

# The procedural immunity of the lawyer in the Jordanian Bar Association act

Dr. Abdullah Ahmad Al-Khseilat

Assistant Professor / Faculty of Law, Middle East University - Jordan

## 1. Introduction:

The legal profession is considered a valuable profession, and one of the mainstays of justice, the rule of law, the realization of the right and the protection of citizens' rights. It is a heavy duty and one of the professions that not anyone can master. It is a conflict between right and wrong, good and evil. Therefore, the profession of the lawyer is one of the hard professions, which is the search and investigation of evidence and collecting and submitting them to the competent court to be weighed and then the court issues its decision.

In order for the lawyer to be free in the exercise of his profession, States must grant the lawyer, through legal texts, immunity inside and outside the sessions associated with his profession, in order to achieve justice.

This study is devoted to the subject of procedural immunity of the lawyer, through the explanation of its legal provisions and their adequacy in Jordanian law using the comparative approach by comparing it with some Arabic laws.

## 2. The meaning of immunity:

Immunity in its broad sense means either the exemption of the person enjoying it from the application of the criminal law on him or the limitation of prosecution so that the function of the procedural restriction will be executed for those who enjoy the immunity.

Thus immunity has two types: substantive and procedural. Substantive immunity means protecting the person enjoying it from some prosecutions, as it prevents the prosecution of a person for certain acts. Procedural immunity means that there is a legal protection for the person who enjoys it, so that some ordinary judicial proceedings shall not be taken against him and / or shall be suspended on certain conditions in order for the prosecution to be valid.

## 3. The importance of immunity to the lawyer:

From one hand, it is clear that the lawyer exercises a job that is somewhat dangerous. He defends the rights of the people and by this defense he puts himself in danger in certain cases. Therefore, the sound logic requires that the lawyer must enjoy immunity that protects him from the malicious allegations against him and preserves his dignity so he can make effort in defense without fear or regret.

On the other hand, the lawyer is an integral part of the justice system. According to Article 6 of the Jordanian Bar Association Law, a lawyer is considered to be one of the judicial agents. Therefore, and according to the words of the late Professor Nusrat Haydar, the judges and the lawyers are two branches of the same tree in the same oasis, which is the oasis of justice, if one branch is strengthened, the other will be strengthened with it, and if one branch is weakened, the other will be weakened with it".<sup>1</sup>

Therefore, the enjoyment of immunity by a lawyer would push him to defend the rights of the people in a better way. But if the lawyer, in some cases, feels that he is susceptible for being charged and arrested, he will not perform his duties as required and customary, as the sword of accusation will always be hanging over him.

## 4. Substantive immunity of the lawyer:

When we look at the Bar act, we find no reference of this type of immunity except in Article 58, which states: (A lawyer must refrain from insulting his client's opponent or mentioning personal matters that offend him or accuse him of what affects his honor and dignity unless required by the state of defence or the need to defend the interests of his client). Article 39 of the same law states that the lawyer (..... shall not be responsible for what he stated in the oral or written pleadings which is required by the right of defense ...).

These texts are understood to mean that if the lawyer makes during defending his client what is detrimental to his client's opponent, it will constitute an offence. However, if such detriment is required by the state of defense or its necessity, it will not constitute an offense.

In practice, this protection is not sufficient because the wording of the text did not specify who can determine that this phrase is required by the state of defense or its necessity, as it is well known that each lawyer has his style and manner of defense according to the established constraints. Here we find that this decision must be taken by the court, which will decide whether the words of the lawyer during defending his client constitute a crime or not.

<sup>1</sup> Nusrat Haidar, The immunity of the judge and the immunity of the lawyer, Damascus 1968, p.84

In order for the immunity to be effective in this case, the text should be similar to that of the immunity of the members of the National Assembly, namely similar to the text of Article 87 of the Constitution, which reads as follows: (Each member of the Senate and House of Representatives shall have the freedom to speak and express opinion within the limits of the rules of procedure of the Council to which he is an associate and may not be held liable due to any vote or opinion he gives or a speech he delivers during the sessions of the Council).

So we hope that the lawyer gets the full freedom to speak during hearings without being held liable for what he is saying, or at least his statements be subject to disciplinary accountability not to the criminal one.

### **5. Procedural immunity of the lawyer:**

This immunity has three types according to the text of Article 40 of the Bar Association Law. They are:

#### *5.1 The inadmissibility of arrest or prosecution of the lawyer:*

Article 40, paragraph 1, states:

Notwithstanding the provisions of any other legislation, lawyers shall enjoy full freedom in the courts, divisions and authorities before which he exercises his profession freely, so that he shall not be arrested or pursued for any act performed by him in the performance of his professional duties and shall only be subject to disciplinary responsibility towards such courts, divisions and authorities before which he exercises his profession)

In fact, this text is wonderful if it is actually applied, but it is obstructed by the interpretation of the phrase (any act performed by him in the performance of his professional duties), as who will decide that what the lawyer did was within his professional duties. This matter will be for the court to decide, though the duty of the lawyer is provided for in article 39 of the bar act, which states: (The lawyer can take the path which he sees to be successful in defending his client ....)

Also, since the text is clear in the sense that the lawyer will not be subject to responsibility towards the courts, divisions and authorities before which he practices his profession except for disciplinary responsibility, though this text has not been taken into consideration in practice. we derive this from the following decisions of the courts:

- (As regards to the immunity of the lawyer, our court considers that, although the lawyer is subject to disciplinary responsibility, this does not restrict the judges from hearing any criminal offense committed during the trial, including the Contempt of Courts Act).<sup>1</sup>

- (We find that, if a lawyer made during the exercise of his profession an act that would constitute a crime punishable by the law, this will not prevent his prosecution for doing so for doing so, on the grounds that no one is above the law, in addition to the fact that the same article indicates in paragraphs 4, 5 that the president of the Bar should be informed in the event of the initiation of the investigation of any complaint or in the event of flagrante delicto, which means that the criminal prosecution of a lawyer is permissible and does not conflict with the provisions of Article 40 of the Law of the Bar Association).<sup>2</sup>

- (With the court referring to Article (40/1) of the Bar Association Law in its amended text, it found that it stipulates that:

((Notwithstanding the provisions of any other legislation, lawyers shall enjoy full freedom in the courts, divisions and authorities before which he exercise his profession freely, so that he shall not be arrested or pursued for any work performed by him in the performance of his professional duties and shall only be subject to disciplinary responsibility towards such courts, divisions and authorities before which he exercise his profession)).

The court also finds that article 10 of the law of the Contempt of Courts stipulates that:

((In applying this law, the provisions of the Bar Association Act shall be observed)).

Since the simplest rules of interpretation includes the plain meaning rule and that the interpretation of the text should be in whole and that the texts are read together as a single unit. And since Article (40/1) of the Bar Association Law, as amended, requires that the lawyer abide by the ethics of his profession in order to be subject to the disciplinary responsibility only, does the ethics of the lawyer's profession allow him to shout and raise his voice on the bench and in the courtroom and speak with the court in a condescending manner and refuse to leave the courtroom when asked to do so and terrorize litigants and cause disruption and confusion in the courtroom Which would require the disregarding of the complainant's defense because it does not rest on a legal or sound realistic basis)<sup>3</sup>

#### *5.2 The lawyer's enjoyment of the proper care and appropriate attention to the dignity of attorney ship:*

<sup>1</sup> The decision of the Court of First Instance of Amman, in its appellate capacity, No. 1354/2016 dated 28/3/2016 Qustas circulars.

<sup>2</sup> The decision of the Court of First Instance of Irbid, in its appellate capacity, No. 131/2011 dated 28/4/2011 Qustas circulars.

<sup>3</sup> The decision of the criminal Magistrate Court of East Amman No. 8479/2012 Dated 14/4/2016 Qustas circulars.

According to article 40, paragraph 2, of the Bar Association Act:

(The lawyer must receive the proper care and attention of the dignity of the attorney ship from the courts and the prosecution offices at all levels and the police services and all the divisions and official references before which he exercises his profession. They should also provide him with all the facilities required by the exercise of his duties. It is inadmissible to disregard his applications without legal justification).

In fact, as the profession of law is a human profession which has its respect and appreciation because its purpose is to defend the rights and freedoms, the lawyer must be respected and appreciated by all the authorities before which he exercises his work.

But does this text actually apply?

In fact, we only find a simple application of this text in practical life. The best example of this is what happens with lawyers when they exercise their duties in the police stations.

As for why this text is not applied?

We believe that the main thing that obstructs its application is the absence of sanctions for its violation. Although the text was phrased in a mandatory fashion, it does not entail a penalty for anyone who violates it by mistreating a lawyer while performing his profession, and also the rules that should be followed when dealing with lawyers were not defined.

Therefore, in order for this text to have a legal value, there must be a penalty for its violation.

However, we have found a unique decision in this regard that consolidates the principle of respect for the lawyer, stating that:

(...The witness (A) works as a lawyer and his insistence on not leaving the security center despite being expelled by lieutenant (M) was the reason for the occurrence of this case. The court here points out that article 40 of the Bar Association Law, which the attorney (p) has submitted its backing to the security center, stated that:

The lawyer must receive the proper care and attention of the dignity of the attorneyship from the courts and the prosecution offices at all levels and the police services and all the divisions and official references before which he exercises his profession. They should also provide him with all the facilities required by the exercise of his duties. It is inadmissible to disregard his applications without legal justification.

Therefore, it is inadmissible to expel him from the security center or to place him in detention.)<sup>1</sup>

### 5.3 Immunity from inspection:

In accordance with article 40, paragraph 3, of the Bar Association Act:

(A lawyer may not be inspected during the trial).

By this provision, it is prohibited to inspect a lawyer, but this prohibition is restricted in time due to the fact that it only takes place during the trial, which means that a lawyer may be inspected outside the trial.

This provision does not provide the required protection for the lawyer, especially when his office is being inspected. There is no text prohibiting this, unlike Arab legislation that prohibited the inspection of the offices of lawyers, including:

Article 51 of the Egyptian Bar Law stipulates that:

(A lawyer or his office may only be inspected by a prosecutor)

Egyptian jurisprudence states that the lawyer's office may not be inspected unless he is charged with a crime. They see that his house or office may be searched for evidence of the crime which he is accused of. The investigator will be able to seize the lawyer's private papers. However, the interests of third parties, who have files in the lawyer's office, should be respected as they are alien to the subject of the inspection. If the lawyer is the agent of the accused in the case, the lawyer's office may not be inspected for the papers, letters and documents handed over or sent by the accused to his lawyer, otherwise the inspection would be void.

- Article 77 of the law regulating Lebanese legal profession stipulates that:

(Every judicial decision to inspect a lawyer's office or to seize funds existed in it or to list his assets shall not be implemented until at least 24 hours have elapsed since the deposition of a copy of the decision to the union center which he belongs, and the issuance of an invitation to be addressed to the president of the bar to attend the proceedings himself or by a member which he delegates for this purpose from the members of the Bar association).

- (Article 78 of the Law regulating Syrian legal profession stipulates that:

A lawyer may not be inspected, detained, or interrogated, during the course of his work, and his office may not be inspected except after the head of the branch council has been informed to attend or to send who he delegated from the members of the council or who deems appropriate from the senior lawyers. The dismissal of the this right under the nullity of the procedures is considered invalid)

We therefore hope that we will have such texts, as we have no provision prohibiting the inspection of the lawyer's office or regulating its procedures when necessary.

<sup>1</sup> The decision of the criminal Court of First Instance of Amman No. 997/2014 dated 19/11/2015 Qustas circulars.

## **6. Conclusion:**

At the end of this study, which we tried to simplify as much as possible, I believe that the texts dealing with the subject of the immunity of the lawyer are insufficient and I think that the best way to rectify this is to amend the texts, in particular the text of article 40, to include the following points:

1. A lawyer may not be prosecuted, tracked or detained for any act performed during the performance of his profession, except where his act constitutes a felony, in this case the proceedings may only be initiated against him after the president of the bar is notified in writing and a letter of no objection has been received. The decision of the president shall be subject to appeal before the Court of Appeal.

2. Adding the following to article 40, paragraph 2:

Any person who violates this shall be punished according to article 182 of the Penal Code. A person who has insulted any lawyer or disrespected him may not be registered in the Bar.

3. Adding the following to paragraph 3:

The office of the lawyer may not be inspected for any reason except in the case of flagrante delicto.

4. In case of nullity, no judicial proceedings against a lawyer may be commenced unless the written consent of the President of the Bar is taken. The decision of the President shall be subject to appeal before the Court of Appeal.