



## Pretrial detention in Egyptian legislation

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## Methodology

The paper reviews the texts contained in the Criminal Procedures Law No. 150 of 1950 regarding pretrial detention, and provides an objective analysis of these texts. It also reviews some guarantees related to pretrial detention in French legislation.

## Introduction

Personal freedom has been safeguarded by Article 54 of the Egyptian constitution. It has also been guaranteed by the Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights. Therefore, freedom of movement may not be infringed except by arrest or pretrial detention, provided that either procedure is carried out within the framework of guarantees set by the constitution and the law, and in light of the constitutional protection of personal freedom. The legal principle stating that every person accused of any crime is considered innocent until proven guilty should be observed in this regard. These are the legitimate guarantees related to the restriction of the right to freedom of movement.<sup>1</sup>

Several jurists and laws defined pretrial detention as an abhorrent measure, as it affects personal freedom and causes defendants to spend years in prison without sufficient evidence for accusation. Pretrial detention orders are also issued by bodies that often combine the powers of both accusation and investigation.

Pretrial detention in the modern Egyptian positive laws has gone through significant stages to strike a balance between the interest of the investigation and the accused's freedom of movement. These include the Criminal Investigations Law issued on 13 November 1883 and its amendments, the Criminal Investigations Law issued in 1904, the Criminal Procedures Law No. 150 of 1950, and finally Law No. 145 of 2006 amending the previous law.

In light of the development of guarantees of pretrial detention in different laws, and in order that pretrial detention will not turn into a continuous assault on constitutionally protected freedoms, the Egyptian legislation must keep pace with the guarantees of pretrial detention.

French Law No. 1062 of 1987 has entrusted the power of issuing pretrial detention orders to a judicial body composed of three judges, not including the investigating judge who interrogates the accused. The French Court of Cassation monitors the legality of pretrial detention.

In Egyptian legislation, pretrial detention is a punishment issued by the investigation authority, not the court. This may cause severe harm and violent shock

<sup>1</sup> Dr. Ahmed Fathi Sorour's presentation of the book "Pretrial Detention in Egyptian Legislation," Judge: Serri Mahmoud Syam, the vice-president of the court of appeal, Dar Al-Shorouk, 2007 edition, p. 8

to the accused, as it harms their reputation.

Do the articles governing pretrial detention in the Egyptian Criminal Procedures Law strike a real balance between the state's right to punishment and the accused's right to personal freedom as a constitutional rule based on the legal principle stating that every person accused of any crime is considered innocent until proven guilty? This is what this paper seeks to answer.

## **First: What is pretrial detention?**

The Egyptian legislation did not define pretrial detention, but rather laid down the rules regulating it. It mentioned its reasons, justifications, the cases in which it is applied, the authority that issues pretrial detention orders, its duration, supervision and complaint against it. The law considers pretrial detention as one of the investigation procedures undertaken by the competent court, whether the investigation is initial or final.

Jurists provided several definitions of pretrial detention. Dr. Abdel Raouf Mahdi defined it as "the deprivation of the accused's freedom for a period of time by placing him in a prison, and the principle is that it is a punishment. Therefore, it should not be applied without a court ruling after a fair trial in which the accused should have guarantees to defend himself, pursuant to a general principle of criminal trial procedures – rather it is a human right – which is that every person accused of any crime is considered innocent until proven guilty. Yet, the legislator permitted it for the investigator in the initial investigation as soon as the investigation begins or during its course. So, pretrial detention is an investigation procedure that contradicts the presumption of innocence".<sup>2</sup>

Dr. Ahmed Fathi Sorour defined it as "an investigation procedure in all cases", saying "it is not a punishment and it should not turn into a precautionary measure classified as a penalty".

Article 381 of the public prosecution's instruction booklet defines pretrial detention as "an investigation procedure that aims to ensure the integrity of the initial investigation, by putting the accused at the disposal of the investigator. This facilitates interviewing and interrogating the accused whenever the investigation requires it, and prevents him or her from fleeing, tampering with case evidence, influencing witnesses, or threatening victims. It also protects the accused from possible acts of revenge, and calms general feelings of agitation caused by the magnitude of the crime".

<sup>2</sup> Explanation of the general rules of criminal procedures, Dr. Abdel Raouf Mahdi, authored by: The Judges Club, 2003 edition, p. 367

## **Second: The evolution of pretrial detention in Egyptian legislation**

The Criminal Procedures Law regulated pretrial detention through the Civil Felonies Investigation Law issued in 1883 to apply to civil courts. We will not dwell on that law as it was suspended until 1889 and then was amended in 1904. Following the abolition of foreign privileges under the 1936 treaty, the Felonies Investigation Law regulating pretrial detention was issued in 1949. It entrusted the power of issuing pretrial detention orders to the investigating judge for a period of one month, if the crime he is investigating is punishable by detention, without setting a minimum term of imprisonment or another punishment more severe than imprisonment.

In the event of extending the pretrial detention, the papers would be submitted to the consultation chamber before the expiry of the one-month period, without obligating the investigating judge to justify the pretrial detention order. The consultation chamber had the authority to extend the detention month by month until the investigation is completed, provided that the competent court – whether it is a misdemeanors or a felonies court – would be responsible for issuing the pretrial detention order without being bound by a maximum term.

The Criminal Procedures Law No. 150 of 1950 contained more guarantees related to the procedures regulating pretrial detention. We will discuss this in detail when we talk about the purpose and conditions of pretrial detention. When the 1971 constitution was issued, more guarantees were added, including justifications for pretrial detention and the necessity of setting its duration. However, these guarantees had not been applied until Law No. 145 of 2006 was issued, amending the Criminal Procedures Law with regard to pretrial detention.

## **Third: The contradiction between the laws governing pretrial detention and its purpose stated in the constitution**

Article 54 of the 2014 constitution lists the cases in which the personal freedom of individuals may be infringed and restricted, noting that this should be done by a causal judicial warrant necessitated by an investigation. This means that the order of pretrial detention must be for the interest of the investigation only. The constitution referred the regulation of pretrial detention, its duration, causes, grievances, and which cases are eligible for compensation to the law. The law here is intended to be the Criminal Procedures Law or other laws related to pretrial detention, such as Law No. 94 of 2015 regarding Combating Terrorism, or Emergency Law No. 162 of 1958.

Therefore, when deciding on pretrial detention, being a measure that affects personal freedom that has been safeguarded by the constitution, the legislator

must adhere to constitutional legality by observing the guarantees related to pretrial detention. Moreover, the law should strike a balance between the personal freedom of the accused and the interest of the investigation.

There should be a balance between the interest of society and freedom of movement, as pretrial detention affects that freedom severely. Pretrial detention has been abused in many countries, especially the ones ruled by authoritarian regimes, where the rights of the authority outweigh the rights of individuals.<sup>3</sup>

So, we will review the justifications and reasons for pretrial detention stated in Article 134 of the Criminal Procedures Law and the flaws contained therein that violate the constitution. This requires legislative intervention so that the Article will match the purpose of pretrial detention. We are going to review this through the following points:

**A. Deviation of the justifications for pretrial detention stated in the Criminal Procedures Law from the purpose for which pretrial detention was prescribed**

Article 134 of the Criminal Procedures Law expanded the purpose of pretrial detention stated in the current constitution. It infringes upon the accused's right to personal freedom and refutes the presumption of innocence. It also contains justifications that deviate from the purpose for which pretrial detention was prescribed, which is the interest of the investigation. The Article limits the reasons and justifications for pretrial detention to four cases, as follows:

1. If the crime is committed in flagrante delicto, and the judgment must be executed immediately upon its issuance
2. If there is a fear of the accused fleeing or absconding
3. If there is a fear that the interests of the investigation will be compromised either by influencing the victim or witnesses or tampering with evidence or by reaching agreements with the remaining accused to distort the truth
4. If it is necessary to prevent grossly compromising security and public order as a result of the magnitude of the crime

It is clear that the fourth item of Article 134 of the Criminal Procedures Law violates Article 54 of the current constitution, which states: "Personal freedom is a natural right which is safeguarded and cannot be infringed upon. Except in cases of in flagrante delicto, citizens may only be apprehended, searched, arrested, or have their freedoms restricted by a causal judicial warrant necessitated by an investigation."

This article in the 1971 constitution allowed detention by a judicial warrant for the sake of serving the interest of the investigation and maintaining the security of society. Since the phrase "maintaining the security of society" has been deleted from the current constitution, the law must abide by Article 54.4

<sup>3</sup> Dr. Ahmed Fathi Sorour's presentation of the book "Pretrial Detention in Egyptian Legislation," Judge: Serri Mahmoud Syam, the vice-president of the court of appeal, Dar Al-Shorouk, 2007 edition, p. 8

<sup>4</sup> Dr. Ahmed Fathi Sorour's explanation, Al-Waseet in the Criminal Procedures Law, Book One, Dar Al-Nahda Al-Arabiya, 2014 edition, p. 1003

The first and second items of Article 134 of the law included justifications for pretrial detention. These justifications are related to the accused and the magnitude of the crime, not the investigation or anything related to it. The purpose of pretrial detention should not be expanded, and pretrial detention should not be considered as a precautionary measure, as this will classify it as a penalty, thus contradicting the temporary nature of pretrial detention. Taking into account the general feeling of the public because of the magnitude of the crime should not be addressed by imprisoning the innocent. The fear of the accused fleeing should not be a reason for detaining him, otherwise it will be a confiscation of what is required, which is to make sure of his conviction, which completely contradicts the presumption of innocence.<sup>5</sup>

### **B. Expanding the reasons for pretrial detention**

As this research paper discusses the problems of pretrial detention in Egyptian legislation, the following reason can be addressed as it is related to the expansion in the issuance of pretrial detention orders. This reason is represented in having sufficient evidence to attribute the crime to the accused.

Article 134 of the Criminal Procedures Law states that “the investigating judge may, after questioning the accused or in the event of his escape, if the incident is a felony or misdemeanor punishable by imprisonment for a period of no less than one year, and if the evidence is sufficient, issue an order for the accused to be held in pretrial detention...”.

The article used the term “evidence”, which is a broad description and insufficient for conviction, as the Public Prosecution can consider the investigations – for example – as evidence, something which we have recently seen in the repeated pretrial detention orders. Pretrial detention must be based on “evidence” in accordance with the judgments issued by the criminal courts and the court of appeal, such as the technical report, the confessions, or the testimonies of witnesses. This requires legislative intervention to ensure that any pretrial detention order must be based on evidence, since such an order – like punishment – deprives the accused of his freedom.<sup>6</sup>

For a pretrial detention order to be valid, the investigator must have sufficient evidence to attribute the crime to the accused, whether as a principal or an accomplice (Article 134 of the Criminal Procedures Law). The law used the phrase “sufficient evidence” without clarifying what is meant by it; does it mean that suspicions or evidence are sufficient, or there must be strong evidence for attributing the crime to the accused?<sup>7</sup>

### **Jurisprudence tends to deem pretrial detention orders and all consequent**

<sup>5</sup> Op. cit.

<sup>6</sup> Dr. Abdel Raouf Mahdi’s explanation of the general rules of criminal procedures – the Judges Club – 2003 edition, p. 373. He also referred to the opinion of Dr. Al-Marsafawi - Fundamentals of Criminal Procedure, 1996, p. 424, where he said: “Pretrial detention is a kind of imprisonment that is exceptionally authorized without a judgment, but by a decision of the investigator. So, it should be based at least on solid evidence from the investigator’s point of view, otherwise the accused may be referred to trial while he is released, so that the court can decide on his case.”

<sup>7</sup> Dr. Abdel Raouf Mahdi, *ibid*, p. 373

procedures invalid if the competent court had no sufficient evidence to justify the order to detain the accused<sup>8</sup>. Since the pretrial detention order is extremely dangerous, it must be based on solid evidence.

### C. The purpose of pretrial detention in French legislation

The French legislator used the phrase “temporary imprisonment” instead of “preventive detention”, according to Article 144/1,2 of the French Code of Criminal Procedure, in order to “preserve material evidence or clues or to prevent either witnesses or victims or their families being pressurised or fraudulent conspiracy between persons under judicial examination and their accomplices; to protect the person under judicial examination, to guarantee that he remains at the disposal of the law, to put an end to the offence or to prevent its renewal; to put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offence, the circumstances in which it was committed, or the gravity of the harm that it has caused”.

Despite the expanded justifications for pretrial detention, especially in matters that deviate from the interest of the investigation, the French legislation made the alternatives to pretrial detention (judicial supervision) a rule while pretrial detention an alternative. Article 144 of the French Code of Criminal Procedure stipulates that “pretrial detention may only be ordered or extended if it appears from clear elements and circumstances that it is the only way to achieve one or more of the objectives of pretrial detention, and that these objectives cannot be achieved in the case of subjecting to judicial oversight and commitment to stay at the place of residence while being subject to electronic supervision”.

Article 138 of the French Code of Criminal Procedure stipulates that “judicial supervision may be ordered by the investigating judge or the liberty and custody judge if the person under judicial examination is liable to incur a misdemeanour imprisonment penalty, or one that is more severe”. The article also defined the judicial supervision measures.

## **Fourth: Pretrial detention must be issued by a judicial authority and its temporary nature must be observed**

Article 54 of Egypt’s 2014 constitution set two conditions for restricting personal freedom. The first is that the order for pretrial detention must be issued by a judicial body represented in the preliminary investigation bodies (the investigating judge, or the Public Prosecution) or by the final investigation bodies (the competent court that examines the case). Since pretrial detention is an investigation measure that affects personal freedom, the judicial officer may not be delegated to issue it. The second condition is to set a maximum

<sup>8</sup> Dr. Ahmed Fathi Sorour, *Al-Waseet in the Criminal Procedures Law*, Seventh Edition, 1993, p. 599

period for pretrial detention, given its temporary nature. So, pretrial detention should not be ordered at all without a time limit. The constitution stated that the law would regulate the duration of pretrial detention.

Therefore, the Criminal Procedures Law regulates the judicial bodies tasked with issuing pretrial detention orders, as well as the duration of pretrial detention, as follows:

**A. The power of issuing pretrial detention orders**

1. **The investigating judge:** Pursuant to the amendment to the Criminal Procedures Law under Law 353 of 1952, the investigating judge's role is limited to investigation into crimes that lie within his jurisdiction in accordance with Articles 64 and 65 of the Criminal Procedures Law. The investigating judge in this case and pursuant to Article 142 of the Criminal Procedures Law may issue an order for pretrial detention for a period not exceeding fifteen days and may extend the detention for similar periods provided that the total period of detention does not exceed forty-five days.

If the investigating judge deems it necessary to extend the period of pretrial detention prescribed in Article 142, the accused shall, prior to the elapse of 45 days, be referred to the misdemeanors court of appeal convened in consultation chambers to issue, after hearing the statements of the Public Prosecution, the accused and his defense, an order extending the period of detention for consecutive periods that shall not exceed 45 days each, pursuant to Paragraph 1 of Article 143.

If the investigation has not been concluded and the accusation attributed to the accused is a felony, the period of pretrial detention issued by the misdemeanors court of appeal may not exceed five months except after obtaining, before its expiry, an order from the criminal court convened in consultation chambers to extend the detention for a period not exceeding 45 days, subject to renewal, or for a similar period or periods within the maximum limit of pretrial detention, pursuant to Paragraphs 3 and 4 of Article 143 of the Criminal Procedures Law.

2. **The Public Prosecution:** Pursuant to Article 199 replaced by Law No. 353 of 1952 amending the Criminal Procedures Law, which assigned the Public Prosecution to conduct investigations into misdemeanors and felonies in accordance with the provisions established by the investigating judge, the Public Prosecution has the authority to issue an order for pretrial detention, as Article 201 of the Criminal Procedures Law states: "The detention order issued by the Public Prosecution may only be valid for four days following the day of the arrest of the accused or the day of handing him over to the Public Prosecution, if he was previously arrested. The four days shall be counted from the date of the arrest of the accused

if the arrest warrant was issued upon an order from the Public Prosecution. If the accused was arrested by the judicial officer, the period of pretrial detention shall start from the date of handing him over to the Public Prosecution.”

According to Article 202 of the Criminal Procedures Law, if the Public Prosecution decides to extend the pretrial detention period, the accused and the justifications for extending his detention should be referred within four days of the end of the detention period to the judge of summary jurisdiction to issue a ruling in that respect, after hearing the accused. The judge of summary jurisdiction may release the accused or extend the pretrial detention to one or several successive periods such that the total period of detention may not exceed 45 days, where each period may not exceed 15 days, provided that the four days issued by the Public Prosecution are counted.

If the Public Prosecution decides to extend the pretrial detention in excess of what is decided by the judge of summary jurisdiction, it must, before the expiry of the 45-day period, refer the accused to the misdemeanors court of appeal to issue its order after hearing the Public Prosecution, the accused and his defense. The court may release the accused or extend his detention for 45 days each time, pursuant to the first paragraph of Article 143 of the Criminal Procedures Law.

If the investigation has not been concluded, and the accusation attributed to the accused is a felony, the period of pretrial detention issued by the misdemeanors court of appeal may not exceed five months except after obtaining, before the expiry that period, an order from the criminal court convened in consultation chambers to extend the detention for a period not exceeding 45 days, subject to renewal for a similar period or periods within the limits of the maximum period of pretrial detention, pursuant to Paragraphs 3 and 4 of Article 143 of the Criminal Procedures Law.

The Public Prosecution has exceptional powers to extend pretrial detention according to:

- The Criminal Procedures Law: Article 206 bis states: “The Public Prosecution members of at least the grade of chief prosecutor – in addition to the powers granted to the Public Prosecution – shall have the powers of the investigating judge to investigate the felonies stipulated in Chapters I, II, II bis and IV of Book Two of the Penal Code. Moreover, they shall have the powers of the misdemeanors court of appeal, meeting in consultation chambers, set forth in Article 143 of this Law, to investigate the crimes stipulated in Section One of the aforementioned Chapter II, provided that the period of pretrial detention does not exceed 15 days each time. Members of that grade shall have the powers of the investigating judge, with the exception of the periods of pretrial detention stipulated in Article 142 of this law, to investigate the

felonies stipulated in Chapter III of Book Two of the Penal Code.”

- Anti-Terrorism Law No. 94 of 2015: Article 43 states: “During the investigation of a terrorist offense, and in addition to the legally-prescribed competencies thereof, the Public Prosecution or the relevant investigating authority, according to the case, shall have the jurisdiction of investigating judge and the misdemeanors court of appeal, meeting in consultation chambers, according to the same jurisdiction, restrictions, and periods provided for in Article 143 of the Criminal Procedures Law.”

The period of detention of a person accused of terrorism offenses stipulated in Article 40 of the Anti-Terrorism Law is counted as part of the period of pretrial detention ordered by the Public Prosecution or the investigating authority which is prescribed in Article 43 of the same law. The detention order may be appealed before the competent court, and the court shall decide on it within three days from the date of reporting it.

Article 40 of the Anti-Terrorism Law stipulates: “In the case of an eminent terrorist crime that needs to be confronted, law enforcement officers shall have the right to collect information on such crimes, search for the perpetrators, and keep them in custody for a period not exceeding 24 hours. Law enforcement officers shall prepare reports on the procedures and the detainee(s) shall be referred along with the report to the public prosecutor or the relevant investigating authority, according to the case. For the same necessity set forth in the first paragraph of this Article and before the expiration of the period specified, the Public Prosecution or the relevant investigating authority may order the extension of custody once for a period not exceeding 14 days. The order shall be issued with the causes by at least an attorney general or the equivalent. The custody period shall be calculated as part of the pretrial detention, and the accused shall be kept in a legally-designated area. The provisions of the first paragraph of Article 44 of this Law shall apply to grievances against the continuation of custody.”

Article 44 of the Anti-Terrorism Law states: “The accused and other relevant parties may appeal without fees the order of pretrial detention or the extension of such detention before the relevant court. The court of appeal shall grant a reasoned decision within three days of the date of submission, after hearing the statements of the Public Prosecutor or the relevant investigating authority and the defense of the appellant. If this period expires without a ruling on the matter, the accused in detention shall be released immediately.”

Despite the abolition of Law No. 105 of 1980 establishing State Security Courts under Law No. 95 of 2003, the authority of the Public Prosecution in pretrial detention has been maintained, in addition to the authority of the misdemeanors court of appeal. Thus, the Public Prose-

cution has the authority to issue pretrial detention orders for up to six months (five months according to the last amendment), unless the accused has been referred to the court, in which case it becomes within the court's jurisdiction to detain or release him. This expansion of the Public Prosecution's authority in issuing pretrial detention orders in terrorist crimes was severely criticized by MPs when discussing the draft law, according to the minutes of the People's Assembly session No. 103 on 16 July 1992, p. 281.

Therefore, the guarantees introduced by Law No. 145 of 2006 regarding the amendment of Article 206 bis of the Criminal Procedures Law, which stipulates that the grade of prosecution members who may exercise this power shall not be less than that of a chief prosecutor and that the period of pretrial detention shall not exceed 15 days, are insufficient. These guarantees infringe on the right of the accused and do not strike a balance between the interest of the investigation and the accused's right to personal freedom. On the other hand, maintaining the powers of accusation and investigation in the Public Prosecution's hands would create a conflict of interest, which could lead to harm and abuse of the accused's right.

3. The authority of the competent court: The court to which the criminal case is referred shall issue an order to detain or release the accused, based on Articles 151 and 380 of the Criminal Procedures Law, taking into account the maximum period of pretrial detention stipulated in Article 143. The district court is obligated during the examination of misdemeanors to abide by the maximum period of pretrial detention set at one-third of the maximum period prescribed for the custodial penalty, provided that it does not exceed six months.

As for felonies, the competent court shall observe the maximum period of pretrial detention set at one-third of the maximum period prescribed for the custodial penalty, provided that it does not exceed 18 months, and two years if the penalty prescribed for the crime is life imprisonment or death.

Law No. 153 of 2007 and 83 of 2013 added a sentence to the last paragraph of Article 143 to the effect that the court of appeal and the court to which the felony is referred to may not abide by the maximum period of pretrial detention if the penalty is life imprisonment or death.

#### **B. The maximum period of pretrial detention must be observed**

Since pretrial detention is an investigation procedure that is supposed to be temporary, legislators differed in how to make it temporary. Some did not set a

maximum period for pretrial detention, while others did.<sup>9</sup>

Egyptian legislation stated that the duration of pretrial detention should be limited. Article 54 of the constitution stipulates that “the law shall regulate pretrial detention, its duration, causes, and which cases are eligible for compensation that the state shall discharge for pretrial detention,...”. Law No. 145 of 2006 amending the Criminal Procedures Law stipulated a maximum limit for the period of pretrial detention. Although this limit has been stipulated since the 1971 constitution, it was not complete until Law 145 of 2006 came into force, where it amended the provisions of Article 143 of the Criminal Procedures Law.

Paragraphs III, IV and V of Article 143 of the Criminal Procedures Law stipulate that the period of pretrial detention may not exceed three months, unless the accused has been referred to the competent court before the expiry of that period. In this case, the Public Prosecution shall present the pretrial detention order within at most five days from the date of the notification of the referral of the accused to the competent court in accordance with the provisions of the first paragraph of Article 151 of this law, otherwise the accused must be released.

If the accusation attributed to the accused is a felony, the period of pretrial detention may not exceed five months except after obtaining, before the expiry of that period, an order from the competent court to extend the detention for a period not exceeding 45 days, renewable for a similar period or periods, otherwise the accused must be released.

In all cases, the period of pretrial detention at the preliminary investigation stage and all stages of the criminal case may not exceed one-third of the maximum period of custodial penalty, provided that it does not exceed six months in misdemeanors and 18 months in felonies, and two years if the penalty prescribed for the crime is life imprisonment or death.

Nevertheless, the court of appeal and the court to which the case was referred may, if the sentence is death or life imprisonment, order the pretrial detention of the accused for a period of 45 days, renewable without being bound by the periods stipulated in the previous paragraph.

### **C. Pretrial detention must be deemed null and void if it exceeds the maximum period stipulated by law**

The Egyptian Criminal Procedures Law adopts the theory of self-invalidity, although it does not mention it explicitly. This invalidity is rather based on a breach of the essential guarantee stipulated by law in procedural work.

The breach of the pretrial detention rules entails procedural penalties, whether

nullity or dismissal, according to the case. Pretrial detention is an essential procedure stipulated in Article 331 of the Criminal Procedures Law, as it relates to ensuring respect for the rights and freedoms of the parties to the criminal litigation, especially the accused. For any procedural action to be valid, it should meet some conditions. Some of these conditions are objective and others are formal (which are called formalities in the jurisprudence of criminal procedures, such as statements and appointments)<sup>10</sup>. These differ from the guiding or organizational procedural rules that do not contain guarantees of personal freedom and other human rights, but rather protect other rights related to the regulation and admission of evidence.<sup>11</sup>

In reality, however, the accused exceed the period of pretrial detention stipulated in the law, as the law does not stipulate penalty for exceeding the maximum period of pretrial detention. This requires legislative intervention to annul this practice and not to be satisfied with the theory of self-invalidity.

The maximum periods for pretrial detention stipulated by law did not meet the requirements of the second paragraph of Article 41 of the constitution (Article 54 of the current constitution) that necessitated a limit for the period of pretrial detention, which means that setting a maximum period for pretrial detention should not be limited to the stage of preliminary investigation only. The validity of the aforementioned periods, however, is limited to the stage of preliminary investigation. Even for the criminal court, there is no maximum period for the pretrial detention ordered by the competent court during that stage, after draining the authority of the misdemeanors court of appeal convened in consultation chambers. So, compliance with the constitutional rule that the period of pretrial detention must be limited was not complete until Law 145 of 2006 came into force.<sup>12</sup>

Article 143 requires that the papers of the case be presented to the Public Prosecutor if three months have passed since the accused has been detained, in order to take the measures necessary for completing the investigation. Violation of this procedure does not result in invalidity. Rather, it is just a reminder that the continuation of the pretrial detention of the accused is not due to laxity or negligence in the preliminary investigation.<sup>13</sup>

## **Fifth: Alternatives to pretrial detention in Egyptian legislation**

Law No. 145 of 2006 amending some provisions of the Criminal Procedures Law introduced alternatives to pretrial detention in the second paragraph of Article 201, which we hope will be the rule while pretrial detention will be the alternative, as in French legislation. Article 201/2 of the Criminal Procedures Law states that “the authority concerned with pretrial detention may issue one

<sup>10</sup> Dr. Ahmed Fathi Sorour, *ibid*, pg. 610

<sup>11</sup> Dr. Ahmed Fathi Sorour, *ibid*, pg. 611

<sup>12</sup> Judge Serri Mahmoud Syam, *the vice-president of the court of appeal, Dar Al-Shorouk, 2007 edition, p. 67*

<sup>13</sup> Dr. Abdel Raouf Mahdi, *ibid*, p. 377

of the following measures instead:

1. Requiring the accused not to leave his place of residence or domicile
2. Requiring the accused to be present at the police headquarters at specified times
3. Banning the accused from going to specific places

If the accused violates the obligations imposed by the measure, he may be remanded in custody.

The same rules set for pretrial detention shall apply to the period of the measure, its extension, its maximum limit, and the appeal against it.

The aforementioned text needs to be amended, especially in light of the technological development and the Covid-19 pandemic. Some measures should not be used anymore, such as requiring the accused to be present at police headquarters at specific times. This measure can be replaced by requiring the accused not to leave his place of residence and imposing electronic restrictions, just as the case in French legislation. Article 144 of the French Code of Criminal Procedure states that “pretrial detention may only be ordered or extended if it appears from clear elements and circumstances that it is the only way to achieve one or more of the objectives of pretrial detention, and that these objectives cannot be achieved in the case of subjecting to judicial oversight and commitment to stay at the place of residence while being subject to electronic supervision”.

## **Conclusion and recommendations**

Based on the fact that the Criminal Procedures Law reflects the degree of respect for personal freedom, which is safeguarded by the constitution and law, we must learn from other countries’ legislation. We should respect citizens, preserve their rights and freedoms, and prevent infringement on them except through the law and the constitution.

We call for a new system of pretrial detention that should be issued by independent judges. Also, judicial and electronic supervision should be the rule, while pretrial detention should be the alternative.

The Association for Freedom of Thought and Expression (AFTE) recommends amending some articles of Criminal Procedures Law No. 150 of 1950 related to pretrial detention, as follows:

1. Article 134 should be amended to read: “The investigating judge may, after questioning the accused, if the incident is a felony or misdemeanor punishable by imprisonment for a period of no less than one year, and if the evidence is sufficient, issue an order for the accused to be held in

pretrial detention, in one of the following cases: If there is a fear that the interests of the investigation will be compromised either by influencing the victim or witnesses or tampering with evidence or by reaching agreements with the remaining accused to change or distort the truth.”

2. Article 136 should be amended to read: “The investigating judge shall, prior to issuing an order for detention, hear the statements of the Public Prosecution and the defense of the accused. The detention order shall state the crime attributed to the accused, the penalty prescribed for it, and the reasons on which it was based. The provisions of this article shall apply to the orders issued to extend pretrial detention, in accordance with the provisions of this law. Any order issued in violation of the foregoing shall be deemed null and void.”
3. Article 143 should be amended to read: “If the investigation has not been concluded, and the judge deems it necessary to extend the period of pretrial detention in excess of the period prescribed in the previous article, the papers of the case shall, before the expiry of the aforementioned period, be referred to the misdemeanors court of appeal convened in consultation chambers to issue its order, after hearing the statements of the Public Prosecution and the accused, to extend the detention for successive periods that shall not exceed 45 days each, if such is necessary for the investigation, or otherwise release the accused with or without bail. Nevertheless, if three months have elapsed since the accused was held in pretrial detention, the matter shall be presented to the Public Prosecution with a view to taking the measures deemed necessary to conclude the investigation. The period of pretrial detention shall not exceed three months unless the person accused has been referred to the competent court prior to the elapse of that period. In this case, the Public Prosecution shall present the detention order within at most five days from the date of announcing the referral to the competent court in accordance with the provisions of the first paragraph of Article 151 of this law, otherwise the accused must be released. If the accusation attributed to the accused is a felony, the period of pretrial detention may not exceed five months except after obtaining, before the expiry of that period, an order from the competent court to extend the detention for a period not exceeding 45 days, subject to renewal, or for a similar period or periods, otherwise the accused must be released. In all cases, the period of pretrial detention at the preliminary investigation stage and all stages of the criminal case may not exceed one-third of the maximum period of custodial penalty, provided that it does not exceed six months in misdemeanors, one year in felonies, and two years if the penalty prescribed for the crime is life imprisonment or death, otherwise the accused must be released.”
4. An article should be added to stipulate nullity and immediate release in case of violating the dates of pretrial detention, whether these dates are

related to the issuance or extension of the pretrial detention order or appealing it.

5. The second paragraph of Article 206 bis should be deleted so the article reads: “The Public Prosecution members of at least the grade of chief prosecutor – in addition to the powers granted to the Public Prosecution – shall have the powers of the investigating judge to investigate the felonies stipulated in Chapters I, II, II bis and IV of Book Two of the Penal Code. Members of that grade shall have the powers of the investigating judge, with the exception of the periods of pretrial detention stipulated in Article 142 of this law, to investigate the felonies stipulated in Chapter III of Book Two of the Penal Code.”
6. Article 43 of the Terrorism Law No. 94 of 2015 should be amended by deleting the text regarding granting the Public Prosecution or the competent investigation authority the powers established for the misdemeanors court of appeal convened in consultation chambers to read: “During the investigation of a terrorist offense, and in addition to the legally-prescribed competencies thereof, the Public Prosecution or the relevant investigating authority, according to the case, shall have the jurisdiction of investigating judge, according to the same jurisdiction, restrictions, and periods provided for in Article 143 of the Criminal Procedures Law.”
7. An article should be added to stipulate compensation for the periods of pretrial detention.