

# COMPARATIVE ANALYSIS OF PARLIAMENTARY IMMUNITY UNDER THE JORDANIAN AND IRAQI CONSTITUTIONS

**Shatha Ahmad Al-Assaf, Isra University**

## ABSTRACT

*This research addresses the legal regulation of immunity of the House of Representatives members in the Jordanian constitution, to identify the strengths and weaknesses in the Jordanian legal regulation of the parliamentary immunity *ratione materiae* and procedural immunity enjoyed by the House of Representatives members. It also investigates to what extent such regulation realizes the justifications for granting immunity, aimed at ensuring the independence of the parliament, and allowing the House of Representatives members to carry out their role and represent the popular will efficiently, without fear of accountability or retaliation through malicious charges to hinder them from performing their legislative and oversight duties. On the other hand, the legal regulation of immunity shall prevent the representatives from abusing the immunity. The research also highlights to what extent the Jordanian legal regulation of parliamentary immunity needs development and amendment in terms of the restrictions related to the parliamentary immunity *ratione materiae* and procedural immunity, and the exceptions thereof. This research conducts a comparative analysis with the Iraqi constitution's legal regulation of immunity, regulated under legal provisions different from those of the Jordanian constitution, as well as containing legal texts that are more recent than the Jordanian ones.*

*The research revealed a number of important findings, the most prominent of which is the existence of loopholes and shortcomings in the Jordanian constitution's regulation of immunity, most notably that the immunity *ratione materiae* is subject to a spatial restriction, i.e. such immunity covers only the statements and opinions expressed during the House's settings, which limits the effectiveness of this type of immunity, confining it to the parliament building. In addition, procedural immunity is limited to the arrest and trial of the representative without taking into consideration the rest of the penal procedures, such as searching the representative or their house, and it is also subject to a temporal restriction, i.e. it is enjoyed only in the parliamentary sessions without parliamentary recess. Moreover, another loophole and shortcoming is that the decision to lift the immunity of any member of the House of Representatives is not subject to judicial oversight. In addition, the immunity does not cover the felonies committed in *flagrante delicto*, overlooking the seriousness of such misdemeanours violating honor and public morals.*

*This research presents a set of recommendations, most notably the need to amend the Jordanian constitution by expanding the spatial scope of the parliamentary immunity *ratione materiae* to include the opinions and statements of the House of Representatives member related to parliamentary duties thereof, without limiting it to the parliament building. It is also recommended to provide effective procedural immunity by amending the Jordanian constitution to include all penal procedures, and by expanding the scope of its temporal restriction to include*

*convening and non-convening sessions. There is also a need to provide for judicial oversight over the decision related to the lifting of procedural immunity, and it is preferable that the Jordanian Constitutional Court be the competent authority of oversight.*

**Keywords:** Constitution, Parliament, Parliamentary Immunity, Constitutional Guarantees.

## INTRODUCTION

The House of Representatives members are in need of guarantees to carry out their legislative duties in addition to their oversight ones over the executive authority efficiently, and to express the nation's will freely without fear of being held accountable and prosecuted due to the opinions expressed during the performance of such duties, or being subject to judicial accountability due to malicious accusations. The most prominent of these guarantees is parliamentary immunity, both the immunity *ratione materiae*, and procedural immunity.

To ensure this, national constitutions are keen to provide parliamentary immunity to the House of Representatives members. The present research addresses the parliamentary immunity of the House of Representatives members as provided in the Jordanian constitution, and conducts a comparative analysis with the parliamentary immunity set out by the Iraqi constitution. The reason for using the Iraqi constitution in the comparative analysis is that it regulates parliamentary immunity under legal provisions different from those of the Jordanian constitution, as well as makes use of legal texts that are more recent than the Jordanian ones.

The significance of the research lies in the importance of regulating parliamentary immunity legally and accurately, given that parliamentary immunity is an exception to the general rule stipulating that everyone is equal under the law and before the judiciary. At the same time, granting parliamentary immunity to representatives is important, as it allows them to carry out their duties when discussing and approving draft laws, and when overseeing the executive authority without hesitation or fear of being held accountable.

The key research question is as follows: Does the Jordanian legal regulation of parliamentary immunity need to be amended and developed in terms of its restrictions and exceptions related to the immunity *ratione materiae* and procedural immunity, to enable the representatives to carry out their legislative and oversight duties?

The study addresses this question through an analytical approach examining Jordanian legal texts to indicate the strengths and weaknesses of the immunity *ratione materiae* and procedural immunity enjoyed by the House of Representatives members, and through a comparative analysis with the Iraqi regulation of parliamentary immunity.

The research aims to shed light on the strengths and weaknesses in the Jordanian legal regulation of parliamentary immunity, and to identify to what extent this regulation meets the purpose of the immunity and prevents representatives from abusing it.

To achieve its objectives, this research first clarifies the definition of parliamentary immunity, and the types and justifications thereof, and then points out the regulation of the immunity *ratione materiae* in the Jordanian constitution compared to the Iraqi constitution as well as the Jordanian and Iraqi constitutions' regulation of procedural immunity. Lastly, the research findings will shed light on the loopholes and shortcomings in the Jordanian legal regulation of parliamentary immunity, followed by recommendations to rectify them.

## Parliamentary Immunity: Definition, Types and Justifications

The research will first show what is meant by parliamentary immunity, and then it will point out the types thereof and the differences between them, as well as highlighting the justifications for granting this immunity.

Parliamentary immunity is defined as follows:

*“A legal instrument, which temporarily or permanently inhibits legal action, measures of investigation, and/or measures of law enforcement in criminal and/or civil matters against members of parliament” (Hardt, 2015).*

Parliamentary immunity is defined in a Jordanian ruling issued by the Amman criminal conciliation court in Case No. 3687/2015, dated 28/06/2018, as follows: *“The guarantees and privileges granted by the constitution to the parliament member to protect it, allow it to do its job freely and without obstacles to reinforce its independence, enable it to carry out its duties regarding representing the people and defending the interests thereof, and prevent any criminal judicial action against it during the period in which it is appointed as a member in the parliament or the House of Representatives, as per the name used. Immunity is attached to the job itself and it shall not be considered as a personal privilege enjoyed by the representative or parliament member”*. However, the Iraqi rulings do not include an explicit definition of the immunity.

The researcher posits that parliamentary immunity is a constitutional guarantee granted to the parliament in order to protect its members from the criminal or civil accountability that may stem from their opinions and statements expressed during the parliamentary job, and to inhibit any penal procedures against them for any crime committed outside the scope of their parliamentary duties throughout the parliament sessions.

There are two types of parliamentary immunity, the immunity *ratione materiae*, and procedural immunity. The immunity *ratione materiae* means that the House of Representatives member is not criminally or civilly liable for the ideas he/she expresses during their work in the House or the committees thereof. This guarantee decriminalizes their statements expressed during or as a result of carrying out their parliamentary duties in the House or the committees thereof (Hassan, 2017).

On the other hand, the procedural immunity is defined as a constitutional guarantee that inhibits any penal procedures, other than those related to the crimes committed in *flagrante delicto*, against the parliament member during the parliament's sessions without obtaining permission from the House to which the member belongs (Mohsen, 2010).

It is clear that both immunity *ratione materiae* and procedural immunity are part of the public order, and are considered as parliamentary rights that may not be waived by the representative itself. However, there are a number of differences between them, the first of which is that immunity *ratione materiae* does not make the representative liable for what they are saying during their work criminally and civilly, while procedural immunity has to do with procedures, and does not decriminalize acts or prevent punishment. In addition, immunity *ratione materiae* continues to subsist, while procedural immunity is temporary and lasts only during the parliament's sessions. Finally, immunity *ratione materiae* protects against criminal and civil liabilities, while procedural immunity is related to criminal and not civil liabilities (Ajmi, 2012).

The general principle is that all people shall be subject to the law, and if anyone violates the same, they shall be held accountable. However, granting parliamentary immunity has many important justifications, the most important of which is ensuring the independence of the parliament, as ensuring the freedom of representatives while performing their duties, away from any influence on their will, is one of the requirements of the separation of powers principle (Al-Khafaji, 2018). They shall be protected from the influence of the executive authority where the government may resort to instituting procedures against representatives to lift their immunity, in order to reduce its opponents in parliament, or to pressure other representatives to change their stance (Al-Shtawi, 2009). Immunity is not a personal privilege enjoyed by the parliament member; however, it is intended to protect the parliament, which is the true representative of the nation, and to guarantee its independence in its work away from the interventions of other authorities (Al-Hiqouq, 2016).

In addition, one of the justifications for granting immunity is guaranteeing good parliamentary performance. The representatives' legislative and oversight roles over the work of the executive authority requires providing them with immunity, as they may, in the course of their work, say words that expose them to criminal liability, such as criticizing and accusing a minister of embezzlement or negligence. In addition, the representatives need protection from any threats to be able to carry out their role. Therefore, it can be said that providing the representative with immunity enables them to express their opinions and serve the interest of the nation (Al-Shawabkeh, 1997).

### **Regulation of the Immunity Ratione Materiae in the Jordanian and Iraqi Constitutions**

Article (87) of the Jordanian Constitution of 1952 stipulates the following: *“Every member of the Senate and the House of Representatives shall have complete freedom of speech and expression of opinion within the limits of the internal by-laws of the House to which it belongs; and the member may not be answerable because of any voting or opinion it expresses or speech it makes during the sittings of the House.”*

It is noted that the immunity ratione materiae is subject to two restrictions, the first of which is that the immunity covers ideas and opinions without actions, which are subject to the general rules of liability, and the second one is that such ideas and opinions shall be expressed within the scope of the parliament member's duties, whether within the House or the committees thereof (Al-Zoubi, 2013).

In accordance with the Jordanian constitution, the immunity ratione materiae is attached to opinions and statements without criminal acts such as beatings, as they are not related to parliamentary work. Immunity covers all opinions and statements, in whatever form, expressed by the parliament member, whether through speech, voting, suggestions, questions or interrogations (Haboul, 2003).

This is meant to ensure that the members of the Jordanian Parliament, especially the House of Representatives, enjoy the freedom of speech, even if it includes criticism of the government (Al-Laymoon, 2021), and that the members have the confidence necessary to confront the government with its mistakes, and discuss individual complaints before the parliament. By providing adequate protection, silence and fear will not hinder the member from disclosing the government's mistakes (Al-Zoubi, 2013).

The immunity *ratione materiae* allows parliament members to express their opinions within the House or one of the committees thereof to which they belong (Al-Shehhi, 2016). The immunity shall be exercised within the limits of the internal by-laws of the Senate and the House of Representatives, and such by-laws shall be applied inside the parliament or one of the approved committees thereof (Al-Adayleh, 2022). Therefore, the immunity *ratione materiae* is not a bar to the disciplinary accountability of the parliament member before its House (Al-Zoubi, 2013). However, there are suggestions that the spatial scope of immunity *ratione materiae* shall not be confined to the parliament building, and that the immunity shall cover parliamentary members' opinions and ideas related to their parliamentary duties, even when expressed outside the parliament. This can include parliamentary investigation committees for instance, who perform their work outside the parliament. In order not to keep such opinions inside the parliament building and lose its impact on public opinion, there is a need to amend the Jordanian constitutional text to include opinions and ideas expressed during the performance of the parliamentary duties in immunity *ratione materiae* (Al-Shawabkeh, 1997).

In accordance with a ruling issued by the Amman criminal conciliation court, in Case No. 17056/2017, dated 11/01/2017, the immunity *ratione materiae* granted by the constitution to the parliament member is described as: *“Absolute immunity given to the parliament member regarding any word that constitutes a crime, slander and humiliation, so it is not held accountable for such act. However, it shall be exercised under the dome of the parliament where Article (87) of the constitution includes the phrase “during the sittings of the House”, while in the present case, the incident was outside the sittings and via websites”.*

Similarly, it has been held that the temporal restriction shall be observed when exercising immunity where the opinions shall be expressed during the sittings of the House, and they may not be held and expressed during the period in which the House is not in session, or when the sittings thereof are postponed, because the member does not perform their parliamentary duties during that period (Bateekh, 1994). As for the temporal scope of this immunity, it continues to subsist, that is, it begins with the acquisition of the parliamentary membership and lasts indefinitely, and does not terminate with the end of the parliamentary membership, whatever the reason for the termination thereof (Al-Shehhi, 2016). Therefore, the immunity *ratione materiae* does not cover the speeches of the candidates during their candidacy (Al-Shawabkeh, 1997).

In Case No. 3687/2015, dated 28/6/2018, the Amman criminal conciliation court points that: *“The defendant has met all the conditions related to the immunity *ratione materiae* in that it only expressed its opinions and statements according to the spatial and temporal scopes, i.e. during the sittings of the House, and such words and statements were related to the discussion of the general budget law. Therefore, it is not liable for the crimes attributed thereto.”*

The researcher notes that the Jordanian constitution includes explicit text prohibiting the accountability of the representative for their statements and opinions, and determining the spatial and temporal restrictions related to the immunity. As could be gathered from this text, it covers all kinds of accountability, whether it is criminal, civil, or administrative. On the other hand, the internal by-laws of the House of Representatives only regulate procedural immunity, without handling the immunity *ratione materiae*. The aforementioned rulings thus indicate that the judiciary has applied what is stipulated in the constitution.

Article (63/2/A) of the Iraqi constitution stipulates the following: *“A member of the House of Representatives shall enjoy immunity for statements made while the House is in*

*session, and the member may not be prosecuted before the courts for such.” This is confirmed by Article (20/1) of the internal by-laws of the Iraqi House of Representatives: “No member shall be questioned for the opinion it expresses or the fact that it presents while it performs its job in the House.”*

It is clear that the immunity *ratione materiae* related to the statements expressed by the representative during the session is absolute, i.e. it includes crimes related to speech or opinion and does not cover other crimes such as beating or harm. In addition, the constitution does not impose any spatial restriction where the immunity covers the opinions expressed by the representatives inside or outside the House and the committees thereof (Al-Khafaji, 2018). Concerning this point, the constitutional legislator has done well, as the House of Representatives members represent the nation, and shall enjoy freedom of speech to fulfill the public interest (Hassan, 2017).

While the Iraqi constitution requires that the opinions be expressed during the sessions, there has been some criticism of this requirement however, calling for the Iraqi constitution to be amended to include opinions related to parliamentary work, and for the temporal restriction related to the expression of opinions, i.e. expressing the opinions during the sessions, to be abolished (Ajmi, 2012).

Article (22) of the internal by-laws of the Iraqi House of Representatives points out what is meant by the session and legislative term: *“First: The House of Representatives has annual session with two legislative terms. Each session is about 8 months. The first session starts on 1 March and ends on 30 June and the second one start on 1 September and ends on 31 December. Second: The legislative term at which the state’s general budget is presented shall not end until the budget is approved. Third: The House of Representatives shall meet at least 2 days a week, and the presidency commission has the right to make extension or limitation if necessary.”*

The immunity *ratione materiae* covers both civil and criminal liability, and this is confirmed by the Iraqi constitution where it stipulates that the representative shall not be prosecuted before the courts. In addition, the immunity continues to subsist, meaning that the representative may not be held accountable when their parliamentary membership comes to an end or terminates for any reason. This is applied for fulfilling the purpose of the immunity, to make them feel safe and fearless while performing their parliamentary duties (Mohsen, 2010).

The immunity *ratione materiae* is a part of the public order, so it may not be waived by either the representative or the House of Representatives to achieve the goal of protecting the parliamentary function, the House, and the representative’s performance and effectiveness (Al-Huwaidi, 2019).

The Iraqi Federal Supreme Court ruled in its ruling No. 134/Federal/2017 dated 27/11/2017 that *“if a member of the House of Representatives is accused of a crime, not felonies, for the opinions it expresses during the session stipulated in Article (57) of the Constitution, the general principle stated in Paragraph (A) of Article (63/2) thereof shall be observed; therefore, such member may not be prosecuted before the courts...”*

## **Regulation of the Procedural Immunity in the Jordanian and Iraqi Constitutions**

Regulating procedural immunity requires setting controls and restrictions for immunity so that the goal of granting it is not violated, not taken as a pretext for breaching the law, not abused

for evading criminal liability, and not used to protect corrupt representatives from prosecution (Ajmi, 2012).

### **Limits of the Procedural Immunity in the Jordanian Constitution**

Article (86) of the Jordanian Constitution of 1952 stipulates the following: *“1. No member of the Senate and the House of Representatives shall be detained or tried during the sitting of the House unless the House to which it belongs issues a decision by the absolute majority that there is sufficient reason for its detention or trial or unless it is arrested in flagrant delicto in the commission of a felony. In the event of its arrest in this manner, the House should be notified immediately. 2. If a member is detained for any reason during the period the parliament is not sitting, the Prime Minister shall notify the House to which that member belongs, when it sits, of the proceedings taken, coupled with the necessary explanation.”*

In accordance with the Jordanian constitution, the House of Representatives members shall enjoy procedural immunity throughout parliamentary sessions of any kind, whether they are ordinary sessions, extraordinary sessions, or exceptional sessions (Haboul, 2003). Therefore, this immunity ends when the session is ended by a royal decree or the dissolution of the House (Al-Laymoon, 2021). Similarly, when the parliament is not in session, i.e. during the parliamentary recess, all procedures may be taken against the representative for committing a crime, and according to the internal by-laws of the House of Representatives, the House shall be notified of all the procedures when it sits.

The immunity is limited to the House’s sessions in order to protect representatives from malicious cases that aim at preventing them from performing their duties and attending parliament sittings, or hindering them from voting on a matter in which they expressed their opinion, for fear that its vote comes in favor of the decision to be issued or for fear of its influence on the rest of the members when it attends the meetings and convinces them with its opinion (Al-Shtiwi, 2009). Some suggest that immunity should cover the entire term of the House, that is, the convening and non-convening sessions, as parliament members exercise their duties in all periods. Moreover, it also gives parliament members more confidence to exercise their duties, and prevents the government from taking any malicious procedures against them (Al-Shawabkeh, 1997).

Jurisprudence differs as to the procedural immunity’s coverage of the criminal acts preceding the acquisition of the membership in one of the two houses. Some argue that the criminal acts shall be covered (Bateekh, 1994, Al-Saeed, 2010), while some see the coverage as invalid, since the immunity is not retroactive, and the possibility of victimization is absent (Al-Shtiwi, 2009).

The Jordanian Constitutional Court has answered the question about the procedural immunity’s coverage of criminal acts preceding the acquisition of the parliamentary membership in one of the two houses. In its explanatory decision No. 7 of 2013 dated 15/05/2013, the Constitutional Court ruled that: *“This protection or immunity granted by the constitutional legislator to the appointed person or the representative is absolute in terms of the time of the committed act, and here the constitutional legislator does not distinguish between a crime committed by the appointed person or the representative before it acquires the membership of one of the two houses or a crime it commits after getting the position. The only exception made*

*by the constitutional legislator is the arrest of one of the members of the two houses in flagrante delicto, where the House shall be notified of this incident immediately, or the arrest of the member during the period in which the parliament is not in session, where the prime minister shall notify the House to which that member belongs, when it sits, of the proceedings taken, coupled with the necessary explanation.”*

According to the Jordanian constitution, the immunity is limited to arrest and trial without other penal procedures. In Case No. 1811 of 2016 dated 15/11/2016, the Jordanian Court of Cassation ruled that the acceptance of the Court of Appeal of the appeal submitted by the public prosecution comes in consistent with the constitution, although it is submitted during the parliamentary sessions. The constitution prohibits the court from trying the House of Representative member during the parliamentary sessions only, and this prohibition does not include the submission of appeal or cassation statements within the period specified in the law, otherwise they will be rejected in form.

On the other hand, Article 139 of the internal by-laws of the House of Representatives of 2013, as amended, expands the scope of procedural immunity and stipulates the following: *“It is not permissible, during the session of the House, to prosecute a member criminally, take penal or administrative procedures against it, or arrest it without obtaining permission from the House. However, this does not include the cases of flagrante delicto, and in the event of the member’s arrest in this manner, the House shall be notified immediately.”*

It is noted that the above-mentioned article contradicts Article (86) of the Jordanian constitution, which is limited to arrest and trial, while the internal by-laws include penal and administrative procedures not provided for by the Jordanian constitution’s regulation of immunity. This means that other penal procedures, according to the constitution, can be taken against the representative, such as the search of it or the house thereof. Therefore, the Jordanian constitutional shall be amended to include all penal procedures.

The Jordanian constitution includes two exceptions concerning procedural immunity. The first exception is felonies committed in flagrante delicto, due to two reasons: (i) the absence of a malicious accusation hindering the parliament member from performing their duties (Al-Zoubi, 2013), and (ii) the avoidance of the loss of the traces and evidence of the crime, or the escape of the perpetrators if the relevant procedures are not taken immediately (Al-Shawabkeh, 1997).

Article 28 of the Jordanian Rules of Penal Trials Code No. (9) Of 1961 defines flagrante delicto as follows: *“1. the flagrante delicto (is a crime which had been witnessed by somebody during or immediately after its commission), 2. other crimes shall be considered as flagrante delicto crimes such as crimes where the perpetrator/s is caught due to peoples’ screams shortly after the commission of the crime or when such perpetrators are caught carrying things or weapons or documents which leads to believe that they are the perpetrators of such crime. This has to be done within the first twenty four hours which follow the commission of the crime or if during such period the perpetrators caught have marks which lead to believe that they committed the crime.”*

It is noted that the Jordanian constitution does not include misdemeanours committed in flagrante delicto in the reasons upon which parliamentary immunity shall be lifted, which is unjustified. Therefore, the researcher recommends that an amendment be made thereof.

As for the second exception, it has to do with the lifting of immunity. Articles 140-145 of the internal by-laws mention the procedures related to the lifting of immunity, stating that the



prime minister shall submit a request to the speaker of the House of Representatives asking for permission to take the necessary penal procedures, and such request shall be accompanied by a memorandum clarifying the type, place, and time of the crime, and the evidence that requires urgent procedures to be taken. On their part, the speaker of the House of Representatives shall refer the request to the legal committee, which shall submit a report on such request within a period not exceeding 15 days, and then the speaker shall refer the report to the House in the first following sitting to discuss the matter. The House shall take its decision related to the lifting of immunity by an absolute majority if it finds a relevant reason, provided that the decision shall be based only on the act mentioned in the request. The member whose immunity has been lifted may attend the House's sittings, committees' meetings, and discussions, and cast their vote if they are not suspended. If the legal committee does not submit the report during that period, the House may take a decision on the request directly. However, if the representative is arrested during the period in which the House is not in session, the prime minister shall notify the House, when it sits, of the proceedings taken, coupled with the necessary explanation and the House may take a decision concerning the continuation or immediate cessation of the procedures.

The internal by-laws have an advantage over the constitution, where the former give the House of Representatives the right to take a decision concerning the continuation or immediate cessation of the procedures when the prime minister notifies it, when it sits, of the proceedings taken against the representative who was arrested during the period in which the parliament is not in session. On the other hand, the Jordanian constitution does not grant this right to the House, and only obligates the prime minister to notify the House when it sits. Therefore, the researcher recommends amending the constitution to give the parliament, when it sits, the right to take a decision regarding the continuation of the procedures against the representative arrested when the parliament was not in session. However, it would be better if the immunity covers the period in which the parliament is not in session where the representative shall be protected during such period without taking any action against it until the House sits.

It should be noted that the request related to the lifting of immunity or the permission does not mean that the House of Representatives will examine the facts attributed to the representative judicially; it will not rule whether the representative is innocent or convicted (Haboul, 2003). Rather, the House will examine the facts politically to know whether the accusation is real or malicious, and in case the accusation is real, the immunity shall be lifted. In addition, the request submitted to the House for the lifting of immunity leads to the suspension of the legal period due to the admissibility of filing a criminal case (Ahmed, 1995).

The Jordanian constitution does not stipulate the admissibility of appealing against the decision related to the lifting of immunity; however, some argue that the decision may be appealed before the Supreme Court of Justice, which was replaced by the Administrative Court under the Administrative Judiciary Law of 2014, being the court competent to consider appeals related to any decisions contrary to the constitution or the law according to Article 9/A/7 of the repealed Supreme Court of Justice Law. If the court finds that the decision related to the lifting of immunity breaches the constitution, law, or the internal by-laws of the House of Representatives and the Senate, it shall cancel such decisions (Haboul, 2003).

The researcher disagrees with the above-mentioned opinion, and finds that the decision related to the lifting of immunity is not an administrative decision, and cannot be appealed before the Administrative Court. In addition, the repealed Supreme Court of Justice Law of 1992 and

the Administrative Judiciary Law of 2014 did not allow appeals against the decisions of the House of Representatives or the Senate.

Procedural immunity is part of the public order, and Article 146 of the internal by-laws of the Jordanian House of Representatives stipulates that “*None of the representatives has the right to waive its immunity without the approval of the House.*” In addition, being part of the public order, the court may rule on its own for the dismissal of the criminal case before the lifting of immunity, and the appeal may be made regardless of the state of the case. In this case, all criminal procedures shall be invalid (Al-Zoubi, 2013).

This immunity is limited to the suspension of criminal procedures against the parliament member. It is grace immunity, not meant for negligence; in such a manner that it postpones the accountability of the representative without decriminalizing the acts they committed (Al-Shehhi, 2016). In addition, this immunity does not cover civil liability, so a civil case can be filed to claim compensation from the representative for any damage caused to others, or for the breach of any contractual obligations. Moreover, personal status cases may be filed against them, such as a divorce case, and their funds may also be seized (Al-Shawabkeh, 1997). The reason for limiting the immunity to penal procedures and excluding civil ones in many constitutions is the perception that civil cases are not triggered by malicious purposes (Al-Shtiwi, 2009).

The Amman Court of Appeal confirmed in Case No. 36970/2017 that procedural immunity does not cover civil liability, ruling that the constitutional legislator had given the representative immunity from arrest and trial during the sessions of the House of Representatives. Therefore, the imprisonment stipulated in the execution law is a threatening action for the purpose of forcing the debtor to pay the debt owed to the creditor, and is not considered a penal penalty.

### **Limits of Procedural Immunity in the Iraqi Constitution**

Article 63/2 of the Iraqi constitution of 2005 stipulates the following: B-A House of Representatives member may not be placed under arrest during the legislative term of the House of Representatives, unless the member is accused of a felony and the House of Representatives members consent by an absolute majority to lift its immunity or if it is caught in flagrante delicto in the commission of a felony. C-A House of Representatives member may not be arrested beyond the legislative term of the House of Representatives, unless the member is accused of a felony and the speaker of the House of Representatives consents to lift its immunity or if it is caught in flagrante delicto in the commission of a felony.

Article (20) of the internal by-laws of the Iraqi House of Representatives stipulates that: Second: A House of Representatives member may not be arrested during the legislative term of the House of Representatives, unless the member is accused of a felony and the House of Representatives members consent by an absolute majority to lift its immunity or if it is caught in flagrante delicto in the commission of a felony.

Third: A House of Representatives member may not be arrested beyond the legislative term of the House of Representatives, unless the member is accused of a felony and the speaker of the House of Representatives consent to lift its immunity or if it is caught in flagrante delicto in the commission of a felony.

The procedural immunity stipulated in the Iraqi constitution is part of the public order, i.e. it may not be waived as it is imposed for the benefit of the House of Representatives and not the representative in its personal capacity. In addition, the immunity is limited to criminal cases without the civil ones, and this is clear in the constitutional text. Therefore, it is possible to claim compensation from the representative or file a civil case against it without the need to obtain prior permission from the House of Representatives (Mohsen, 2010).

The researcher finds that the constitutional text limits immunity to one form of penal procedure, which is arrest, without covering investigation and search, which are not even mentioned in an indicative or exhaustive manner.

In accordance with Article 63/2/C of the Iraqi constitution and Article 20 of the internal by-laws of the House of Representatives, the person shall be a parliament member at the time of their arrest. Therefore, procedural immunity does not protect a person who does not enjoy membership at the time of arrest. However, if the arrest is implemented after the member's win in the parliamentary elections and before the beginning of the legislative term, this penal procedure shall be subject to the approval of the House or the speaker thereof for the lifting of immunity, as the Iraqi constitution of 2005 does not regulate such an instance (Al-Khafaji, 2018).

The request to lift immunity is submitted by the investigative judges to the Supreme Judicial Council, which addresses the House of Representatives and sends it a request to lift the member's immunity, attached with the investigative documents, in order for the House to vote on the decision to lift immunity if this is during the legislative term. However, if the request is submitted beyond the legislative term, the speaker of the House of Representatives shall be asked to approve the lifting of immunity. The criminal prosecution is limited to the act determined in the request to lift immunity and does not extend to other acts, and the internal by-laws of the Iraqi House of Representatives should be amended so that the parties entitled to submit a request to lift immunity are determined and the procedures necessary to lift immunity are regulated (Mohsen, 2010).

In accordance with Article 63/2 of the Iraqi constitution of 2005 and Article 20 of the internal by-laws of the Iraqi House of Representatives, the cases under which the representative's immunity shall be lifted are as follows: First Case: If the representative is accused of a felony, provided that the House of Representatives approves the lifting of immunity

Article 25 of the Iraqi Penal Code No. 111 of 1969, as amended, defines felony as an offense punishable by one of the following penalties: Death, life imprisonment, or more than 5 to 15 years imprisonment.

It is noted that the representative enjoys absolute immunity when committing a misdemeanour, and in this case, the House of Representatives is not entitled to lift the representative's immunity even if such a misdemeanour is repeated several times. The constitutional text has been criticized for limiting immunity to the felonies and overlooking the seriousness of the misdemeanours, which include perjury, breach of trust, and fraud. It has therefore been argued that the constitutional text should be amended to include misdemeanours (Hassan, 2017).

Concerning the House of Representatives' decision to lift the representative's immunity, the decision shall be taken by an absolute majority of the members of the House, i.e. it shall be issued by one half of the number of all the House of Representatives members plus one, and not

only those present (Ajmi, 2012). Some posit that the majority required to lift immunity should be amended to two-thirds of the House of Representatives members, so that the decision is not misused to influence the representatives and the independence of their decisions, or limit their freedom (Mohsen, 2010).

However, if the parliament refuses to lift the immunity, or delays in taking a decision on the request, this shall not lead to the dismissal of the case on the ground of prescription, but rather the suspension of such prescription, as in these two cases, there is a legal impediment preventing the case from being initiated (Mohsen, 2010).

In its decision No. 34/Federal/2008, the Iraqi Federal Supreme Court decided to cancel the House of Representatives' decision related to lifting the immunity of one of its members and preventing them from traveling and attending sittings, and based its decision on the fact that it has the powers to take decisions on the resolutions and procedures taken by the federal authority consisted, as per Article (47) of the constitution, of the legislative, executive, and judicial authorities. The court found that the decision taken by the House of Representatives contradicts the constitution and the internal by-laws of the House of Representatives, which require the decision to lift immunity to be based on a request from the judicial authority represented by the Supreme Judicial Council. Moreover, such a decision shall also be taken in specific cases strictly defined in the constitution, of which the Court did not find the present lawsuit to be.

It is suggested that the Iraqi constitutional legislator shall determine the parties entitled to submit a request to lift immunity, the procedures related to lifting thereof, and the time period between submitting the request to lift immunity and taking a relevant decision, and shall clarify the decision to be taken regarding silence and non-issuance of a decision during that period (Al-Khafaji, 2018).

Second Case: If the representative is caught in flagrante delicto in the commission of a felony

Article 1/B of the Rules of Penal Trials Code No. 23 of 1971 defines flagrante delicto as follows: *"An offense is considered to have been witnessed if it was witnessed whilst being committed or shortly afterwards or if the victim followed the perpetrator afterwards or if shouting crowds followed it afterwards or if the perpetrator was found a short while later carrying the equipment, weapons, goods, documents or other things pointing to the fact that it was a perpetrator or participant in the offense or if traces or signs indicate this at the time."*

Procedural immunity shall be suspended when felonies committed in flagrante delicto take place, as the cases of flagrante delicto contradict the purpose upon which the immunity is granted, prove the crime against the representative, and negate suspicions of maliciousness and arbitrariness that aim at hindering their work. In addition, these cases cannot be postponed to keep the scene of the crime and the supportive evidence from being lost (Al-Khafaji, 2018).

In accordance with Article 63/2/C of the Iraqi constitution and Article 20/3 of the internal by-laws of the Iraqi House of Representatives, the cases of lifting immunity beyond the legislative term are as follows:

First Case: If the representative is accused of a felony, provided that the speaker of the House of Representatives approves the lifting of immunity

The Iraqi constitution stipulates that if the representative is accused of a felony beyond the legislative term, the lifting of immunity shall be approved by the speaker of the House of Representatives. The reason for this is that the speaker of the House of Representatives becomes the one that represents the House and speaks on its behalf after the end of the legislative term,

and the House's parliamentary activity continues during the parliamentary recess (Al-Khafaji, 2018).

The speaker of the House's approval to lift the immunity shall be a prior and not subsequent approval; otherwise the procedures will be invalid. It is noted that the Iraqi constitution is marred by shortcomings, especially when requiring the approval of the speaker of the House of Representatives, as placing the decision to lift immunity in the hands of one person is a waste of the guarantees provided by the constitution to the representative. Therefore, it is suggested that the article should be amended by adding the condition of notifying the House in its first session of the matter, and clarifying the relevant reasons, provided that the decision shall be taken within 30 days. Non-issuance of a decision after the end of such a period shall be considered as an approval (Ajmi, 2012).

Second Case: If the representative is caught in flagrante delicto in the commission of a felony

The Iraqi constitution and the internal by-laws of the House of Representatives confirm the necessity of lifting immunity from the representative caught in flagrante delicto in the commission of a felony; however, they do not mention the misdemeanours or infractions. Excluding infractions from the scope of procedural immunity is right, as it is not likely to be malicious accusations against the parliament member (Al-Shtawi, 2009), and it does not require the suspension of parliamentary work or the appearance before the judiciary and imprisonment, where the penalty is often a fine (Al-Helou, 1995).

The researcher posits that what is mentioned in the previous paragraph is right especially if the penalty for the infraction is a fine, and not imprisonment; however, it is necessary that the cases of lifting immunity include the misdemeanours violating honor if the representative is caught in the commission thereof.

In accordance with its ruling No. 90/Federal/2019, dated 28/04/2021, the Federal Supreme Court stated that it has jurisdiction to consider the case filed before it, under which the plaintiff requests the cancellation of the House of Representative's decision to lift their immunity, and the court based its right to consider the case on Article 93/3 of the Iraqi constitution, and Article 4/3 of the Federal Supreme Court No. 30 of 2005, as amended, that stipulate that the court has jurisdiction to consider the matters that arise from the application of federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. In this important ruling that established a new rule and stipulated overlooking any previous rules, the court ruled for the inadmissibility of the execution of the arrest warrant against the House of Representatives member in the crimes that are not committed in flagrante delicto without the approval of the members of the House by an absolute majority during the legislative term and the approval of the speaker of the House beyond that period. The ruling also stipulates that there is no need to obtain approval for the execution of arrest warrants in misdemeanours and infractions, as the constitutional legislator's failure to mention misdemeanours and infractions does not mean that the House of Representatives member will not be held accountable in the event of their commission where this leads to the breach of the principle of criminal equality. Moreover, this ruling did not comply with the previous rule related to the calculation of the absolute majority required to lift immunity, and it established a new rule stipulating that the absolute majority shall be more than half of the total number of the House of Representatives members wherever it appears, whether it is associated with the phrase (the number of its members) or not

## CONCLUSION

Parliamentary immunity is an exception to the general rule that all are equal under the law and before the judiciary, because of the many justifications that prompted constitutions to grant immunity *ratione materiae* and procedural immunity to parliamentary representatives, perhaps the most prominent of which is ensuring the independence of parliament, and the good performance of representatives for their legislative and oversight functions. While taking into account the realization of such justifications, the legal regulation should simultaneously prevent the abuse of immunity to violate laws, especially since it is from public order, so the representative is not entitled to waive it.

Under the Jordanian constitution, immunity *ratione materiae* is placed under two restrictions. The first relates to limiting immunity to the words and opinions expressed by the representative without actions, and the second is a spatial and temporal restriction related to expressing opinions during the parliament's sessions. The immunity *ratione materiae* is characterized by a wide time range, which includes the period of time from acquiring parliamentary membership, and lasts indefinitely. While the Iraqi constitution limited immunity to statements, it did not require a spatial restriction, but rather a temporal restriction that statements are issued during the session, bearing in mind that immunity includes both criminal and civil liabilities.

Representatives enjoy procedural immunity with regard to criminal liability, which is limited to arrest and trial in accordance with the Jordanian constitution, and does not include a search of a representative, a search of its home, an investigation with it, admissibility of an appeal against a judgment issued against it, or cassation thereof, according to what was confirmed by the Jordanian judiciary, while the internal by-laws of the House of Representatives, as amended, expanded in 2013 the scope of procedural immunity to include taking penal or administrative procedures against a representative. It has thus violated the constitution, with the Iraqi constitution limiting this immunity to arrest only.

There is a temporal limitation for procedural immunity under the Jordanian constitution, which is grace immunity, not meant for negligence, in such a manner that it postpones the criminal accountability of the representative throughout the periods of parliamentary sessions of whatsoever kind. As for the Iraqi constitution, it covers the period within the legislative term and beyond.

The Constitutional Court came to a decisive position through its explanatory decision to include procedural immunity for acts prior to the acquisition of parliamentary membership, while there is no similar ruling from the Iraqi Federal Court.

The Jordanian constitution included two exceptions to procedural immunity, which are felonies committed in *flagrante delicto* and the issuance of a decision by the House of Representatives to lift the immunity. As for the Iraqi constitution, there is a difference in the exceptions between two cases: within the legislative term if the representative is accused of a felony, provided that the lifting of immunity is approved by an absolute majority of the House of Representatives, and in the event that a representative was caught in *flagrante delicto* in the commission of a felony, and beyond the legislative term if the same was accused of a felony, provided the approval of the Speaker of the House of Representatives, and if the representative was caught in *flagrante delicto* in the commission of a felony.

The internal by-laws of the Jordanian House of Representatives clarified the mechanism for lifting immunity, unlike the internal by-laws of the Iraqi House of Representatives, which did not explain the mechanism in detail. As for the decision to lift immunity according to the Jordanian constitution, it is not subject to judicial oversight, while such decision is subject to judicial oversight of the Federal Supreme Court in accordance with the Iraqi constitution.

### RECOMMENDATION

Amending the Jordanian constitution in a manner to expand the spatial scope of the parliamentary immunity *ratione materiae* to include the opinions and sayings of a member of the House of Representatives related to parliamentary work, without limiting it to the parliament building.

Effective procedural immunity should be provided by amending the Jordanian constitution, which is limited in its regulation of procedural immunity to arrest and trial, so that it is expanded to include all penal procedures, such as the search of the representative and his home among others.

The Jordanian constitution should extend the temporal limitation of procedural immunity through amending its coverage only for the periods of parliamentary sessions of whatsoever kind as to include the convening and non-convening sessions to enable the representative to perform its work effectively without fearing expiry of the term of the session in order to be held criminally accountable. No penal action against the representative shall be taken until the House sits and takes its decision.

The necessity of excluding from the procedural immunity misdemeanors committed in *flagrante delicto*, if it is a misdemeanor against honor and public morals, due to the seriousness of these crimes and their similarity in the ruling of lifting the immunity for the felonies committed in *flagrante delicto*.

The necessity of providing judicial oversight over the decision to lift procedural immunity, and it is preferable that the Jordanian Constitutional Court be the competent authority of oversight.

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