَ مَقَامِ إِبْرَاهِيمَ، فَهَضُّوا عَلَيْهِ الْقِصَّةَ، فَقَالَ: "أَنَا أَقْضِي بَيْنَكُمْ" وَاخْتَبَى، فَقَالَ: رَجُلٌ مِنَ الْقَوْمِ إِنَّ عَلِيًّا قَضَى فِينَا، فَهَضُّوا عَلَيْهِ الْقِصَّةَ، فَأَجَازَهُ رَسُولُ اللَّهِ ﷺ (٤٨).

Inference point: that the people referred this ruling to the Prophet- after they were not satisfied with the ruling issued by our master Imam Ali - but the Prophet confessed the ruling issued by Imam Ali (as). - There was evidence that the Prophet - if he saw that there were shortcomings in Ali's judgment - would decide on it and the first sentence would be revoked, and this is the same appeal, and if the verdict is revoked, the verdict that Imam Ali -PBUH - ruled with his great knowledge and skill, is allowed for other judges in the first stage.

According to the above, the researcher believes that appeal is permissible from a religious point of view, as it is legally permissible, and this is one of the important guarantees for the defendants in particular and for the special defendants. It also helps to realize the right, consolidate justice and prevent injustice in society in general.

Interpretation of doubt in favor of the accused:

It is worth mentioning that one of the rulings imposed in Islamic law is that (the principle is innocence)⁽⁴⁹⁾.

This rule is one of the special evidences that cannot be refuted except with evidences that are in the same degree as the legislator has specified from the credible evidences. This is in accordance with another rule which states: "What is proved with certainty does not increase except with certainty." The punishment of a personal conviction is not permissible on the basis of suspicion, but suspicion

must be interpreted in favor of the accused, and the reason for the action is derived from what he said.

Ayesheh narrated the messenger of Allah says:

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، أَنَّ رَسُولَ اللَّهِ ﷺ قَالَ: (ادْرَأُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ، فَإِنْ وَجَدْتُمْ لِمُسْلِمٍ مَخْرَجًا فَخُذُوا بِهِ، فَإِنَّ الْإِمَامَ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ خَيْرٌ مِنْ أَنْ يُحْطِئَ بِالْعُقُوبَةِ)⁽⁵⁰⁾.

Islam has always warned on Muslims and rulers against shedding innocent blood on the ground or attacking human dignity and oppression, and has emphasized the innocence of blood and the sanctity of honor and dignity; The Holy Prophet (pbuh) insists in the hadith that you should remove the limits from the Muslims as much as possible and stop the punishments, and if there is a way to get rid of them, release them; Because if the Imam of the Muslims goes astray in forgiveness, it is better than making a mistake in punishment.

This ruling is not limited to the punishments of hadd, but applies to all kinds of disputes, including rights, retribution, punishments and limits, as well as to all actions and words.⁽⁵¹⁾

As in the previous hadith, the acquittal of a criminal in case of doubt is better than the punishment of a person whose innocence is suspected by society. And to achieve justice and prevent injustice, this is what the Prophet (pbuh) emphasized that the purpose of imposing sanctions is not the punishments themselves, but the goal is to achieve security and stability in society.

End

In our research, we achieved the following results and suggestions:

Conclusion:

1. The Iraqi legislature has not defined interrogation; rather, it has assigned this to the jurists. And I think he did the best he could. Because the task of the law is not the definitions of terms, but the development of texts designated to apply their provisions.

2. 2- We introduced Article (128/ a) and praised the Iraqi legislature, which states: "The statements of the accused must be written by the judge or the interrogator in the report and signed by the

accused and the judge..." because the accused can do what he has been forced to do so by not signing the report and this is a great guarantee for the accused.

3. 3- Islamic Sharia has been superior to handmade systems in terms of position and application in guarantee.

Recommendations:

We recommend the Iraqi legislature to add a clause in Article (123) in which the investigating authority is obliged to inform the accused before interrogation and to warn him that he has the right to remain silent and refuse to answer.

- (١) ابن منظور، لسان العرب، فصل الجيم، ج ١ ص ٢٨٣ - ٢٨٤.
- (٢) د. سليم ابراهيم حرب، والاستاذ عبد الأمير العكيلي، ج ١ ص ١٥٦.
- (٣) جمال محمد مصطفى، شرح قانون أصول المحاكمات الجزائية العراقي، ص ٨٤.
- (٤) أحمد أبو الروس، المتهم، ص ٢٥٦.
- (٥) ينظر: د. سليم حرب و الاستاذ عبد الأمير العكيلي، ص ١٥٦ - ١٥٧.
- (٦) ينظر: فخري عبدالرزاق صليبي الحديثي، شرح قانون أصول المحاكمات الجزائية العراقي، ص ٢٤٧.
- (٧) ينظر: ازاد أحمد محمد و كمنند عثمان ابراهيم، الوجيز في الإجراءات القانونية، ص ٨٠.
- (٨) ينظر: خيرى خضر حسين، ضمانات المتهم في مرحلتي التوقيف...، ص ٣٢.
- (٩) ينظر: ازاد أحمد محمد و كمنند عثمان ابراهيم، ص ٩٣.
- (١٠) ينظر: سردار علي عزيز، ضمانات المحاكمة العادلة، ص ١٠.
- (١١) ينظر: م. م. سعاد شاكر بعيوي، ضمانات المتهم في المحاكمة العادلة، ص ٢٤٥.
- (١٢) ينظر: عودة يوسف سلمان، حق المتهم في الصمت بين الشريعة الإسلامية والقانون المقارن، ص ٦١، ونزار رجا سبتي صبرة، أحكام المتهم في الفقه الإسلامي (مقارنة بالقانون الوضعي) ص ١٢٧.
- (١٣) ينظر: ازاد أحمد محمد و كمنند عثمان ابراهيم، ص ٨١.
- (١٤) ينظر: خيرى خضر حسين، ص ٣٣. و م. م. سعاد شاكر بعيوي، ص ٢٤٧.
- (١٥) ينظر: فخري عبدالرزاق صليبي الحديثي، ص ٢٥.
- (١٦) ينظر: م. م. سعاد شاكر بعيوي، ص ٢٤٧.
- (١٧) ازاد أحمد محمد، الوجيز في الإجراءات...، ص ٨١.

- (١٨) ينظر: فخري عبدالرزاق صليبي الحديثي، ص ٢٥١.
- (١٩) البخاري، صحيح البخاري، كتاب الوكالة، باب: الوكالة في الحدود، ج ٢، ص ٨١٣، برقم: (٢١٩٠)، ومسلم، صحيح مسلم، كتاب: الحدود، باب: مَنْ اعْتَرَفَ عَلَى نَفْسِهِ بِالزَّيْنِ، ج ٣، ص ١٣٢٤ برقم: ١٦٩٧.
- (٢٠) (أبو داود سليمان بن الأشعث بن إسحاق بن بشير بن شداد بن عمرو الأزدي السجستاني (المتوفى: ٢٧٥ هـ)، سنن أبي داود، ج ٥ ص ٤٣٤. قال شعيب الأرناؤوط، ومحمد كامل قره بللي: صحيح بطرقه. والحاكم، المستدرک على الصحيحين، ج ٤، ص ١٠٥ برقم: (٧٠٢٥) هَذَا حَدِيثٌ صَحِيحُ الْإِسْنَادِ وَلَمْ يَرْوِهِ قَالَ الْحَاكِمُ يُخْرِجُهُ وَعَلَى عَلَيْهِ الذَّهَبِيُّ بِقَوْلِهِ: حَدِيثٌ صَحِيحٌ.
- (٢١) ابن القيم الجوزية، الطرق الحكيمة، ص ٥٥.
- (٢٢) أبو يوسف يعقوب بن إبراهيم بن حبيب بن سعد بن حبة الأنصاري (المتوفى: ١٨٢ هـ)، الخراج، ص ١٦٧.
- (٢٣) نزار رجا سبتي صبرة، أحكام المتهم في الفقه الإسلامي، ص ١٥٢.
- (٢٤) المصدر نفسه، ص ١٥.
- (٢٥) المصدر نفسه، ص ١٥.
- (٢٦) ينظر: البهوتي، كشف القناع، ج ٦، ص ٣٢٠. وابن حجر الهيتمي، تحفة المحتاج في شرح المنهاج، ج ١٠، ص ١٣١.
- (٢٧) ينظر: نزار رجا سبتي صبرة، ص ١٥٤.
- (٢٨) البخاري، صحيح البخاري، كتاب: الأدب، باب: ستر المؤمن على نفسه، ج ٢٢ ص ٥٤، برقم: ٥٧٢١.
- (٢٩) ينظر: نزار رجا سبتي صبرة، ص ١٥.
- (٣٠) النساء: ٥٨.
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- (٣٢) العبيدة: الكبير والنخوة يريد بهذا القول ما كان عليه أهل الجاهلية من التفاخر بالأنساب والتباهي بها. أبو سليمان حمد بن محمد بن إبراهيم بن الخطاب البستي المعروف بالخطابي (المتوفى: ٣٨٨ هـ)، غريب الحديث، المحقق: عبد الكريم إبراهيم الغرابوي، وخرج أحاديثه: عبد القيوم عبد رب النبي، الناشر: دار الفكر، الطبعة: ١٤٠٢ هـ - ١٩٨٢ م، ج ١، ص ٢٩٠.
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(٣٦) ابن حزم، المحلى بالآثار، ج ٨، ص ٣٤٣.

(٣٧) ينظر: أبو عمر يوسف بن عبد الله بن محمد بن عبد البر بن عاصم النمري القرطبي (المتوفى: ٤٦٣ هـ)، التمهيد لما في الموطأ من المعاني والأسانيد، ج ٢، ص ١٠٨. وعلي بن بكر بن عبد الجليل الفرغاني المرغيناني، أبو الحسن برهان الدين (المتوفى: ٥٩٣ هـ)، الهداية في شرح بداية المبتدي، ج ٣، ص ١٣٦. وأبو بكر المشهور بالبكري (عثمان بن محمد شطا الدمياطي الشافعي) (المتوفى: ١٣١٠ هـ)، إعانة الطالبين على حل ألفاظ فتح المعين، ج ٣، ص ١٠٠. وإبراهيم بن محمد بن عبد الله بن محمد ابن مفلح، أبو إسحاق، برهان الدين (المتوفى: ٨٨٤ هـ) المبدع في شرح المقنع، ج ٤، ص ٣٥٥.

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(٤٥) البدارين، محمد إبراهيم محمد، الدعوى بين الفقه والقانون، ص ١٥٤.

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- (٥٠) ((الحاكم، المستدرک علی الصحیحین، ج ٤، ص ٤٢٦، برقم: (٨١٦٣)، قال الحاكم: هَذَا حَدِيثٌ صَحِيحٌ الْإِسْنَادِ وَلَمْ يُخَرِّجَاهُ.
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