

LEGISLATIVE DEFICIENCY IN THE PRELIMINARY INVESTIGATION STAGE
IN THE CRIMINAL PROCEDURE LAW OF THE INTERNAL SECURITY FORCES¹Sarmad Musdak Radi, ²Prof. Dr. Mohammed Hamid Abd^{1,2}College of Law and Political Science, Iraqi UniversityE-mail: sarmad.musdak@aliraqia.edu.iq

ABSTRACT

This research examines the issue of legislative deficiency in the preliminary investigation stage as regulated by the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008). Given that the preliminary investigation constitutes one of the most critical phases of criminal proceedings—due to its fundamental role in gathering evidence, uncovering the truth, and determining criminal liability—the study aims to assess the adequacy of the legal provisions governing preliminary investigation procedures and the competent authorities responsible for conducting them, as well as to identify the manifestations of legislative deficiency that may affect these provisions in practical application. The research concludes that some of the legal texts regulating the preliminary investigation stage suffer from insufficiency or ambiguity in organizing certain procedures or delimiting jurisdictional powers, a situation that may generate legal and practical challenges during implementation. Accordingly, the study emphasizes the necessity of reviewing and developing these legal provisions in a manner consistent with the requirements of criminal justice and the guarantees of a fair investigation, thereby contributing to the enhancement of the effectiveness of the legal system within the Internal Security Forces.

Keywords: Legislative Deficiency, Preliminary Investigation, Criminal Procedure Law, Internal Security Forces.

INTRODUCTION

Among the most important functions exercised by public authorities within the state is the enactment of criminal legislation, given its direct connection to public rights and civil liberties on one hand, and to the state's criminal policy on the other. The Code of Criminal Procedure constitutes the primary legal instrument through which those authorities regulate the activities concerned with confronting crime and preventing its occurrence. In view of the specific nature of the duties discharged by the Internal Security Forces—derived from their designated functional role of protecting citizens in all matters pertaining to their persons, property, honour, values, and freedoms—it became imperative for this institution to have a dedicated legal framework encompassing all aspects of security life. Against this background, the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) was enacted, constituting the legislative framework intended to regulate the criminal procedural rules applicable to members of this institution.

However, practical reality and judicial application have revealed a manifest legislative deficiency embedded within this Law, whether in terms of its drafting or its compatibility with constitutional principles and the general procedural criminal rules enshrined in the General Code of Criminal Procedure (Law No. 23 of 1971, as amended). This situation opens the door to divergent interpretations that may ultimately lead to the violation of the rights of the accused police officer.

Significance of the Research

The significance of this research derives from several legal and practical considerations, the most prominent of which are:

- Illuminating the pivotal role of the preliminary investigation stage in criminal proceedings and its impact on the achievement of criminal justice.
- Shedding light on the legal provisions governing preliminary investigation in the Criminal Procedure Law of the Internal Security Forces.
- Identifying the manifestations of legislative deficiency that may affect these provisions and their impact on practical application.
- Contributing to the development of the legislative framework regulating the investigation of offences committed by members of the Internal Security Forces, in a manner that achieves the appropriate balance between the requirements of institutional discipline and the guarantees of justice.

Research Problem

The research problem revolves around the following central question:

To what extent do the legal provisions regulating the preliminary investigation stage in the Criminal Procedure Law of the Internal Security Forces suffer from legislative deficiency, and what is the effect of such deficiency on the integrity of investigative procedures and the attainment of criminal justice?

Research Methodology

This study adopts the descriptive-analytical method, through the description of the legal provisions regulating the trial stage in the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008), and the analysis of their contents in order to identify the manifestations of legislative deficiency that may affect them. The study also analyses relevant judicial applications and doctrinal opinions pertaining to the subject matter.

Structure of the Research

A comprehensive treatment of the subject requires dividing the research into four sections. The first section addresses the definition of criminal legislative deficiency; the second examines the deficiency in the competent authorities for preliminary investigation under the Criminal Procedure Law of the Internal Security Forces; the third deals with the deficiency in preliminary investigation procedures under the same law; while the fourth is devoted to the deficiency in the disposition of the investigation and its procedural effect under the Criminal Procedure Law of the Internal Security Forces.

Section One: Definition of Criminal Legislative Deficiency

Defining criminal legislative deficiency requires clarifying its linguistic and terminological meanings, as well as distinguishing it from the concepts of legislative gap and legislative abstention, as set out below.

First Subsection: Criminal Legislative Deficiency in the Linguistic Sense

Deficiency (*Qusūr*): Linguistically, the word derives from the root verb *qasara*. It means to fall short of something, to be incapable of it, to cease from it, and to leave it because one cannot attain it. The term also appears in the Holy Qur'an in the context of the Shari'a's permission to shorten (*qasr*) the prayers of four rak'as—Dhuhr, 'Asr, and 'Isha—to two, pursuant to the Divine saying: "...it is no sin for you to shorten your prayers..." (*Qur'an 4:101*).

Legislative (*Tashrīṭ*): Linguistically, the adjective derives from the noun *tashrīṭ*, itself derived from the verb *shara'a*, meaning to enact or promulgate laws through a council or legislative authority. The term also carries the sense of paving or preparing a way.

Criminal (*Jazā'ī*): Linguistically, it derives from the verb *jazā*, meaning to recompense or reward. A *jazā'* (sanction) is a penalty prescribed by a legal text, and a criminal court is a court vested with jurisdiction to hear crimes and criminal actions.

Second Subsection: Criminal Legislative Deficiency in the Terminological Sense

Providing a definition of legislative deficiency in law is not a straightforward matter, given the inherent difficulty in defining law itself. This necessitates recourse to the doctrinal positions on the matter. Some scholars have defined legislative deficiency as "the absence of a legal text that governs or regulates a specific factual situation which the legal system requires to be regulated, or as the non-existence of a legal rule, or the existence of a rule that is insufficiently adequate to resolve an issue that is presumed to require regulation by a legal rule." Other scholars have defined it as "the failure of a legal text to contain the detailed or particularized provisions needed in light of the fundamental changes occurring in society." Yet another view holds that legislative deficiency refers to "the inadequacy of an actually existing legal text to adequately regulate and address the matter or subject it was designed to govern"—meaning that the legislator has addressed the entire subject but only superficially.

A review of the aforementioned definitions reveals that they do not, in fact, define legislative deficiency per se; rather, they define legislative incompleteness (gap), which is merely one manifestation of legislative deficiency. Legislative incompleteness is not synonymous with legislative deficiency; it is, rather, a subset thereof. Every incompleteness constitutes deficiency, but not every deficiency constitutes incompleteness. A significant body of scholarly opinion holds that incompleteness is one form of legislative deficiency, not a synonym for it.

Another strand of doctrine defines legislative deficiency as "a situation confronted by a judge in the course of interpreting and applying legal rules—whether substantive or procedural—which may manifest as textual obscurity, conflict between legislative texts, or legislative incompleteness, whether in the form of defective drafting or the complete absence of a text governing the factual situation before the court."

Western legal scholarship has also addressed the concept of legislative deficiency. The International Conference on Constitutional Justice, held in France, stated that "legislative deficiency does not arise from the total absence of a legal text, but rather consists in the inadequacy of an existing text or its inability to achieve the desired legislative purpose, whether due to drafting defects, limited scope of application, or failure to keep pace with social and economic developments." The

German jurist Robert Alexy has argued that legislative deficiency is "a form of legislative ineffectiveness, in which a text formally exists but is incapable of fully addressing practical reality." The Italian jurist Norberto Bobbio held that "legislative deficiency does not impair the completeness of the legal system, but rather its functional quality and its capacity to deliver justice."

The Researcher's View: On the basis of the foregoing discussion, legislative deficiency may be defined as: "the situation that arises when the legislator fails to observe the requirements of sound legislative drafting in the preparation of legal rules, or when those rules become inconsistent with the developments of practical and social reality upon their application, thereby confronting the judge during the interpretation and implementation process with multiple manifestations of deficiency, including incompleteness, obscurity, conflict, error, repetition, and superfluity."

It may be inferred from this definition that legislative deficiency is a broad concept encompassing all drafting defects that may afflict legal rules—namely incompleteness, obscurity, conflict, error, repetition, or superfluity—and that the causes underlying the appearance of legislative deficiency are reducible to two primary factors: first, the failure of those engaged in legislative drafting to observe the sound principles required in formulating legal rules; and second, the inadequacy of legal rules to address the facts and developments occurring in human society.

Section Two: Deficiency in the Competent Authorities for Preliminary Investigation under the Criminal Procedure Law of the Internal Security Forces

The investigation conducted by police officers within the Internal Security Forces in relation to criminal offences and disciplinary infractions falling within their jurisdiction constitutes an administrative investigation, whether conducted by a single officer (the disciplinary commander or the officer designated for investigation) or by an administrative body (the investigative council).

Article 5 of the Criminal Procedure Law of the Internal Security Forces provides as follows: "If the disciplinary commander is informed of, or becomes aware of, the commission of an offence, or finds that there are matters necessitating the conduct of an investigation, he shall take one of the following measures: First, investigate the matter himself; Second, assign an officer to conduct the investigation; Third, form an investigative council."

The Researcher's View: The researcher is of the view that the legislator was not well-advised in granting the disciplinary commander discretionary authority to initiate an investigation and to exercise prosecutorial power unilaterally, particularly in the absence of oversight by a public prosecution authority whose role is confined to the trial stage. This approach excludes the system of popular prosecution (*actio popularis*) adopted under the General Code of Criminal Procedure (Law No. 23 of 1971, as amended), which empowers the victim of the offence, his legal representative, or any person with knowledge of its commission, to file a complaint with the public prosecution, pursuant to Article 1(a) of that Law.

The preliminary investigation within the Internal Security Forces may resemble judicial investigation before ordinary criminal courts with respect to the exercise of legally conferred powers, particularly in relation to procedures such as arrest, notification, interrogation, appointment of experts, and the like. However, it differs therefrom in that acts emanating from the administrative authority (preliminary investigation) are subject to the administrative hierarchy, and those conducting the investigation are not specialists in judicial work—in contrast to investigations conducted by judicial authorities.

In order to shed light on the competent authorities for investigation under the Criminal Procedure Law of the Internal Security Forces, this section is divided into two subsections: the first addresses the disciplinary commander and the officer designated for investigation, while the second is devoted to the investigative council.

First Subsection: The Disciplinary Commander and the Designated Investigating Officer

First: The Disciplinary Commander

It was noted earlier that Article 3(1)(b) of the Criminal Procedure Law of the Internal Security Forces defines the disciplinary commander as "the officer of highest seniority or position who is legally empowered to impose punishment on those under his command within his disciplinary authority in respect of disciplinary offences; and the officer assigned with an inspection mission within the Internal Security Forces is considered a disciplinary commander for all agencies of the Internal Security Forces while conducting such inspection, each within the scope of his jurisdiction." Furthermore, Article 20(1) specifies the authority of officers and personnel holding special grades in the Ministry of Interior to impose disciplinary sanctions, providing that "the disciplinary commander is empowered to impose the penalties specified in the schedule annexed to this Law."

Second: The Designated Investigating Officer

This term refers to the officer assigned by the disciplinary commander to conduct the administrative investigation, as previously noted. Article 5(2) of the Criminal Procedure Law of the Internal Security Forces requires that the officer assigned to conduct the investigation by the disciplinary commander must hold officer rank. Article 1(4) of the Service and Retirement Law of the Internal Security Forces (Law No. 18 of 2011, as amended) defines an officer as "a member of the police of the rank of Second Lieutenant and above." Accordingly, non-commissioned members are not eligible to conduct investigations, even if the accused police officer holds a rank lower than theirs.

The Researcher's View: The researcher observes that the legislator has required that the person assigned to conduct the investigation by the disciplinary commander must hold officer rank, without stipulating the necessity of possessing relevant academic qualifications and practical experience, let alone the seniority demanded by military custom. It is therefore recommended that the legislator amend the aforementioned provision by adding conditions relating to military seniority and academic qualifications—specifically, that the officer assigned to conduct the investigation should hold, at a minimum, a primary university degree in law.

In performing his duties, the designated investigating officer may undertake all investigative procedures and exercise the criminal jurisdiction prescribed by the applicable procedural laws, including the Criminal Procedure Law of the Internal Security Forces and the General Code of Criminal Procedure.

Second Subsection: The Investigative Council

The investigative council constitutes one of the most important authorities established by the legislator for the purpose of holding police personnel accountable for offences committed in the course of performing their professional duties.

The significance of the investigative council becomes apparent upon the activation of a police officer's liability: it provides an appropriate opportunity for establishing the accused's innocence and dispelling suspicion, and, on the other hand, serves as a means of revealing the truth by clarifying the relationship between the accused police officer and the offence committed. There are two types of investigative councils formed pursuant to the Criminal Procedure Law of the Internal Security Forces:

First: Investigative Councils Formed by Disciplinary Commanders

Article 5(3) of the Criminal Procedure Law of the Internal Security Forces, referenced above, grants the disciplinary commander the authority to form an investigative council.

The Researcher's View: The researcher notes that Article 5, as cited, contains the phrase "or finds that there are matters necessitating the conduct of an investigation," which indicates that the legislator has conferred upon the disciplinary commander unlimited powers, since the provision does not specify particular offences upon the occurrence of which he is authorized to form an investigative council; rather, it leaves the door open for the disciplinary commander to determine what constitutes an offence. This contravenes the constitutional principle of legality in criminal matters—the principle that there is no crime and no punishment except by virtue of a legal text—and the advantages of this principle in constraining the obligations of those entrusted with the enforcement of the law.

Second: Investigative Councils Formed by the Minister of the Interior

The Criminal Procedure Law of the Internal Security Forces, under Article 6, grants the Minister of the Interior the authority to form investigative councils, as the minister bears primary responsibility for the Ministry's performance and is simultaneously the supreme disciplinary commander. The minister nominates three officers, the most senior of whom serves as the president of the investigative council, and at least one of whom must hold a primary university degree in law. The investigative council is tasked with investigating matters referred to it by the minister or his delegate. Upon the conclusion of the investigation, the investigative papers are forwarded to the Legal Adviser's Office within the Ministry, which reviews them and submits them to the referral commander, with a view to referring them to the Internal Security Forces Court if the evidence gathered is found sufficient for referral, or to returning them to the investigative council for further or supplementary investigation if the circumstances so require.

The Researcher's View: The researcher considers the legislator's approach praiseworthy in assigning to the Ministry's Legal Adviser's Office the authority to review the investigative council's papers and to forward them to the referral commander—being the body most capable of rendering legal opinions on the investigations conducted by investigative councils. However, the legislator has omitted to stipulate the necessity of the Minister of Interior's ratification of the decisions issued by investigative councils following the conclusion of the investigation, being content with the decision of the Legal Adviser alone. This is inconsistent with Article 10(1) of the same Law, which grants the supreme disciplinary commander the authority to ratify the decision of the investigative council formed by him. The

legislator should therefore add the phrase "ratification by the Minister of the Interior" to the text of Article 6, so that the provision is consistent with sound legal procedures.

Section Three: Deficiency in the Preliminary Investigation Procedures under the Criminal Procedure Law of the Internal Security Forces

The investigation procedures at this stage are divided into two categories. The first encompasses the procedures aimed at gathering evidence and information, as well as ascertaining the factual truth concerning whether the charge against the accused is established. The second consists of the precautionary measures adopted by the investigative council against the accused, which are generally in direct contact with his liberty, and which serve to enable the investigating authorities to proceed with the investigation, to compel the accused's attendance, or to prevent his flight.

In order to shed light on the preliminary investigation procedures under the Criminal Procedure Law of the Internal Security Forces, this section is divided into two subsections: the first addresses the procedures pertaining to the collection and examination of evidence, while the second is devoted to the procedures for compelling the accused's attendance.

First Subsection: Procedures for the Collection and Examination of Evidence

The procedures for the collection and examination of evidence constitute important sources for gathering and obtaining information, as well as for ensuring the conditions of their validity and reinforcing their persuasive weight. These procedures are classified as follows:

First: Site Visit and Inspection

Site visit and inspection are two distinct but closely related procedures. "Site visit" refers to the act of the competent investigating authority proceeding to the scene of the offence (the locus delicti) in order to take the necessary measures, such as hearing the testimony of witnesses present, searching the locus delicti, and seizing materials found therein. It is a necessary procedure, though not required in all cases—certain offences, such as bribery, defamation, and slander, do not necessitate a site visit. The investigating officer is legally authorized to proceed with inspection within his jurisdictional area or outside it in cases of necessity. "Inspection" (or "examination of the locus delicti") refers to the physical observation of the crime scene and the material traces resulting from the commission of the offence.

The Researcher's View: The researcher considers that the significance of site visit and inspection lies in the fact that the accused typically leaves evidence at the scene, enabling identification. It is therefore necessary to conduct this procedure swiftly in order to preserve and seize the material traces and physical evidence. The investigating officer must also take the necessary precautions to secure and cordon off the locus delicti. The legislator addressed the procedures of inspection and site visit in Article 9(1) of the Criminal Procedure Law of the Internal Security Forces, which provides that: "the investigative council or the investigating officer shall immediately commence the investigation and proceed to the scene of the offence when necessary, and shall record the procedures in an official minute." It is customary within the Internal Security Forces to delegate any officer of the unit, designated by the investigating authority, to take the necessary measures within its area or against one of its members who is subject to a different disciplinary commander, given that such officers enjoy the status of judicial police officers pursuant to Article 39(1) of the General Code of Criminal Procedure.

Second: Testimony

Testimony is one of the means of proof recognized under various legal systems, including Iraqi law. In legal terminology, it is defined as "a person's disclosure to the investigating authority of information concerning an offence that he perceived through one of his senses." A review of the General Code of Criminal Procedure and the Criminal Procedure Law of the Internal Security Forces reveals that neither instrument provides a definition of testimony. Recourse to doctrine, however, yields the following definition: "what a person affirms before the investigating authority concerning facts he has witnessed or heard of, related to the offence that gave rise to the investigation."

Testimony constitutes direct evidence under procedural laws, but it is not sufficient on its own to form the basis of a judgment unless supported by compelling evidence or a presumption, except where the law prescribes a specific means of proof to which the parties must adhere. As for the view advanced by some commentators that an arrest warrant may be issued against a witness who fails to appear, on the basis of Article 8(1) and (2) of the Criminal Procedure Law of the Internal Security Forces—a view that this researcher finds erroneous, since those provisions relate to the notification of the accused, not the witness—this interpretation is untenable. Analogical reasoning is impermissible in the interpretation of criminal procedural and substantive legal texts alike; there is no room for interpretation where an explicit legal text exists. The appropriate procedure in such a case is founded on Article 59 of the General Code of Criminal Procedure, as supplemented by Article 117 of the Criminal Procedure Law of the Internal Security Forces.

Third: Search

Search is defined as "access to a place afforded particular sanctity by law—whether a person, a dwelling, or another place—for the purpose of seizing whatever may be found therein that assists in uncovering the truth regarding a specific offence." It is regarded as one of the most important preliminary investigation procedures, and may be conducted on persons, public and private premises, correspondence, and equipment, as required by the investigation. The purpose of a search may be to locate perpetrators of offences or their victims—such as the liberation of kidnapped persons—or to obtain evidence or materials related to the offence, such as weapons, instruments, and stolen property.

Given that search is a procedure that impinges upon personal liberty and the inviolability of the home, the law has surrounded it with procedural guarantees and has prescribed the conditions that must be observed when ordering or executing it. The legislator addressed search in Article 9(7) of the Criminal Procedure Law of the Internal Security Forces, which states that: "the investigative council or the investigating officer may search the dwelling of the accused police officer and arrest the suspect in accordance with legal procedures; and the dwelling of a non-police person may not be searched without obtaining the approval of the competent investigating judge."

The Researcher's View: The researcher notes that the legislator has granted the search procedure a discretionary character, with the decision to conduct it being subject to the investigating authority's discretionary power, as evidenced by the phrase "the council or the investigating officer." The legislator has also identified the competent authority to conduct the search—namely, the investigative council or the investigating officer—subject to the condition that it must be conducted in accordance with the law, and that the accused or suspect must be a member of the police. It may be carried out exceptionally in cases of necessity.

Fourth: Interrogation

Interrogation is considered one of the procedures aimed at obtaining evidence useful to the investigation. It is defined as "the questioning of the accused concerning the offence committed, while informing him of all the evidence gathered against him, so that he may rebut it and defend himself if he denies it, or accept it if he opts to confess; ultimately, it leads either to the accused's confession of the offence or to his denial thereof, accompanied by the presentation of evidence supporting that denial if he possesses such evidence."

Interrogation differs from merely asking the accused about the charge against him or hearing his statement thereon, the latter being classified as a preliminary inquiry procedure. The legislator addressed interrogation in Article 9(2) of the Criminal Procedure Law of the Internal Security Forces, which provides that: "the investigation file shall record the statements of each of the complainant or informant, the accused, the victim, and witnesses, individually, in accordance with the procedures followed before the Internal Security Forces courts..."

The Researcher's View: A review of the aforementioned legal provision reveals that the legislator has conflated the procedure of recording testimony with that of interrogation, despite the fundamental differences between the two. It would have been more appropriate to dedicate a separate legal provision to each, setting out the fundamental rules governing interrogation and its attendant guarantees.

Fifth: Appointment of Experts

The appointment of experts is one of the preliminary investigation procedures undertaken by investigating and adjudicating authorities in cases of a scientific or technical nature. Expert evidence (expertise) is defined as "the means by which a judge or investigator seeks assistance in the field of proof, in order to help identify certain indications or evidence through reliance on scientific knowledge." It consists of a technical opinion or consultation provided by the expert to the investigating authorities, and may be a technical or scientific opinion contributing to the discovery of the truth regarding a committed offence.

Expert evidence may also encompass intangible matters where its aim is to assess the degree of the capacity for discernment and volition at the time of the commission of the offence, through an examination of the accused's psychological or mental condition. An expert is defined as "the person conducting the expert examination who relies on knowledge acquired through academic study or practical experience."

The legislator addressed expert evidence in Article 9(8) of the Criminal Procedure Law of the Internal Security Forces, which provides that: "the investigative council or the disciplinary commander, upon learning of a sudden or suspicious death, may request the forensic medical authority to conduct an autopsy in his

presence to determine the cause of death; he may also request permission from the investigating judge to exhume the grave for examination of the body by a specialist expert or physician, in the presence of those related parties who can attend, in order to determine the cause of death." This provision clearly indicates that the investigating authority may resort to experts in matters requiring expert evidence.

Second Subsection: Precautionary Measures Adopted by the Investigative Council

The precautionary measures adopted by the investigative council serve two purposes: the first is to bring the accused before the investigating authority for interrogation, to confront him with other accused persons or witnesses, and to summon related parties either by notification or by issuing an arrest warrant in the event of failure to appear; the second is to ensure the proper conduct of investigative proceedings and to prevent the accused's flight, by detaining him until the conclusion of investigative procedures. The legislator addressed these measures in Articles 8, 14, and 15 of the Criminal Procedure Law of the Internal Security Forces, which are examined in turn below.

First: Notification of Attendance

This is also referred to as "summons" or "order to attend." It is defined as "an invitation to the relevant person among the parties to the proceedings to appear before the issuing authority at the specified time and place; it is characterized as a voluntary notice not involving compulsion, and contains specific conditions and procedures prescribed by the text, including the guarantees ensuring that the person notified is duly served."

The General Code of Criminal Procedure prescribes a set of substantive conditions for the notification of attendance, including its issuance by the competent investigating authority empowered to issue it, and its being addressed to the parties to the proceedings and those with relevant connections to them. Additionally, formal conditions must be observed: it must be drawn up in writing in duplicate on a document known as the "attendance notification form"—oral notification being impermissible. This form must contain complete information concerning the issuing authority, the person to be notified, the nature of the offence, and the applicable legal provision. The person to be notified must affix his signature or thumbprint to the notification form upon receipt; in the event of refusal to accept or sign the form, two witnesses must attend and sign the document to confirm the validity of the notification. The legislator has also permitted the investigating authority to issue an arrest warrant in the event of the notified person's failure to appear at the specified time and place.

Under the Criminal Procedure Law of the Internal Security Forces, the notification of attendance procedure is set out in Article 8(1), which contains the same rules and guarantees as those prescribed under the General Code of Criminal Procedure.

The Researcher's View: A review of the aforementioned provision reveals that the legislator has confined this procedure to the notification of accused police officers exclusively, to the exclusion of other parties to the proceedings. The legislator has also addressed the case of failure to appear in Article 8(2), by providing for the issuance of an arrest warrant to be executed through the accused's chain of command—unless a legitimate or unavoidable excuse prevents attendance—and has permitted a member of the investigative council, after being delegated by the council's president, to travel to the accused's or witness's residence to record their statements. The provision, however, contains numerous legislative errors and defects. In particular, the legislator confined the notification of attendance procedure to the accused in the first part of the provision, then extended it to cover both the witness and the accused in the final part of paragraph three. This constitutes a clear departure from the logical sequence of criminal procedural texts and a manifest drafting error, since it creates confusion for those subject to this Law as to the legislator's intent and purpose. It would have been more appropriate to specify in the first part all persons subject to the notification procedure—whether accused or witnesses—so that the provision is consistent in its meaning and purpose, expressed clearly and explicitly.

Second: Arrest

Arrest is one of the precautionary measures; it refers to the taking of the necessary steps to restrict the liberty of the arrested person and to temporarily place him at the disposal of the arresting authority to prevent his flight, as a preliminary step to handing him over to the competent authority. It is considered one of the most serious procedures in the preliminary investigation stage, given that it impinges upon personal liberty—which the Constitution guarantees to protect. It is a step towards the interrogation of the accused, who must accordingly be interrogated within twenty-four hours. Arrest is criminal in nature and differs from the administrative act of stopping an individual, which members of the Internal Security Forces may perform against any person who raises reasonable suspicion—an action that is administrative rather than criminal in character.

Arrest also differs from the notification of attendance in that it is limited to certain offences characterized by their gravity; it is therefore marked by severity and coercion against the persons sought. The legislator addressed the arrest warrant procedure in Article 8(2) of the Criminal Procedure Law of the Internal Security Forces, applying it where the accused fails to appear before the investigating authority after due notification without a legitimate excuse. The term "arrest" also appears in Article 9(7) of the same Law, which provides that "the investigative council or the investigating officer may search the dwelling of the accused police officer and arrest the suspect."

The Researcher's View: The researcher observes that the legislator was not precise in employing the terms "accused" and "suspect" within the aforementioned provision. If the intent was to refer to the accused, this would constitute unnecessary repetition. If the intent was to arrest any person who raises suspicion, this would fall within the category of administrative precautionary procedures referred to as "stopping," which differs in its legal nature from an arrest warrant.

As for arrest warrants issued against members of the Internal Security Forces pursuant to the General Code of Criminal Procedure by judicial authorities, the legislator, under the Criminal Procedure Law of the Internal Security Forces, stipulated that such warrants may not be executed without the approval of the Minister of the Interior, subject to specific conditions: namely, that the act was committed during or as a result of the performance of official duties; that the act is not a flagrant felony in the case of an officer, or a misdemeanour or flagrant felony in the case of a non-officer member; that the offence is not one that brings dishonour; and that a reasoned decision is issued by the Minister of the Interior, on the recommendation of an investigative council formed for this purpose, containing a refusal to refer the police officer to civil criminal courts. The ministerial decision not to execute the attendance notification or arrest warrant entails "the definitive suspension of legal proceedings and actions." The legal basis for this procedure derives from Article 136(b) of the General Code of Criminal Procedure; however, this paragraph was subsequently repealed, resulting in the suspension of the operation of Article 111 of the Criminal Procedure Law of the Internal Security Forces. This prompted the Supreme Judicial Council to issue Circular No. 775/Office/2019, dated 27 June 2019, re-affirming the application of Article 111 and subsequent provisions in view of the security imperatives and necessities.

The Researcher's View: The researcher considers that the suspension of legal proceedings under the Criminal Procedure Law of the Internal Security Forces is a commendable legislative approach, insofar as it provides legal cover and criminal protection for Internal Security Forces personnel when performing their police and security duties. This measure positively affects the readiness of security personnel and enhances the combat morale in confronting the threat of crime and criminals, and in maintaining security and stability within society and the state.

Third: Detention

Detention is a measure that constitutes a lawful deprivation of individual liberty before guilt is established in a fair trial. Its purpose is to safeguard the interests and necessities of the investigation. It is a procedure that highlights the tension between the individual's right to personal liberty and the state's right to punish. The legislator addressed detention under the Criminal Procedure Law of the Internal Security Forces in Section Four of Chapter Two, entitled "Detention of a Police Officer," within Articles 13 through 17.

The authorities competent to detain a police officer under the Criminal Procedure Law of the Internal Security Forces are: first, the investigating authorities; second, the Internal Security Forces courts; and third, the accused's chain of command—represented by the disciplinary commander of the accused's unit in his capacity as a hierarchical authority, or any other disciplinary commander—in the event of an arrest warrant issued pursuant to the General Code of Criminal Procedure, in the case of a flagrant offence, or in the event of flight following arrest, subject to the obligation to hand the accused over to his unit or to the nearest police station.

The legislator set out the discretionary grounds for detaining a police officer in Article 14(1), which includes: the issuance of an arrest warrant by a competent authority; the commission of a flagrant offence; and flight following arrest. The obligatory grounds are set out in Article 15(1): investigation into an offence punishable by imprisonment; the existence of reasons leading the investigating authority to believe the accused will flee, tamper with the evidence, or influence witnesses or accomplices.

The Researcher's View: The researcher notes that the legislator has included the flagrant offence among the discretionary grounds for detaining an accused police officer—in contrast to the General Code of Criminal Procedure, which makes detention mandatory in flagrant offence cases and requires the accused to be handed over to the requesting authority. The legislator has also placed among the obligatory grounds the investigation into an offence punishable by imprisonment, whereas the General Code of Criminal Procedure prescribes mandatory detention only in capital punishment cases and makes detention discretionary in all other offences.

Furthermore, the criminal legislator of the Internal Security Forces has introduced these grounds—which are not explicitly stated in the General Code of Criminal Procedure—as exclusive provisions.

On another aspect, the legislator has granted the disciplinary commander the authority to detain an accused police officer in only three cases specified in Article 14—out of eight cases prescribed in Articles 102 and 103 of the General Code of Criminal Procedure—namely: commission of a flagrant offence; flight following arrest; and the existence of an arrest warrant issued by a competent authority. The legislator has excluded the following cases: the issuance of a judgment in absentia; apparent intoxication; carrying arms contrary to law; reasonable suspicion of commission of a misdemeanour or intentional felony where the person has no fixed residence; and acts of aggression against judicial police officers and those assigned to public service.

The researcher believes that the rationale for these exclusions is that Internal Security Forces personnel are legally armed and are members of the judicial police, with known and registered domiciles in the Ministry of the Interior's database. As for the cases of persons convicted in absentia and of apparent intoxication, their exclusion from the disciplinary commander's authority to arrest and detain constitutes a legislative deficiency that merits the legislator's attention, given the large number of Internal Security Forces personnel convicted in absentia, and the possibility that some may be found intoxicated while on duty—all of which necessitates an amendment to the relevant legal provision.

Finally, the legislator provided for the detention of the accused and the extension of his detention by the disciplinary commander, but did not provide for the possibility of releasing the accused on financial bail, leaving this matter to the discretionary authority of the investigating bodies. This results in the disregard of the accused's rights and an infringement upon his liberty.

Section Four: Deficiency in the Disposition of the Investigation and its Procedural Effect under the Criminal Procedure Law of the Internal Security Forces

Upon the conclusion by the competent investigating authority of the investigative procedures, it is obligated to dispose of the investigation by issuing a decision either to close the case or to advance it to the trial stage. This section addresses the decisions issued by the investigating bodies, the decisions issued by the disciplinary commander, and the methods of challenging those decisions, in three subsections.

First Subsection: Decisions Issued by the Investigating Bodies

The Criminal Procedure Law of the Internal Security Forces authorizes the competent investigating bodies, upon completion of the necessary investigative procedures, to dispose of the investigation by taking one of the following decisions:

First: Charging the Accused

Upon the completion by the competent authority of the investigative procedures, it is required to issue a decision concluding the preliminary investigation stage. Among those decisions is the decision to charge the accused. Article 9(10) of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) grants the preliminary investigation authority the power to charge the accused where it is satisfied that the factual circumstances constitute a sufficient basis for a charge under the applicable legal provision.

Second: Closing the Investigation and Releasing the Accused

Article 9(11) of the same Law provides that the investigating body may close the investigation and release the accused upon the occurrence of one of the following conditions: the act is not punishable by law; the accused is not legally responsible; or the evidence gathered is insufficient for a charge. Following the adoption of one of the aforementioned decisions, the Law requires the investigating body to present the investigative papers to the disciplinary commander of the directorate, accompanied by the results of the investigation and the measures taken therein.

The Researcher's View: The researcher considers that the decision issued by the investigating bodies—specifically the designated officer or the investigative council—concerning the fate of the investigative papers is a preparatory decision (recommendation), by virtue of Article 9(12), since the investigating body does not possess the authority to determine the fate of the case. It is therefore a decision devoid of legal force, as it does not represent the conclusion of the preliminary investigation stage; rather, it is presented together with the investigation results to the disciplinary commander, who in turn takes the decisive decision in the case. The researcher further considers that this decision is a sound one that rises to the level of correct and precise application, insofar as it is grounded in the legal text, and no equivalent has been found in other departments—for it contains a clear indication of the disciplinary commander's exclusive authority to impose disciplinary sanctions.

Second Subsection: Decisions of the Disciplinary Commander on the Investigation Results

Before addressing the decisions issued by the disciplinary commander on the investigation results, it is necessary to clarify the distinction between the disciplinary commander and the referral commander. As noted in an earlier chapter, the disciplinary commander is defined under Article 3(1)(b) as "the officer of highest seniority or position who is legally empowered to impose punishment on those under his command within his disciplinary authority in respect of disciplinary offences." The referral commander is defined in Article 104(1)(c) as "the head of the department to which the convicted person belongs," while Article 29 of the same Law provides that the referral commander is "the minister or his delegate." Accordingly, the disciplinary commander exercises his powers by operation of law, whereas the referral commander must be specifically empowered by the Minister of the Interior. Thus, every referral commander is a disciplinary commander, but not every disciplinary commander is a referral commander unless empowered by the Minister of the Interior. For example, the organizational structure of the Ministry of the Interior includes a number of deputy ministries, each headed by an officer or official holding the rank of undersecretary, and these deputy ministries comprise several general directorates and other directorates. If an undersecretary forms an investigative council concerning one of the officers or members within one of these directorates, he is the disciplinary commander, while the referral commander is the head of the department to which the officer or member belongs, provided he holds referral authorization.

Concerning the decisions issued by the disciplinary commander on the investigation results: after the investigative papers and investigation results (i.e., its decision) are submitted to the disciplinary commander of the formation or directorate that he heads, by the investigating body pursuant to Article 9(12), through a memorandum organized by the director of the legal department, the disciplinary commander exercises the authority conferred upon him under Article 10, by taking one of the following decisions:

First: Concluding the Preliminary Investigation Stage

This is achieved by ratifying the decision of the investigative council or the investigating officer, or by imposing a disciplinary sanction within the powers prescribed in the schedule annexed to Article 20(1), pursuant to paragraphs (1) and (4) of Article 10.

Second: Continuing the Preliminary Investigation

This is achieved either by returning the investigative papers to the investigating body for completion of the deficiency therein, or by replacing the investigating body with another body for the purpose of conducting a new investigation—in the interest of preserving the integrity of the investigation—pursuant to paragraphs (2) and (3) of Article 10.

Third: Referring the Investigative Papers to a Higher Disciplinary Commander, the Internal Security Forces Court, or Civil Criminal Courts

This is achieved by referring the case to a higher disciplinary commander where the disciplinary sanction falls outside the referring commander's legal jurisdiction, or by referring it to the competent Internal Security Forces court pursuant to paragraphs (5) and (6) of Article 10. The disciplinary commander may also refer the investigative papers to civil criminal courts in the event of lack of jurisdiction, pursuant to Article 25 of the Criminal Procedure Law of the Internal Security Forces.

Fourth: Financial Liability (Indemnification)

The Law authorizes the disciplinary commander to hold the police officer financially liable for the value of property lost or damaged, after the defaulting party and the extent of the damage have been identified by a decision issued by the investigating body, pursuant to the legal powers conferred by his rank under Article 12(1) of the Criminal Procedure Law of the Internal Security Forces. He may combine an indemnification sanction with any other disciplinary sanction for the same act committed. The legislator has also made the enforcement of the indemnification decision mandatory, subject to the possibility of challenge.

The Researcher's View: The researcher is of the view that it would have been more appropriate to restrict the indemnification of the police officer, when issued by the investigating body, to the competent court, so as to enable enforcement and the simultaneous punishment of the accused with imprisonment for a period not exceeding three years in the event of intentional damage—pursuant to Article 34(1) of the Penal Law of the Internal Security Forces (Law No. 14 of 2008, as amended)—since this falls outside the competence of disciplinary commanders, and in accordance with the aforementioned provision.

Conclusion

Having completed the research, the most significant findings and principal recommendations arrived at are presented below.

Findings

1. The Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) aims to protect the public interest—namely, the maintenance of discipline and order within the Ministry of the Interior—by addressing instances of deviation from the prevailing standards and noble values of society, in conformity with the professional norms of the security institution. It simultaneously aims to protect the private interest of police personnel in obtaining the guarantees necessary for vindicating their rights.
2. Article 5 of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) provides that "if the disciplinary commander is informed of or becomes aware of the commission of an offence, or finds that there are matters necessitating the conduct of an investigation, he shall take one of the following measures: First, investigate the matter himself; Second, assign an officer to conduct the investigation; Third, form an investigative council." This provision suffers from a number of deficiencies: it does not grant the disciplinary commander the power to impose disciplinary sanctions directly after interrogating the non-compliant security element; it does not require practical experience or academic qualifications of the officer designated for the investigation; and it does not specify the number of investigative council members, the conditions to be fulfilled by them, or the tasks entrusted to them.
3. The legislator did not provide, in the Criminal Procedure Law of the Internal Security Forces, for the establishment of a public prosecution organ to monitor the legality of the procedures and decisions adopted during the preliminary investigation stage.
4. Article 6 of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) does not stipulate the necessity of the Minister of the Interior's ratification of the decisions issued by the investigative councils formed at his direction upon the conclusion of the investigation—a deficiency that is inconsistent with Article 10(1) of the same Law, which requires the supreme disciplinary commander to ratify the decisions of the investigative council or the investigating officer.
5. The legislator conferred upon the preliminary investigation authority the power to charge the accused, pursuant to Article 9(10), where it is satisfied that the factual circumstances constitute a sufficient basis for a charge under the applicable legal provision. This constitutes a legislative deficiency, since the charging of the accused is within the exclusive jurisdiction of the Internal Security Forces court, in keeping with the general principles of the General Code of Criminal Procedure (Law No. 23 of 1971, as amended), which entrusts the direction of charges to the jurisdiction of the court of the merits, pursuant to Article 181(c) thereof.
6. Article 26 of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) prescribes a criminal method for challenging decisions on arrest, detention, or release on bail issued by the investigating officer, the investigative council, or the referral commander, through the discretionary intervention of the Internal Security Forces courts. This provision contains a legislative deficiency in that it omits the possibility of challenging the referral decision issued by the referral commander.

Recommendations

7. The legislator is recommended to amend Article 5 of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) to read as follows: Article 5: "If the disciplinary commander is informed of or becomes aware of the commission of an offence, disciplinary infraction, or any matter necessitating the conduct of an investigation, he shall take one of the following measures: First, issue a decision imposing any of the disciplinary sanctions prescribed under the Penal Law of the Internal Security Forces directly, after interrogating the non-compliant Internal Security Forces element and providing reasons for the decision; Second, designate an experienced officer holding at minimum a primary university degree in law to conduct the investigation; Third, form an investigative council composed of three experienced officers, the most senior of whom serves as president, at least one of whom holds a primary university degree in law, to conduct the administrative investigation where the act constitutes a disciplinary infraction involving a departure from the requirements of professional duties, the impairment of the dignity and reputation of the public office, or the infliction of material damage on the public treasury by the act committed."
8. The legislator is recommended to provide for the establishment of a public prosecution organ to ensure the monitoring of the legality of the procedures and decisions adopted during the preliminary investigation stage, given that the role of the current public prosecution is confined to the trial phase—in order to ensure the non-fragmentation of the role of the public prosecution organ throughout the stages of proceedings.
9. The legislator is recommended to amend Article 6 of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) by adding the phrase "ratification by the Minister of the Interior," so that the provision reads as follows: Article 6: "The Minister of the Interior may form an investigative council at the Ministry of the Interior headquarters, composed of three officers, the most senior of whom serves as its president, at least one of whom holds a primary university degree in law, to investigate the cases referred to it by the minister or his delegate. Upon the conclusion of the investigation, the investigative papers shall be forwarded to the Ministry's Legal Adviser for review and transmission to the competent referral commander for referral to the competent Internal Security Forces court, after ratification by the Minister of the Interior, or return to the investigative council for further investigation to remedy any deficiencies found therein."
10. The legislator is recommended to amend Article 31—which currently provides that "the court may correct any error in the contents of the charge sheet and may amend or substitute the charge if the circumstances so require, and shall read and explain the correction, amendment, or substitution to the accused"—and to repeal Article 9(10) of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008), which provides that "if the investigative council or the investigating officer is satisfied that the factual circumstances constitute a sufficient basis for a charge, it shall decide to charge the accused accordingly..."—by granting the Internal Security Forces court the power to direct the charge against the accused where it finds there is sufficient evidence to warrant the belief that the accused has committed an offence within its jurisdiction, without limiting its role to correcting, amending, or substituting the charge sheet. The recommended amended provision reads as follows: Article 31: "If it appears to the Internal Security Forces court that the evidence warrants the belief that the accused has committed an offence within its jurisdiction, it shall direct the charge it deems applicable, shall read and explain it to the accused, and shall ask him whether he admits or denies it."
11. The legislator is recommended to amend Article 26 of the Criminal Procedure Law of the Internal Security Forces (Law No. 17 of 2008) by adding the possibility of challenging the referral decision issued by the referral commander. The recommended amended provision reads as follows: Article 26: "Except in respect of petty offences, the Internal Security Forces court may intervene by way of discretionary review, upon the application of the public prosecutor, the accused, the complainant, or the legal representative of either of the latter two, in decisions concerning arrest, detention, or release on bail issued by the investigating officer or the investigative council, or in the decision referring the investigative papers to the Internal Security Forces court issued by the referral commander."

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