

Interim Minister's Penal Liability

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Abstract

There are three distinctive authorities stipulated in all constitutions: the legislative authority, the executive authority, and the judicial authority. Each authority performs its role as stipulated in the Constitution. The executive authority is considered the actual authority in the parliamentary system, i.e. all executive powers are exercised under the leadership of the Prime Minister, consequently; there is an actual minister for each ministerial portfolio. In all systems, the position of the minister is considered the cornerstone in managing the affairs of the ministry, especially in drawing up its general policy. Indeed, the minister represents his ministry before all authorities in the state, not to mention his primary representation before the Parliament since it is the entity that grants him confidence after taking the constitutional oath. While taking office, the minister holds responsibility for all his actions and deeds.

Keywords: Interim minister, penal liability, confidence

Introduction

The principle of penal liability of ministers has gone through different stages. This principle differs depending on the existing regime. Due to the development of ministerial responsibility, the method of accusation took a whole new form known as political criminal responsibility, as Parliament began to use accusation not only against acts that are criminal or misdemeanor but also against all serious mistakes, even if they were not stipulated in the Penal Code, consequently political responsibility became the essence of ministerial responsibility in parliamentary systems (Al-Droubi, 2006).

Therefore, the Prime Minister along with other ministers are subject to criminal liability, as they are to be held accountable for any crimes or criminally culpable acts they may commit while functioning in their posts or because of them (Al-Droubi, 2006). In this case, the laws relating to the prosecution of ministers apply to them.

It is worth noting that the emergence of the minister's criminal liability was a product of the British political system as is the case with the emergence of ministerial responsibility. Whereas the minister's criminal liability was applied before Parliament until it has turned into a policy, as currently applied in parliamentary systems (Ismail, 2006). The system of criminal ministerial liability before parliamentary assemblies also moved from England to other countries, especially those that adopted the parliamentary system. At that time, the first

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application of criminal liability emerged. It was meant to transfer the liability of the executive authority from the not-liable king to his consultants and ministers. Transferring criminal liability is indeed of great importance yet of great danger. Therefore, it was protected by many guarantees that would prevent its misuse. Many constitutions have made this right limited to the Representative Council based on a proposal from a certain number of Council members and the approval of most of its members. Moreover, the head of state was also granted this right, thus the Prime Minister and the ministers function in their posts feeling reassured away from malicious accusations (Al-Droubi, 2006). Criminal liability assumes that the minister or the Prime Minister, like individuals, has committed an act punishable by the Penal Code or other punitive laws.

Therefore, this study of that liability shall address three sections, as follows:

A: The Basis of Criminal Liability.

B: Characteristics of Criminal Liability.

C: The Scope of Criminal Liability.

A: The Basis of Criminal Liability

The minister's criminal liability whether existing or not revolves around his commission of an act punishable by law (Ali, 2006). However, jurisprudence diverged upon criminal liability. Such divergence raged among thinkers. Indeed, Supporters of the traditional theory argued that the basis of criminal liability is the freedom of choice, while those of the positivist theory assume that criminal liability is based on social responsibility. Indeed, each of them has a point of view, as follows:

i. The Traditional Theory (The Freedom of Choice Theory)

The proponents of this theory relied on freedom of choice. Accordingly, after balancing the whole thing, everyone has the freedom to choose his behavior and whichever path to go through, the path of evil or the path of good. One can select either to abide by the law or on the contrary to break it and is free to determine the chosen behavior according to full understanding and awareness (Al-Zalmi, 2013).

According to this approach, freedom of choice is the logical basis for liability; it is the basis for blaming and reprimanding any behavior that violates the law, and there is no basis for this blaming and reprimanding unless the offender can take another path. However, in the case of committing a law-violating act is inevitable, then no liability shall be recognized. Based on the aforementioned, if the minister's administration commits an act that violates the law and he is aware of it, he shall be held liable and he shall be subject to accountability (Al-Raqqad, 2017).

However, this approach has been criticized because freedom of choice is one of the three elements that constitute the basis of criminal liability. The other two are awareness and breach of duty. On top of that, freedom of choice is the essence of criminal liability. Yet, on which basis are crimes and violations in

general established, even though it cannot be said that the perpetrator has chosen these crimes (Al-Zalmi, 2011).

ii. Positivist Theory (Realistic and Deterministic Theory)

The proponents of this theory believe that the basis of actions is not the freedom of choice, rather they are a result of internal factors dating back to the physical and psychological formation of the offender, in addition to other factors related to the surrounding social conditions. They believe that the one who commits an act that violates the law is motivated to commit the crime. Thus, the offender shall be held accountable for his crimes whether he is aware of them or not and whether he is sane or not (Al-Raqqad, 2017). This approach has been criticized; because it looks to the offender as a machine switched on and off by the hands of internal and external circumstances, and he has no control over the criminal acts he commits which is illogical.

B. Characteristics of Criminal Liability

Liability in general and criminal liability in particular have a set of characteristics that distinguish them from other types of liabilities. (Al-Sayed, 2010)

i. The Principle of Personal Liability

Criminal liability is characterized by a personal characteristic. Accordingly, A guilty minister is the one who bears the result of his errors, and the penal laws determine the appropriate penalty for each act (Faraj, 2009). Consequently, no other person bears the punishment. Criminal liability falls with the death of the accused, and it may not be imposed against one of the heirs (Desouki, 2006). The minister's criminal liability falls only to the minister who committed the crime and cannot include members of the Ministerial Council (Al-Raqqad, 2017).

Moreover, the criminal responsibility of the Prime Minister is individual. None of the members of the Council of Ministers shall share such responsibility, they cannot even stand in solidarity with him because solidarity means an implicit confession of sharing in the crime which shall surely put them under the fire of accusation (Al-Sayed, 2010).

ii. The Principle of Judicial Responsibility

Criminal liability is decided exclusively by the judicial authority (Hamid., 2003), that is, a ruling must be issued by the criminal courts, and countries differ between those who place this matter within ordinary jurisdiction and those who are subject to a special judiciary, where the court of competent jurisdiction is established to try ministers (Laila, 1969).

For example, the situation in France after the amendment of February 2007 and July 2008, where it included new provisions related to the criminal liability of ministers, therefore; the second paragraph of Article (28) was canceled and replaced by two new articles, as Article (68/1) stipulated that: "Members of

the Government shall be criminally liable for acts performed in the holding of their office and classified as serious crimes or other major offenses at the time they were committed. They shall be tried by the Court of Justice of the Republic. The Court of Justice of the Republic shall be bound by such definition of serious crimes and other major offenses and such determination of penalties as are laid down by statute (Al-Sayed, 2010).

The Court of Justice of the Republic shall consist of fifteen members: twelve Members of the Parliament, elected in equal number from among their ranks by the National Assembly and the Senate after each general or partial renewal by the election of these Houses, and three judges of the Cour de cassation, one of whom shall preside over the Court of Justice of the Republic. Any person claiming to be a victim of a serious crime or other major offense committed by a member of the Government in the holding of his office may complain with a petition committee (Al-Turkawi, 2017). This committee shall order the case to be either closed or forwarded to the Chief Public Prosecutor at the Court de cassation for referral to the Court of Justice of the Republic. The Chief Public prosecutor at the Court de cassation may also make a referral ex officio to the Court of Justice of the Republic with the assent of the petition committee.

It is worth noting that the main motivation for modifying the trial mechanism for ministers in the French Constitution is that the previous text adopted in France prevented any trials of the accused ministers (Ismail, 2006). It has also been established in France that the special court shall decide the accusations against ministers while exercising the functions of their posts, even if the minister leaves his position at the moment the procedures are initiated against him (Al Dhaheri, 2023).

As for Iraq, through reviewing the texts of the 2005 Constitution, it was clear that the approach adopted by the Constitution in dealing with the liability of the Prime Minister and the ministers differs from that followed in regulating the liability of the President. as the Constitution in force did not address regulating the provisions of the liability of the Prime Minister and the ministers, as the constitution does not contain any text specifying the following aspects (Al Dhaheri, 2023).

- Procedural rules for charging.
- Reasons for accusation and trial.
- The applicable penalty

An exception to the above is Article (93/six) of the Iraqi Constitution of 2005, which made the Federal Supreme Court competent to adjudicate accusations against the Prime Minister and the ministers (Shubar, 2012).

This text indicates that the Iraqi Constitution of 2005 explicitly specified adjudicating charges, as it stipulated that the President, the Prime Minister, and the ministers are equal before the law since the Federal Supreme Court is the competent authority (Al Dhaheri, & Quali, 2018).

It is worth noting that the rules of liability regulate several stages, which are the accusation stage, that includes the body bringing the accusation and the

procedures that shall be followed, the investigation stage, and the trial stage, which includes trial procedures, and the penalty. The rules of liability also include the reasons for the accusation and trial (Al-Mawla, 2011).

Regarding the liability of the Prime Minister and the ministers, the Constitution regulated the trial stage under Article (93/Six), but it did not regulate the stages that precede it and the procedures that shall be followed. The Iraqi Constitution of 2005 neglected to determine the applicable penalty, it also neglected to regulate the cases which are cases that entail liability (Al-Ghousaini., & Al-Ayoubi, 2023). The Iraqi Constitution did not determine the general rules of liability of the Prime Minister and the ministers, except for the text of Article (93/Sixth), and this text does not provide an integrated constitutional and legal cover for regulating the provisions of criminal liability.

As for the Egyptian Constitution of 2014, Article (173) stipulates that the Prime Minister and members of the government are subject to the general rules organizing investigation and trial procedures if they commit crimes while exercising the functions of their posts or because of them. The end of their term of service does not preclude the start or resumption of prosecution, and the provisions contained in Article (159) of the Constitution shall be applied regarding charging them with the crime of high treason (173, of the Egyptian Constitution of 2014).

The Constitution of the Republic of Yemen also states in Article (139) that the right to determine criminal liability towards the Prime Minister and the ministers falls solely within the jurisdiction of the President of the Republic and the House of Representatives.

Referring to the constitutional texts of Yemen's Constitution, we find that they did not include the procedures for the President of the Republic to refer the Prime Minister to investigation and trial. Rather, the Constitution referred to the statement of those procedures to a law (Al Dhaheri, 2023).

The law referred to earlier is Law No. (6) of 1995 regarding the procedures for accusing and trying officials of the highest executive authority in the state. As for Syria, we find that the 2012 Constitution stipulated in Article (124) of it. The Prime Minister, his deputies, and the ministers shall be responsible for their acts, from a civil and penal perspective, under the law; The President of the Republic has the right to refer the Prime Minister, his deputies, and the ministers to the courts for any crimes any of them commits while in office or because of such crimes;

The accused shall be suspended from office as soon as an indictment is made until a ruling is passed on the accusation made against him. His resignation or dismissal does not prevent his trial (Procedures are conducted as stated in the law; 124) of the Syrian Constitution of 2012).

iii. The Principle of Equality in Bearing Liability

Every individual is responsible for the consequences of his actions. If they are good, then his reward is good, and if they are evil, then his reward is evil (Al-

Zalmi, 2013). God Almighty said “*Whoever does an atom's weight of good will see it. And whoever does an atom's weight of evil will see it*”. (Surat Al-Zalzalah).

This liability is based on the equality among individuals before the law, and this principle is affirmed by the International Covenant on Civil and Political Rights of 1966 in the text of Article 26, which stipulates that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or another opinion, national or social origin, property, birth or another status (Article (14/1) of the International Covenant on Civil and Political Rights of 1966).

Article (14/1) of this Covenant, states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” (Article (14/1) of the International Covenant on Civil and Political Rights of 1966).

Accordingly, the constitutions of countries stipulated this principle in explicit texts, including the text of Article (14) of the Iraqi Constitution of 2005 “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status”.

Article 53 of the Egyptian Constitution of 2014 stipulates: “All citizens are equal before the Law. They are equal in rights, freedoms, and general duties, without discrimination based on religion, belief, sex, origin, race, color, language, disability, social class, political or geographic affiliation, or any other reason. Discrimination and incitement of hatred is a crime punished by Law. The State shall take necessary measures to eliminate all forms of discrimination, and the Law shall regulate creating an independent commission for this purpose.

Accordingly, when the law determines criminal liability, it specifies the appropriate crimes and punishments and takes into account that all people are equal before the law, meaning that in case a minister commits a crime by law, he is, therefore, subject to the penalty determined for that act (Al-Raqqad, 2017).

C. The Scope of Criminal Liability

Legal legislation usually specifies a specific scope for legal liability in terms of action and appropriate penalty, since the minister's criminal liability is a characteristic of the legal liability system, this requires defining a scope for it in particular, by determining those who are subject to this liability and the categories within the scope of its application, in addition to determining the actions for which they are punished (Al-Shawi, 2013).

Since the ministerial capacity is the basis of criminal liability, it applies to every minister, as well as to the Prime Minister and members of the government. According to the modern Egyptian attitude in the 2014 Constitution in the text of Article (173), which stipulates that “The Prime Minister and the members of the

government shall be subject to the general rules governing investigation and trial procedures, in case that they commit crimes while or because of exercising the functions of their posts”, and with this text, the existing jurisprudential controversy under the 1971 Constitution was over (Ali, 1995).

It is known that the formation of governments usually includes the Prime Minister, the ministers, their deputies, ministers of state, and interim ministers, therefore, this chapter, which studies these cases, shall be divided as follows:

- **The First Section:** The extent to which ministers of state and ministers without portfolio are subject to the rules of criminal liability.
- **The Second Section:** The extent to which the former minister is subject to the rules of criminal liability.
- **The Third Section:** The extent to which the interim minister is subject to the rules of criminal liability.

The First Section: The Extent to which Ministers of State and Ministers without Portfolio Are Subject to the Rules of Criminal Liability:

Some countries appoint ministers of state alongside ministers with ministerial portfolios because they are needed, for their expertise, or to enhance a certain political situation. They help achieve stability for the government’s policy and ensure the continuous success of its programs. According to their appointment decree under the country’s system, Ministers of state may be entrusted with some tasks related to the management of a specific ministry, or without being entrusted with an administrative task (Al-Baz, 2006). In France, to appoint a minister without portfolio, a decree is required to be issued specifying his powers from the date of his appointment. Moreover, he is not allowed to sign any document unless he has the authorization of the competent minister.

As for Lebanon, the appointment of ministers of state is based on parliamentary custom and the confidence of the House of Representatives. The State Advisory Council has approved basic powers for the Minister of State similar to those of the original minister, except that they do not have powers of an administrative nature (Al-Ghousaini., & Al-Ayoubi, 2023).

According to the rules of the parliamentary system, ministers bear collective and individual liability for governance affairs. Since a minister without a portfolio is a member of the Council of Ministers and participates in voting and decision-making, he is asked about government policy, and his joint liability shall be decided before the House of Representatives (Shiha, 2006). As for criminal liability, some have decided that ministers of state are not subject to the criminal liability system since they are practicing political action, and therefore they are excluded.

However, another opinion – which we support - believes that they are of ministerial status and have nothing to do with the tasks entrusted to them, whether political or administrative. Therefore, the distinction between ordinary ministers and ministers of state in terms of being subject to the system of criminal accountability is arbitral and has no basis to support (Bayoumi, 2016).

The Second Section: The Extent to which the Former Minister is Subject to the Rules of Criminal Liability

The ministerial capacity of a minister ends with the end of his service, whether by dismissal or resignation. He is considered a former minister, meaning he is no longer a member of the government. However, does the end of this capacity mean an exemption from criminal liability? In other words, if the minister commits a violating act that requires accountability while functioning in his post, his ministerial capacity ends. Is it permissible to put him on trial after stepping down (Bayoumi, 2016)?

To answer these questions, it is necessary to refer to the constitutional and legal texts, as the constitutions differed regarding the organization of this situation. There are countries whose constitutions explicitly stipulated and resolved the issue without the slightest room for jurisprudential disagreement by referring to the former minister and holding him accountable, including the Egyptian Constitution of 2014 with the text of Article (173). Concerning the criminal accountability of the Prime Minister and members of the government, it stipulates: “..... The end of their term of service does not preclude the start or resumption of prosecution”.

As for Kuwait, Although the Kuwaiti Constitution neglected this problem, it was stated in the law on the trial of ministers describing the term of the minister, as the first article of it stipulated that the provisions of this law shall apply to every minister who is a member in the Council of Ministers if committing any criminally culpable acts. These criminal acts were stipulated in article Two of this law, even if the minister leaves his post after the crime occurs for any reason, whether permanently or if he was assigned duties of another ministry or even if he was an acting minister at the time of the crime. Accordingly, if the minister leaves his post for any reason, his prosecution will be retroactive (Al-Zoubi, 2011).

Section Three: The Extent to which the Interim Minister Is Subject to the Rules of Criminal Liability

As it was mentioned earlier, the legal basis for the position of an interim minister is that the representative occupies the same post as the principle minister, consequently, his administrative decisions are considered taken by the principle, however, the principle shall not have any presidential authority over the representative, and is not asked about his actions, but rather the representative shall be accountable for those decisions before the administration, and the third party (Abdul Hadi, 1982).

Based on these rules, which are the legal basis for the rules of the interim minister who held the ministry during the absence of the principal minister, if an interim minister commits criminal liability, he shall be held accountable for it, and the principle minister shall not be held accountable for it according to the criminal liability system.

However, the situation may be different in case the minister delegates some of his powers to one of his subordinates. It is inconceivable that the minister shall be held criminally accountable for the criminal acts committed by his

subordinates upon a delegation of him without prejudice to the civil liability of this act (Bayoumi, 2016).

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Conclusion

The position of the minister is one of the most important political positions in formulating public policy in the state. His post is a part of the government program which the Prime Minister introduced. Indeed, the ministerial position certainly imposes on him important duties and liabilities related to his post while holding of their office. Hence, legal liability is one of those responsibilities for which the minister is asked for as his acts fall within the scope of constitutional and legal legitimacy. Moreover, the criminal liability and civil liability become after the legal liability. The principle of criminal liability for ministers is one of the important principles stipulated in constitutions, as the ministerial capacity is the basis of being subject to criminal liability, and therefore it applies to everyone who has the status of a minister, as it applies to The Prime Minister and members of the government, therefore, they are subject to punitive laws, and the interim minister is no exception.

References

- Abdul Hadi, B. (1982). *Delegation of jurisdiction, A Comparative Study*, Dar Al-Furqan, Amman.
- Al Dhaheri, L., and Al Ukaili K. (2018). *The party affiliation of the Prime Minister in contemporary constitutional systems*. Dar Al-Masala, Baghdad.
- Al Dhaheri, Lama. (2023). *Dissolution of legislative councils. And their applications in some contemporary constitutions*. United publisher.

- Al-Baz, A. A. (2006). *Public authorities in the Kuwaiti constitutional system*. Scientific Publishing Council. Kuwait.
- Al-Droubi, A. M. (2006). *Legal Center of the Prime Minister of the Republic of Yemen*, Master's thesis submitted to the League of Arab States.
- Al-Ghousaini M. R., and Al-Ayoubi, I. A. (2023). *Minister of the Political System*, Al-Halabi Legal Publications, Beirut.
- Ali, M. A. M. (1995). *Parliamentary duality and its impact on achieving democracy*, The Egyptian General Book Authority, Cairo.
- Ali, S. A. (2006). *The political system and social structure*. Arab Renaissance House, Cairo.
- Al-Mawla, H. (2011). *Ministerial Solidarity and Coalition Governments*. Zain Legal Publications, Beirut.
- Al-Raqqad, H. M. (2017). *The Criminal Liability of the Minister and the Principles of Prosecuting him (An Analytical Study)*, 1st edition, Dar Al-Thaqafa Publishing House, Amman.
- Al-Sayed, A. A. A. (2010). *Ministerial Responsibility in Contemporary Positive Systems and in Islamic Systems and the Arab Renaissance House*. Cairo.
- Al-Shawi, M. (2013). *The State of Law. Memory Library*. Baghdad.
- Al-Turkawi, M. S. (2017). *The Role of the Prime Minister in the Representative Parliamentary System*, Al-Halabi Legal Publications, Beirut.
- Al-Zalmi, M. (2011). *Human Rights and Their Guarantees in Islam*, 2nd edition, Erbil.
- Al-Zalmi, M. (2013). *Criminal Liability in Islamic Sharia (Comparative Study)*, 2nd edition, Erbil.
- Al-Zoubi, N. S. M. (2011). *The Minister's Criminal Liability in Jordanian and Kuwaiti Law*, Master's Thesis, Faculty of Law, Middle East University.
- Bayoumi, M. S. (2016). *The Civil, Criminal, and Political Liability of Ministers, A Comparative Study*, 1st edition, The Arab Center for Arab Studies. Cairo.
- Bayoumi, M. S. (2016). *The Civil, Criminal, and Political Liability of Ministers, A Comparative Study*, 1st edition, The Arab Center for Arab Studies. Cairo.
- Constitution of Egypt, 2014
- Constitution of Iraq, 2005.
- Desouki, R. (2006). *The dominance of the executive authority over the work of Parliament*. Knowledge Establishment. Alexandria.
- Faraj, A. L. (2009). Means of parliamentary oversight of executive authority workers (an applied study of the Iraqi constitution), *Al-Mustansiriya Journal of Arts*, 34(50). 1-18.
- Hamid, A. M. (2003). *Balance and control of authorities*. The golden eagle, Cairo.
- International Covenant on Civil and Political Rights, 1966.
- Ismail, N. E. (2006). *The Trial of Ministers between the Judicial Judiciary and the Political Judiciary*, Al-Halabi Legal Publications, Beirut.
- Laila, K. M. (1969). *Political Systems and Government*, Arab Renaissance House, Beirut.

- Shiha, A. A. I. (2006). *Status of the executive authority*. Knowledge facility. Alexandria.
- Shubar, S. K. R. (2012). *Separation of the Executive and Legislative Powers in the Parliamentary System in Iraq*, Al-Sanhouri Library, Baghdad.