



## Arresting by Police in the Crime Detection Stage from the Perspective of the Afghan Criminal Justice System and Islamic Jurisprudence

Abdul Ali Tawajjhi<sup>1</sup>; Mohammad Ali Hajidehabadi<sup>2</sup>; Seyyed Mohammad Sajjadi<sup>3</sup>

<sup>1</sup> Faculty Member and Associate Professor, Department of Law, Faculty of Humanities, Shahid University, Iran

<sup>2</sup> Associate Professor, Criminal Law and Criminology Department, Faculty of Law, Qom University, Iran

<sup>3</sup> Ph.D. Student in Criminal Law and Criminology, Al-Mustafa International University, Qom, Iran

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### **Abstract**

Police custody as a security means in the crime detection stage is an issue that this research has investigated to identify and evaluate its position in the criminal justice system of Afghanistan and Islamic jurisprudence. The descriptive-analytical method is used for analyzing the subject. The findings of the research indicate that arrest by police is not legitimate in Afghanistan's judicial system. This method is only accepted for felonies and misdemeanors for which medium imprisonment is foreseen, or for crimes for which there is a possibility that the perpetrator may escape or disappear. Also, the Afghan legislature, by predicting a long period for police detention (72 hours for ordinary crimes and 10 days for serious crimes such as terrorist crimes), is different from other criminal proceedings systems based on international documents and human rights. While, a large number of Muslim jurists believe that police detention is prohibited, and another group considers it to be reserved for crimes such as murder and other crimes that are similar in importance or violate judicial justice, and the Imami jurisprudence limits it to six days.

**Keywords:** *Police Detention; Securitization; Judicial System; Afghan Law; Islamic Jurisprudence; Detention Period*

### **Introduction**

#### **Explanation of the Problem**

"Arrest by police" is mean that is necessary due to its irreplaceable role in the detection of crime and the completion of preliminary investigations, and it is recognized in the type of criminal justice systems; but it cannot be denied that it conflicts with the principles of "innocence", "the need to obtain permission from the judicial authority" and "no one's guardianship over another". Therefore, its use must be explained by the court-friendly reasons for committing or starting a crime, so that executive actions have the least conflict with the aforementioned principles; Therefore, this issue needs to be investigated, what is the approach of the criminal justice system of Afghanistan regarding arrest by police in the stage

of crime detection. Is the criminal policy of this system in line with the observance of citizens' rights or has it adopted a strict approach? To what extent does this view overlap and differ from international human rights documents and Islamic jurisprudence? Even though the principle of this establishment conflicts with basic human rights, which of its subsections and formalities indicate the relationship between arrest by police and security approach? Therefore, the main issue in the current research is to examine the arrest by police in the crime detection stage in the criminal justice system of Afghanistan and Islamic jurisprudence, and even if possible in international documents, and reveal its shortcomings.

## **1- Arrest by Police from the Perspective of Afghanistan's Criminal Justice System**

By examining the effective laws of Afghanistan, during the republic, it becomes clear that "term of detention", "guarantees of the defendant's defense rights" and "crimes subject to arrest" are the most important cases that can be examined as manifestations of security in this criminal system.

### **1-1- Time of Arrest by Police**

Afghanistan's criminal laws set the maximum time of police detention at 72 hours without assigning a specific crime or criminal (Criminal Procedures Law, Article 87, Police Law, Articles 15 and 25, Military Criminal Procedures Law, Article 19, and Anti-Narcotics Law and intoxicants, Article 13). It should be remembered that the mentioned period is for the perpetrators of general crimes; For suspects of terrorist crimes and crimes against internal and external security, this period has been increased to 10 days; Of course, in this case, the judicial officer "can" notify the prosecutor's office within 24 hours after the arrest, without any obligation (Appendix No. 1 of the Law on Criminal Procedures Regarding Terrorist Crimes and Crimes Against Internal and External Security, Article 5).

The duration of police detention is not limited to international documents. Those documents that mention pre-trial detention, without referring to the cases and duration of the detention, allow this action only as a last resort and the necessity of investigating the accusation or protecting the society and the victims of the crime (Appendix of Rules) UN Minimum Standard for Non-custodial Procedures (Tokyo Rules), Article 6-1); However, contrary to the aforementioned documents and Afghan laws, the justice system of some countries have considered the maximum limit of police detention in ordinary crimes to be 24 hours, and more than that is subject to the written permission of the investigator or prosecutor (French Criminal Procedure Code, Articles 63 and 154). and in certain crimes, such as terrorist crimes and organized crimes, the maximum limit can be extended up to 72 hours at the request of the prosecutor, and the police are required to obtain permission from the prosecutor (*ibid.*, articles 63 and 88-706). Therefore, the duration of police detention increases the distance of Afghanistan's criminal justice system from the standards and criteria of fair trial; Therefore, the legislator has tried to compensate for it by providing solutions such as the judicial officer's report to the prosecutor within 24 hours, calculating the days under supervision in the prison sentence of the convicted and determining the daily wage in case of acquittal of the suspect (Afghanistan Criminal Procedure Law, Article 323).

Despite being useful, the aforementioned solutions seem to be of little use; Because first of all, the time of the suspect being under observation as a person whose guilt has not yet been proven is long. Secondly, the text of the legal article has read both the ten-day monitoring and the report within 24 hours from the authority of the judicial officer and expressed it with the word "may" which is independent of the legal requirement. It is clear that depriving the suspect of his freedom and placing his fate in the hands of the judicial officer, in addition to violating the principle of acquittal and the principle of the necessity of obtaining permission from a competent judicial authority, is considered a form of expansion of the authority and authority of this institution, which causes the violation of rights and freedoms. He becomes a legitimate suspect. Of course, the same problem with the 72 hours of custody in ordinary crimes also affects the Afghan legislator; because even there the monitoring time is long and as a result, it is far from judicial justice by further violating the principle of innocence. In this case, the legislator also wanted to

reduce the negative burden of violating the rights and freedoms of the suspect by requiring the police to hand over the report of the meeting and the suspect to the prosecutor's office. But as mentioned earlier, such an effort is useless. Thirdly, calculating the period under supervision if the person is sentenced to punishment is compensatory to some extent; But cash payment against illegal imprisonment, which can cover the material damage of a person during his imprisonment, is unable to cover his moral damage.

### **1-2- Guarantees Regarding the Defense Rights of the Person Under Arrest**

In line with international human rights documents (Civil and Political Rights Convention, Article 14 and Universal Declaration of Human Rights, Article 11), the Afghan legislature has established the most important defense rights of the suspect and the accused, such as having a lawyer (Afghanistan Criminal Procedure Law, Article 7). The only significant ambiguity that should have been clearly stated by the legislator is determining when the suspect will have a lawyer and the possibility of meeting him. The French legislator has decided that the suspect/accused in ordinary crimes can request a lawyer from the moment he is under surveillance, but the time to meet with a lawyer is different. In ordinary crimes, the suspect under observation can request a lawyer 24 hours after the start of observation (Largieh: 2008, p. 93). This is different in the French criminal justice system compared to organized crimes depending on the type of crime. If the crime is crimes and misdemeanors of kidnapping and illegal seizure, panhandling, robbery, and serious crimes of extortion, at the end of 48 hours, you will be under observation and if it is an organized crime of the type of crime and misdemeanors of drug trafficking or crimes and misdemeanors constituting terrorist acts, at the end of 72 hours, he can talk and meet with a lawyer (French Criminal Procedure Code, Articles 63-4).

Afghanistan's criminal justice system, unlike the French justice system, is important to mention that "appointing a defense lawyer or having legal assistance by the provisions of the law" is one of the rights of the suspect and the accused and "when the police arrest, prosecutor before starting the investigation and the judge before the trial, he should inform them of his rights", he said. It is noteworthy that the aforementioned right of defense, which is considered one of the fundamental rights of the suspect in the process of discovering a crime, even though it is capable of such detail, has not been clarified in any of the effective laws of Afghanistan; Therefore, the legislator's neglect of such an important matter puts the accused on the verge of violating his rights and depriving his freedom of defense.

An important point that plays a fundamental role in guaranteeing the suspect's defense rights is the conditions of police custody. Can arrest police people with the slightest suspicion of committing a crime, or is there a need for reasonable and logical reasons for such an action? The French criminal justice system considers the permission of the police to arrest only if there are acceptable reasons; (Ibid., Article 63). However, Afghanistan's criminal justice system does not mention the need for acceptable reasons or proof to allow police arrest. Unless, based on the analysis and inference of the legal articles, we come to the point that, from the point of view of the said judicial system, arrest by police is legitimate only in two cases: one is in the case of obvious crimes and misdemeanors, the punishment of which is medium imprisonment. Second, in the case where a person is identified or introduced as the perpetrator of a crime and the possibility of his escape and absence is imagined. (Criminal Procedures Law of Afghanistan, Article 81). Except for this article, in other cases, the legislator has not mentioned any justifications for police arrests. Negligence and inattention of the legislator to the legitimacy of arresting police suspects for any reason is considered a gross and indefensible flaw in the justice system.

### **1-3- Crimes that Cause Arrest**

The judicial system of Afghanistan has not made any reference to the public or private nature of the crimes warranting arrest, or whether the criminal is an employee or an ordinary person. The only understandable measure of the quality of dealing with the suspect is to rely on the importance of the crime and its discovery. According to this system, investigative bodies, with their jurisdiction, in obvious crimes

and misdemeanors for which the punishment of medium imprisonment is foreseen in the law (Afghanistan Criminal Procedures Law, Article 81). Also, in the case where the committed crime is a crime and the possibility of the perpetrator fleeing or disappearing, they can arrest the person; Also, a person's disobedience to a summons without a justified excuse, fear of concealment, loss of evidence and evidence of the crime in case of release, not having a fixed place of residence in the area of committing the crime (Ibid., Article 97) and jeopardizing the immunity of people and witnesses are among the other cases that, depending on the circumstances, with the order of the prosecutor's office or the court or with the authority of the police, are considered grounds for arresting a person; (Ibid., Article 19). However, this issue is clearly understood from the concept of Article 97 of the Criminal Procedure Law, which mentions cases of police arrest, that in the criminal justice system of Afghanistan, the arrest of a person who has committed a minor offense is not allowed.

Now the question is, how is arrest by police extracted from the above article? The answer is clear from here the arrest will inevitably lead to its release or confiscation. Deprivation of freedom has different titles according to the position of the depriver; If the arrested person's freedom is taken away by the police, it is called police custody, if it is taken away by the order of the prosecutor, it is called temporary detention, and if it is taken away by the order of the judge, it is called imprisonment. At the end of the above article, the Procedures Law has included the police's authority to arrest a person in the aforementioned cases. The clause of arresting "with the authority of the police" does not explicitly refer to the custody of the suspect by this institution, but rather as an obligation.

Therefore, in the criminal justice system of Afghanistan, several points can be criticized in the discussion of police detention, which can direct the approach of this system in the direction of security: first, it has extended the time of police detention, while other countries have been satisfied with it for a shorter period. Secondly, the period for a person under arrest to have a lawyer in this system is not specified precisely. Because the person's guilt has not yet been proven, this is not in line with respecting the rights of citizens and shows the strict view of the aforementioned system.

## **2- Arrest by Police from the Perspective of Islamic Jurisprudence**

Jurisprudential sources have not distinguished between the concept of accused and suspect, as is common in contemporary law, and Muslim jurists have not paid direct attention to this establishment. Because, first of all, the truth of the suspect and the accused, both in terms of the arrest philosophy and in terms of the documents and evidence that may be seized, are not different. To explain that the philosophy of arrest in both cases is to discover the truth, and their arrest is permissible if there are acceptable reasons for the suspect or they're being accused. Secondly, the nature of imprisonment is deprivation of liberty in both cases; But the fact that he is in police custody and locked up in the detention center is related to human benefit from the techniques and tools of deprivation of freedom that have emerged by the needs of the time and the development of police authority and the separation and distribution of power. Such developments do not change the nature of deprivation of freedom; Whether the arrest by police and charges are based on evidence and suspicion and are implemented in the preliminary investigation stage; Therefore, the type of jurists has discussed all three stages of discovery, investigation and prosecution under the title of the preliminary stage. However, the legitimacy of police custody, which is considered an establishment in line with the security approach, is questionable from a jurisprudential point of view; Therefore, it is necessary to examine the viewpoint of Islamic jurisprudence in this regard. In general, from the words of the jurists, two points of view, the inadmissibility and the permissibility of police arrest, can be understood.

### **2-1- Illegality of Arrest by Police**

This point of view is examined separately under the two headings of "The opinion of the Islamic jurisconsult" and "Reasons of Inadmissibility of custody".

### 2-1-1- The Opinion of the Islamic Jurisconsult

Some jurists consider cases of legitimate imprisonment under the headings of "the difference between the rule of legitimate and illegitimate imprisonment" (Al-Qarafi al-Maliki: n.d, Vol. 4, pp. 79-80) and "The rule of imprisonment is the suspension of enforcement of rights" (Al-Aamili: n.d, Vol. 2, p. 192) and some have expressed it in chapters such as "In the statement of the person who is imprisoned" (Ibn Farhun al-Maliki, vol. 2, p. 312) and "In the statement of legitimate imprisonment" (Al-Tarbalsi: n.d, p. 199). In general, cases of legitimate imprisonment in the opinion of the aforementioned jurists include "imprisonment of the criminal in the absence of the victim to protect the right of retribution [qisas]", "runaway slave"; "refusal to enforce payment"; "Unknown indebtedness in terms of property and lack to check his situation"; "Imprisonment and deterrence of criminals"; "Imprisonment for refusing to perform an irrevocable duty, like a new Muslim who has two sisters in marriage and refuses to choose one"; the confessor to the unknown that refuses to determine it until the time of determination"; "Imprisonment of a person who refuses to perform divine duties that cannot be delegated, such as fasting"; "Imprisonment of a man who claims to be a wife to a woman at the same time until sufficient evidence and reason are provided" and "Imprisonment of a person who is accused of committing a crime such as theft and corruption to check the accuracy of the attribution".

Considering the concept of the rule and the few cases of legitimate detention, it seems that police detention is illegitimate. If the opinion of the jurists was not on confinement, they would not be satisfied with merely quoting cases of lawful confinement and would leave the chapter on lawful confinement by mentioning a rule or a sentence that advises against confinement. Although the appearance of the mentioned cases does not include police detention, the precision in the phrase "detention authority..." negates the lack of permission; Because this establishment is done in line with the fulfillment of rights; But regarding the inclusion of the examples of this rule and also the words of other jurists who have limited themselves to mentioning examples such as "theft and corruption" regarding legitimate imprisonment (Ibn Abd al-Salam al-Shafi'i: 1993, vol. 1, p. 118). This question is raised, does the statement of such cases negate the non-mentioned cases to exclude the arrest by police as illegal imprisonment? It seems that the implication of some cases on the legitimacy of "police arrest" and "temporary arrest" can be inferred; Because the mentioned examples in his words, which are after the word "the meaning of the statement", are for example, and as examples of "attributed accusation", not that the crimes of this category are exclusive to the same two cases; In addition, if the tenth instance of theft and corruption is accepted, the word "corruption" is a general term that covers many crimes. Apart from the point of view of the aforementioned jurists, which seems to be questionable, some jurists explicitly do not recommend the imprisonment of those accused of murder (Ibn Idris al-Halli: 1989, vol. 3, p. 343, Al-Amili: 1991, vol. 2, p. 410, *ibid*: 1992, vol. 15, p. 223, Fartosi Hawezi: 1995, p. 446, Fakhr al-Muhaqqin al-Halli: 1967, vol. 4, p. 620). The important question is that this group's statement is about the "imprisonment of the accused of murder", what does it have to do with other accusations? The answer can be found in "the importance of crime"; That is, if it is not permissible to arrest the suspect and the accused in an important crime such as murder, in other crimes that are usually less important than that, it will not be permissible in a first way.

The leader of this group of jurists is Ibn Idris Hali. He called the promise of permission "lacking acceptable documentation and contrary to the evidence". (Ibn Idris: Previous, p. 343) Now we have to see what evidence or arguments support this view.

### 3-1-2- Reasons for not Allowing Arrest by Police

In general, there are two reasons for the illegitimacy of deprivation of liberty, except for the cases mentioned in the traditions and sayings of jurists. The most important reason for the mentioned point of view is the priority of the cause over the cause; To explain that the first principle for any person, according to the principles of "innocence", "no jurisdiction" and "freedom", is the inadmissibility of

imprisonment. Therefore, imprisonment of all its types, which is considered an exceptional matter, will be legitimate when it is based on valid Shariah reasons (Al-Muntzari: 1988, Vol. 2, p. 481). It is obvious that until the case is reviewed by a qualified judge and the necessary formalities are observed, and the judge's verdict is issued that the person is guilty, it will not be established in general; Therefore, all deprivation of freedom that takes place before the said process, whether it is of the police type or temporary detention, violates the basic principles of innocence and freedom. According to the interpretation of jurists, such an arrest is subject to the rule of "accelerating the punishment of establishing the reasons; That is, the punishment precedes the cause" (Al-Isfahani: 1995, vol.11, p.146, Tabasi: n.d, p.44, Al-Hosseini Al-Amili: 1998, vol.10, p.73 and Ardabili: 1982, vol.12, p.133). As mentioned, the inclusion of this reason compared to other examples of arrest by police is due to its generality and priority; This means that when preventive detention is considered "punishment before the reason" for the accused who is at a higher level of severity and accusation, arresting a policeman who is still suspected of committing a crime will be the first punishment before the cause and the cause will prevail over the cause.

It is possible to reject the mentioned reason, the punitiveness of arrest by police based on denial and its nature is considered only to discover the truth (Al-Mousavi El-Ardabili: 2002, vol. 2, p. 95 and Al-Safi Al-Golpaygani: n.d, p. 54). It is very clear that denying the punitive nature of this criminal institution is a form of erasing the face of the problem, running away from the problem, and contrary to the existing reality; Because the infliction of suffering and hardship resulting from such detention is not a creditable and abstract matter; Rather, it is an obvious suffering that cannot be separated from punishment.

Of course, it is possible to provide a solution to separate arrest by police from punishment using a semantic analysis of the word "arrest" in its lexical and Sharia meanings; To explain that the word imprisonment in the word means absolute prohibition and restraint (Al-Zubaidi: 1993, vol. 8, p. 234). Of course, it is possible to provide a solution to separate arrest by police from punishment using a semantic analysis of the word "arrest" in its lexical and Sharia meanings; To explain that the word imprisonment in the word means absolute prohibition and restraint (ibid). And in hadiths, beyond prison, it is used in the sense of prohibiting a person from independent possessions; Whether such a prohibition occurred in the house or mosque or under the employment of the petitioner or his lawyer (Rafat Othman: 1994, p. 284).

The mentioned solution also seems inefficient compared to police arrest; Because what is meant by imprisonment in the discussion of police custody is the placement of the suspect in police custody, which removes any doubts about its punitiveness, and as a result, the violation of the principle of innocence in the "establishment of police custody" will be clear and definite. Therefore, the permission to arrest a policeman from a jurisprudential point of view is different from its permission/obligation from a legal point of view.

What is the way out of these problems and prevent the violation of the principle of innocence? In the same way, wise people do not consider it as an obstacle to being careful about protecting lives, property, and other important matters (Al-Khuvansari: 1984, vol. 7, p. 249). Rather, due to necessity and according to the rule of "priority of important over important", "necessity of order and public interest", minor corruption and violation of the principles of "innocence", "lack of jurisdiction" and "freedom" in some cases as a minimum. Rather, due to necessity and according to the rule of "prioritizing the important over the non-important", "necessity of public order and expediency", minor corruption and violation of the principles of "innocence", "no guardianship" and "freedom" in some cases they accept the minimum. Examples such as the permissibility of killing innocents due to fear and exist in Islamic jurisprudence (Ibn Abdul Salam, p. 111), and the philosophy of legislating punishments is to protect the interests of religion, life, honor, reason, and man's property returns.

The second reason is traditions. A group of narrations that can be cited for the impermissibility of arrest by police are narrations that have stated the legitimate cases of non-punitive detention using the tool of "detention"; For example, Imam Muhammad Baqir has been quoted: Imam Ali (imprisoned only three

groups: the usurper, the usurper of the orphan's property, and the betrayer of the trust" (Al-Tusi: 1986, vol. 6, p. 299). Although the appearance of this narrative of the inadmissibility of arrest by police is used, this monopoly is invalid due to the inconsistency with many texts, according to the consensus of jurists (Al-Najafi: 1983, vol. 40, p. 165). No jurist considers the restriction used in this narration to be genuine; Rather, for the jurists who have entered into this discussion, the imprisonment contained in the above narration is carried over to the prevailing case, additional confinement, or proceedings in absentia, or the cases of debt payment by the guarantor (Al-Majlisi: 1985, vol. 10, p. 205). Or he called it a type of punishment, long imprisonment, or imprisonment in prison (Al-Tousi: 1979, p. 353) or penal servitude (Al-Mughniyya: 2000, vol. 6, p. 334); Therefore, the mentioned narrations are not able to prove the impermissibility of arrest by police from the point of view of Islamic jurisprudence.

Two hadiths quoted from Hazrat Ali can be considered the strongest evidence for the prohibition of police arrest. The first one said: "I do not arrest someone based on an accusation and do not punish him based on suspicion" (Al-Thaqafi: 1989, Vol. 1, p. 251). The meaning of the mentioned hadith is the absolute impermissibility of non-punitive detentions, including police and temporary detention, whether it is related to temperature or otherwise. In its criticism, it has been said that the narration indicates his personal life, considering the political problems, he did not arrest the accused just for the accusation; Not that such an arrest faces problems from the point of view of Sharia; Therefore, the impossibility of pursuing and prosecuting the accused based on the accusation is not sufficient (Al-Muntzari, *ibid*, p. 324).

The second one is about Khurait Bin Rashid, who was one of the leaders of the Khawarij, in response to the protest of one of his companions, why he let him go and did not imprison him, and did not ask him for a commitment from him? He answered: "If I imprison all those who are accused, there will be no room left in the prison." "I don't think it is permissible for me to imprison and punish people unless they express their enmity with us in action." (Al-Thaqafi, *previous*, p. 223). This narration, like the previous narration, is absolute, it includes the inadmissibility of imprisoning charges and police, in homicide and non-homicide cases.

Previous criticism has also been made on this narration; That is, the emergence of the narrative is that the non-arrest of the accused was due to special problems and the political situation of their time, not because of Sharia issues, but such an understanding and criticism of this hadith seems incorrect; because the sentence "And I don't see that I can jump on people" appears in sharia incompetence and not in political incompetence (Al-Muntzari, 1986, vol. 2, p. 480). It seems that the same appearance is also present in the previous hadith; Therefore, the above-mentioned hadith can be considered as evidence of the non-permissibility of promises, which are neglected due to more important matters.

The result of the mentioned opinion and its reasons is that some of the reasons for the non-permissibility opinion cannot be ignored; They remain in force unless extratextual and basic reasons come to the aid of the advocates of the arrest by police license and concerning them, this establishment is allowed in limited cases.

## **2-2- Permission to Arrest by Police**

Regardless of the type of permission, which is mandatory or non-obligatory, this view has been reflected in the words of jurists in different ways; Therefore, the issue of permission is explained under the two headings "Opinions of jurists" and "Reasons for the permission of police arrest".

### **2-2-1-The Opinion of Jurists**

Many jurists believe that "police detention" is reserved for crimes against physical integrity, especially murder, due to the conflict with the principles of "innocence" and "freedom" and due to Sharia's concern for the personality and respect of individuals. Unless the other crimes are as important as the aforementioned crimes, in which case the scope of police detention will be wider (Al-Muntzari: P. 2,

p. 482), but others, regardless of the above issue, allowed the imprisonment of a person who was summoned to the ruler without prior accusation, until the ruler has the opportunity to process (Ibn al-Qaim:n .d, p. 89). Although the last word is about the defendant who, at the request of the claimant, was summoned to the judge from a distance to settle disputes; paying attention to the philosophy of summons and imprisonment, which is the discovery of the reality, cancels the specificity of the case, and can be applied to each of the stages of the proceedings; Especially since the aforementioned jurist emphasizes that imprisonment is not a charge. Imprisonment is considered a charge when the commission of a prohibited act is attributed to a person based on valid reasons and he is prohibited from independent possessions with the motive of discovering the truth (Al-Raba'a: 2004, p. 192). Of course, the existence of "valid reasons" is not required for the accusation of imprisonment to be true; Rather, a person's suspicion is enough for this. (Man Al-Al-Tarein Collection: 2006, Vol. 16, p. 292) This definition equates accused imprisonment to "police arrest" to a large extent, and as a result, reduces our suffering in proving the legitimacy of this type of imprisonment from the perspective of jurists.

Some jurists, while distinguishing between the powers of the judiciary and the executive, have given more extensive powers to executive officers and politicians; Based on this, one of the special powers of "emir" and "governor" that distinguishes him from a judge and a ruler is to imprison the accused to discover the truth (Ibn al-Fara: 2000, p. 258). Some other jurists, after dividing imprisonment into judicial and political, have considered the imprisonment of "usury, slander, and corruption" to be one of the powers of the governor, and each of the judges and governors has a separate prison (Man Al-Al-Tarein Collection, p. 318). It seems clear that adding the word Ahl Ribeh next to Ahl Tahmet brings this view closer to police arrest; Similarly, the addition of the imprisonment of "police custody" in addition to the two judicial and political categories (the imprisonment of the judge and the governor) is a suggestion to the point of view of allowing the detention of the suspect in the police custody (Al-Hamwi: 1984, vol. 3, p. 81).

Some other jurists have considered the criterion of the permissibility of "imprisonment" to be "justification of the right" (Al-Aamili: n.d, vol. 2, p. 192). It doesn't matter whether this right is financial or non-financial, human right or God's right that has reached the stage of satisfaction and has been prepared for prosecution.

Paying attention to the nature of non-punitive detentions is one of the other methods that help us understand the permissibility or impermissibility of police detention; Because, as mentioned in the previous point of view, the word imprisonment has applications including prison. Therefore, arresting a police officer to identify the normality and abnormality of the accused, or to prevent his escape or his negative effects on the investigating authority, is a purely precautionary measure and far from punishment (Al-Muntzari: Pishin, p. 457).

According to the various and numerous words that were expressed about non-punitive imprisonment, it is understood that the principle of police imprisonment is a legitimate thing, regardless of the amount, manner, conditions ,and details that are defined for it in judicial systems today. Is. But its quality, quantity, conditions ,and cases should be extracted from the following reasons.

## **2-2-2-Reasons for Permission to Arrest by Police**

To prove this point of view, we can refer to two categories of intratextuality evidence (taken from hadiths) and extratextual evidence (general rules about prioritizing the more important over the important).

**The First Reason; is Hadith:** there are two types of hadiths about imprisonment. The first type recognizes prison as a punishment, and the scend recognizes it as an arrest by police (under arrest).



**The First Category - Imprisonment, in Absolute Accusation:** a group of narrations in terms of sentence structure and words used, express the Shari'i ruling about the absolute accusation. Research shows that five hadith have expressed the sentence of imprisonment in an absolute manner (Tabasi: n.d, p. 32). I refer only to two of these.

**One:** The Prophet (PBUH) imprisoned an accused man for a day and night (Al-Hakim Al-Nisaburi: *ibid*, p. 114). This narration, which tells about the practical life of the Prophet (PBUH), is absolute in terms of brokering, it includes any kind of accusation.

**Second:** The Prophet (PBUH) arrested and imprisoned a group of people for an accusation; But after facing the protest of one of the neighbors, he released the prisoners (Al-Sanaani: 1982, vol. 10, p. 216 and Ibn Hanbal: 2000, vol. 33, p. 223). It is not understood from the word imprisonment that it is a punishment, nor from the word slander, that it is assigned to a specific case; Therefore, the mentioned story also includes any kind of non-punitive imprisonment before the trial.

Although the above-mentioned hadiths are absolute in terms of brokering, they include only accusations against blood and non-blood, not all accusations. In addition to that, they face two other serious problems: First, all five hadiths require hastening the punishment before the cause. Secondly, all of them are unreliable in terms of weak documents (Al-Tabasi: n.d, p. 43).

### **The Second Category - Imprisonment on Charges of Murder**

One of the documents based on which advanced jurists such as Sheikh Tusi considered the permissibility of imprisonment is the famous narration of Imam Sadiq (a.s.). According to this hadith, the Prophet (pbuh) used to imprison the accused for six days on charges of murder; Then, if the parents of the victim were to testify, the murder would be confirmed, otherwise, the accused would be released (Al-Tousi: 1986, Vol. 10, p. 312). Sekoni's narrative is not only the license of imprisonment in terms of the brokerage; Rather, because of the composition used in it (past continuous), it shows the continuous history of the Prophet (PBUH) regarding imprisonment. Despite its popularity, this narration has documentary and brokerage forms due to the existence of a stillness in the chain of narration and its entry regarding the accusation of "blood". According to the basis of the majority of Imamiya jurists, its weakness is compensated by the famous act; (Al-Najafi: 1983, vol. 42, p. 277). But in terms of implication, it has serious problems in two ways. One of the problems is the punishment before the cause and the incompatibility with the basic principle of innocence, which is solved by the rule of caution about "temperature" and the importance of preserving interests. The second brokering problem is the inclusion of the hadith in a special case, which prevents its inclusion about the permissibility of imprisoning charges against other crimes, even "wound".

This problem cannot be solved due to the non-flow of the rule of cancellation of character and the generalization of imprisonment to non-life; Because according to Shari'ah, the value of life has an importance that other values cannot reach it. Therefore, the generalization and cancellation of the characteristic of the tail require the acceptance of a false analogy, which is not acceptable according to the Imamiyyah. The other hadiths mentioned in this chapter are all affected by the problem of weak transmission (Tabasi: n.d, pp. 39-40).

**The Third Category - Imprisonment on Charges of Theft:** this category of hadiths under the title "Imprisonment of the accused for theft" with the subheadings of "Imprisonment of the accused until the return of stolen goods", "Imprisonment of the accused until the presence of witnesses", "Imprisonment of the accused until the adjustment of witnesses" and "Imprisonment of the accused claiming the property" have been combined. The first title is documented by a hadith and action of Numan bin Bashir from the companions of the Prophet (pbuh) and the second title is documented by a biography of Imam Ali .The third title is only a quote from the opinion of Imam Malik Ibn Anas in the book "Al-Maduna Al-Kubari" and the fourth title is only documented by a letter from Omar Ibn Abdul Aziz. The hadiths on this

topic can be used as a document for police arrest. Because they have all mentioned imprisonment and imprisonment is essentially no different from police imprisonment, but in terms of documents, they are weak and cannot be cited; Because, first of all, some of them are not narrations, so the authenticity and inauthenticity of their documents can be discussed. Secondly, in those categories that can be seen as narratives, their narrators are religious people; Therefore, none of the Shia jurists issued a fatwa based on them, but Imam Malik, among the Sunni jurists, has allowed the imprisonment of those accused of theft, and Abu Al-Hasan Mawardi also believes that the ruler can imprison the accused to discover the truth that he is a criminal and or the defendant's absence is accelerated (ibid: pp. 157-161). Other jurists, such as Ibn Farhun Maliki, believe in imprisoning the "plaintiff" after the testimony of the witnesses and his refusal to accept the testimony until the truth is clarified, although they have not provided any documentation for their point of view, they expressed their opinion based on such weak documentation. And (Ibn Farhun: 1985, vol. 2, p. 18).

### **The Second Reason; the Rules of Conflict**

If there is any doubt about the validity of the mentioned evidence against the principles such as the principle of innocence, the principle of freedom, the absence of guardianship over others, other evidence such as the preservation of the Muslim system, the rights and property of the people can be cited; Because maintaining the mentioned values, in many cases, depends on preventing the escape of the accused, to his arrest and imprisonment for discovery and investigation. If in such cases, the point of view of impermissibility is insisted on, the grounds for the loss of people's rights and property, as well as the disruption of public order, are provided, especially when corruption is prevalent and pervasive. In such a situation, the arrest of the accused is justified, but with due care and caution, so that the dignity of the person is protected from attack if possible. Of course, it should be kept in mind that assault and imprisonment based on "fantasy" and "illusory" accusations, especially in minor trivial matters, are not permissible. Some hadiths that prohibit imprisonment are applied to such cases (Al-Muntzari: P. 481).

The only drawback of this reason is the general ambiguity of expediency and preventing system disruption; Because this causes abuse and confrontations and interpretations of taste and covers for the loss of the rights and freedoms of the accused. This problem can be solved by providing defined and macro criteria; Therefore, there is nothing wrong with the accused being kept under observation in important cases while respecting human rights with minimal restrictions, to discover the truth; perhaps giving up on this matter will cause irreparable losses to the individual and the society, which is far more important than limiting the rights and freedoms of the suspect; What is the fact that avoiding possible harm is obligatory from the point of view of reason (Al-Shabiri Al-Zanjani: 1998, Vol. 2, p. 505).

The narrative reasons conclude that detention before trial is not permissible, except in the case of murder charges; However, according to the rules of conflict, the permissibility and nonpermissibility of arrest should be placed in the criterion of importance so that whichever one is more important is given priority. While in Afghanistan's criminal justice system, arrest by police was valid for some crimes such as obvious crimes and crimes under Article 113 of the Criminal Procedure Law.

### **3-2-2- The Duration of Arrest by Police from the Perspective of Islamic Jurisprudence**

The Imami jurists do not have a single view on this subject. Some have allowed the imprisonment of the accused of murder without a time limit until the provision of evidence or the end of a quarrel. (Tabasi: ibid, p. 45) Sheikh Tusi and another group considered this period to be six days, Ibn Hamza three days (Ibn Hamza: 1987, p. 461), and Ibn Junaid Askafi one year. The documentary of Sheikh Tusi and his followers is about the hadith of Sakuni, which was discussed in the section on the reasons for the permission to maintain. Ibn Junaid's point of view also has no reason; Apparently, the word "*Sunnah* (year) " in this view may be spelled as "*Setah* (six)".

But Ibn Hamza did not mention any documentation for his view. Perhaps his document is the abolition of the feature of giving a three-day grace period in the case of apostates, which includes the subject of the dispute (Al-Najafi: P.277).

Sunni jurists also disagree about this. While distinguishing between the known accused for debauchery and corruption and the anonymous accused, they have given a different time for each of them. They say one, two, three days to one month for the anonymous accused. It has been attributed to Imam Malik and his followers, Ahmad Ibn Hanbal, and the researchers of his companions and the companions of Imam Abu Hanifah that the accused remain in prison until his condition is clarified. Of course, if this time lasts for a long time and exceeds one year, Maliki jurists do not consider such imprisonment permissible; However, the detention period of a known criminal is more severe than that of an unknown accused. Sunni jurists have considered the maximum time of his imprisonment to be one month until the crime is discovered, even if this period continues until his death. This result has been understood from the words of Hanafi, Maliki, Shafi'i, and Hanbali jurists (Collection of Man al-Al-Tarein: P. 294-295). Therefore, the view of Islamic jurisprudence regarding the duration of detention by the police, in addition to being different from the judicial system of Afghanistan, also has a strong intra-jurisprudential difference.

### **Conclusion**

- 1- Arrest by police is permissible in the criminal justice system of Afghanistan and is accepted for obvious crimes and misdemeanors for which imprisonment is of medium type and also for crimes for which there is a possibility of escape or disappearance of the perpetrator. It doesn't matter if the felony and misdemeanor are charges of murder or other crimes that are defined as felonies and misdemeanors in the criminal code of Afghanistan; While the permission of arrest by police for general crimes, from the point of view of Islamic jurisprudence, is faced with strong and justified opposition by a group of jurists, and it can be extended to all accusations and criminals only with secondary reasons and the necessity of interests and importance of cases.
2. The initial period that the Afghan legislator has predicted for this situation is 72 hours for ordinary crimes and 10 days for important crimes such as terrorist crimes; While this period is controversial in terms of Islamic jurisprudence; Imamiyyah jurisprudence considers its maximum limit to be six days, and Sunni jurisprudence considers this period to be very different. In a way that may lead to life imprisonment.

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