

*National Institution for Human Rights (NIHR)'s Opinions on the
Draft Law Presented by the Council of Representatives' Committee on Foreign Affairs,
Defense and National Security
To Modify Article (127 bis) of the Decree – Law No. (46) of 2002 on Issuance of the penal
Procedures Law*

(Executive Summary)

The original Article:

Upon request of the victims, witnesses or those who give information on the case, and for reasonable considerations related to their own safety or the safety of those people who are very close to them, the Public Prosecution may order to take necessary actions to protect them against any threatening dangers because of or in relation to giving testimony or information, and may further seek consent of the victims, witnesses or people planned to be protected on taking one or more of the following measures until they become safe:

1. To change their place of residence,
2. To change their ID,
3. To prohibit disclosure of any information on their identity, location and place of residence, or to set limits on exchanging some of this information.

In case of taking any of the abovementioned measures, a brief of testimony or information shall be documented in the investigation without stating its real source till the demise of circumstances that necessitated taking such measures or the referral of case to the competent court, which issues permission to disclose the identity of the source.

The draft Article:

Upon request of the victims, witnesses, **communicants, experts** or those who give information on the case, **or as evidenced by investigations to the competent bodies**, and for reasonable considerations related to their own safety or the safety of those people who are very close to them, the Public Prosecution may order to take necessary actions to protect them against any threatening dangers because of or in relation to giving testimony or information, and may further seek consent of the victims, **communicants**, witnesses, **experts** or people planned to be protected on taking one or more of the following measures until they become safe:

1. To change their place of residence
2. To change their ID,
3. To prohibit disclosure of any information on their identity, location and place of residence, or to set limits on exchanging some of this information,
4. **To place the person or residency under guardianship.**
5. **To monitor means of communication and correspondences.**

In case of taking any of the abovementioned measures, a brief of testimony or information shall be documented in the investigation without stating its real source till the demise of circumstances that necessitated taking such measures or the referral of case to the competent court, which issues permission to disclose the identity of the source.

NIHR's opinions:

NIHR believes that **Article (5)** of the Draft Law **entitled “to monitor means of communication and correspondences”** at an absolute may lead to prejudice of the right to privacy, the matter which requires reconsideration from the constitutional point-of-view.

While recognizing the right of the Public Prosecution to take various actions during the investigation stage, including controlling letters, messages, newspapers, publications, parcels and dispatches, monitoring calls and telecommunications, or recording interviews held privately, whenever it is useful in determining the truth of a felony or misdemeanor penalized by imprisonment, **it shall only be applicable** through judicial guarantee decided by the legislator pursuant to the provision of Article (93) of the Decree – Law No. (46) of 2002 on Issuance of Criminal Procedures Law, which states that the Public Prosecution shall obtain a causative permission from the Lower Criminal Court judge who have reviewed all accusation documents for maximum 30 days, which shall be renewable for further similar duration(s).

Explanatory Note

General Note:

In consideration of the efforts undertaken by the esteemed Council of Representatives in all matters related to the human rights issue, being the constitutional organization vested in the protection of public rights and freedoms, and in appreciation for the considerations targeted by the Draft Law to modify Article (127 bis) of the Decree – Law No. (46) of 2002 on Issuance of the Criminal Procedures Law, and upon request of the Council of Representatives' Committee on Foreign Affairs, Defense and National Security, the NIHR hereby refers its opinions on the Draft Law to the esteemed Committee, taking into consideration the relevant provisions of the Constitution as well as international instruments and conventions.

The NIHR's terms of reference, pursuant to the provisions of Article (12) Paragraph (b) of its Establishment Law No. (26) of 2014, stipulate that:

“The NIHR may study legislations and codes applicable in the Kingdom of Bahrain, which are relevant to human rights, and recommend modifications it finds appropriate, especially with regard to conformity of such legislations with Bahrain's international human rights commitments, and may further recommend the issuance of new legislations relevant to human rights”.

Whereas the NIHR highly appreciates the efforts undertaken by members of the Council of Representatives in order to continue the organization of the legislative structure in Bahrain, the NIHR finds that its terms of reference as mentioned above are limited to the study of legislations rather than draft laws that have not yet been admitted by the Council, which have not been further discussed and studied by the concerned Council's Committee and have not yet been finalized, the matter which raises the possibility of modifying or canceling thereof by the Committee or the Council, and referring it back again to the NIHR for opinion.

Therefore, the NIHR's opinions shall be limited to the current Draft Law to the extent it finds touching of influential upon basic human rights and freedoms.

NIHR's Opinions on the Draft Law in Detail

Proposal to modify Article (127 bis) of the Decree – Law No. (46) of 2002 on Issuance of the Criminal Procedures Law:

The original Article:

Upon request of the victims, witnesses or those who give information on the case, and for reasonable considerations related to their own safety or the safety of those people who are very close to them, the Public Prosecution may order to take necessary actions to protect them against any threatening dangers because of or in relation to giving testimony or information, and may further seek consent of the victims, witnesses or people planned to be protected on taking one or more of the following measures until they become safe:

1. To change their place of residence,
2. To change their ID,
3. To prohibit disclosure of any information on their identity, location and place of residence, or to set limits on exchanging some of this information.

In case of taking any of the abovementioned measures, a brief of testimony or information shall be documented in the investigation without stating its real source till the demise of circumstances that necessitated taking such measures or the referral of case to the competent court, which issues permission to disclose the identity of the source.

The draft Article:

Upon request of the victims, witnesses, **communicants, experts** or those who give information on the case, **or as evidenced by investigations to the competent bodies,** and for reasonable considerations related to their own safety or the safety of those people who are very close to them, the Public Prosecution may order to take necessary actions to protect them against any threatening dangers because of or in relation to giving testimony or information, and may further seek consent of the victims, **communicants,** witnesses, **experts** or people planned to be protected on taking one or more of the following measures until they become safe:

1. To change their place of residence
2. To change their ID,
3. To prohibit disclosure of any information on their identity, location and place of residence, or to set limits on exchanging some of this information,
4. **To place the person or residency under guardianship,**
5. **To monitor means of communication and correspondences.**

In case of taking any of the abovementioned measures, a brief of testimony or information shall be documented in the investigation without stating its real source till the demise of circumstances that necessitated taking such measures or the referral of case to the competent court, which issues permission to disclose the identity of the source.

NIHR's opinions:

The NIHR believes that the Article under modification is related to the right to privacy or the right to inviolability of private life, which is considered core of personal freedom and a mainstay for the enjoyment of all public rights and freedoms and the subsequent preservation of human dignity and respect.

The right to inviolability of private life extends to include the right to inviolability of the home and the right to confidentiality of private calls and correspondences, both being material translation for personal or private views, which may not be viewed or eavesdropped by a third party.

The legislator establishes legal protection of the right of individuals to privacy, pursuant to the provision of Article (26) of the Constitution of the Kingdom of Bahrain, which states that **“the freedom of postal, telegraphic, telephonic and electronic communication is safeguarded, and its confidentiality is guaranteed, and therefore it is not permissible to monitor any communications or divulge their confidentiality except in exigencies specified by law and pursuant to procedures and guarantees stipulated in it”**. Furthermore, Article (31) of the Constitution of the Kingdom of Bahrain refers to Law the matter of organizing the rights and freedoms stated by the Constitution, provided that organization or determination shall not undermine the essence of right and freedom. Therefore, freedom of correspondences, including telecommunications and electronic communication, being naturally means of such correspondences, is deemed as personal freedom, which is safeguarded to everyone, and is deemed as one of the public, basic and personal freedoms ensured to citizens by virtue of the Constitution. This includes the principle of keeping such correspondences and communications confidential, otherwise the principle of freedom and confidentiality of correspondences and communications shall be emptied of its content and significance, since extending the acknowledgement of eavesdropping, monitoring the communications and penetration of networks by any party shall materially limit freedom of making correspondences and communications.

This consequently makes it impossible to organize the practice of the right to privacy, since mentioning this right at the core of the Constitution gives it protection and sanctity and adds power to it, like all the other constitutional provisions.

Consequently, this right requires respect by authority and individuals. At the same time, it requires constitutional and legal protection by authorities against illegal infringement of it. However, the right to inviolability of private life is not an absolute one. It is restricted by considerations to public interest, since the right and interest of the state to preserve its internal and external integrity and monitor everything that may prejudice its discipline and security of citizens, through controlling the criminal phenomenon, prevails over the right of an individual to confidentiality and inviolability of private life and non-disclosure of it without permission.

This leads to the fact that it is the public interest that draws the limits on this right and determines its scope according to the principle of legality, through balancing between the right of individual to enjoy privacy and the right of the state to achieve security and order.

With regard to proposal (5) “**To monitor means of communication and correspondences**”, the NIHR admits the right of the Public Prosecution to take several actions during the investigation stage, including controlling letters, messages, newspapers, publications, parcels and dispatches, monitoring calls and telecommunications, or recording interviews held privately, whenever it is useful in determining the truth of a felony or misdemeanor penalized by imprisonment, **it shall only be applicable** through judicial guarantee decided by the legislator pursuant to the provision of Article (93) of the Decree – Law No. (46) of 2002 on Issuance of Criminal Procedures Law, which states that the Public Prosecution shall obtain a causative permission from the Lower Criminal Court judge who have reviewed all accusation documents for maximum 30 days, which shall be renewable for further similar duration(s).

In addition, the NIHR believes that the exception mentioned in Article (26) of the Constitution of the Kingdom of Bahrain, which establishes limitations on the freedom and confidentiality of correspondences and telecommunications, may not be expanded in its interpretation or weighed against, and emphasizes that such exceptional permission that limits the freedom and confidentiality of communication, being an exceptional and special case, requires a Law, to be abided by the public authority, and to be applicable as necessary in a democratic community to the interest of national security, keeping order, prevention of crime, protection of public morals and health or protection of the rights and freedoms of others.

Therefore, a legislation plays an organizing role within the framework of constitutional provision. And any law may not clear out the essence of the constitutional provision or infringe the public, personal and basic rights or freedoms stipulated therein, which are further safeguarded by international legitimacy of human rights and the international instruments which the Kingdom of Bahrain is a party therein¹, which are deemed as part of its applicable and enforceable laws, pursuant to Article (37) of the Constitution, which states that “**the King shall enter into treaties by decree and notify thereof to the Councils of Shura and Representatives accompanies by appropriate statement and the treaties shall have the power of law after being entered into, ratified and published in the official gazette**”.

On the other side, the NIHR emphasizes that the nature of call or correspondence requires a caller and a called party, an addressor and an addressee, or a sender and a receiver, and while one of the two parties is accused, the other is non-accused. Therefore, it becomes necessary to abide by the judicial guarantee decided by the legislator pursuant to the provision of Article (127 bis)

¹ Article (12) of the Universal Declaration of Human Rights.
Article (17) of International Covenant on Civil and Political Rights.

of the Decree – Law No. (46) of 2002 on Issuance of Criminal Procedures Law, in order to safeguard the non-accused party's right to confidentiality of his/her private calls and correspondences.

Meanwhile, the right of the accused party to enjoy guarantees of fair trial requires allowing him/her to call and consult with his/her advocate freely at any time without any possibility to eavesdrop the content of talk². Besides, pursuant to the provision of Article (94) of the Decree – Law No. (46) of 2002 on Issuance of Criminal Procedures Law, it is very essential to maintain the sanctity of correspondences between the accused person and the advocate or consultant expert, the matter which undoubtedly confirms that the abovementioned Article is compatible with the principle of presumption of innocence, considering that the accused person is an individual who is worth of all rights safeguarded by the Constitution.

The NIHR therefore finds it appropriate to modify the original text as follows:

The inmate or his/her relatives to the second degree may ask for exceptional visit for a reason and the chairman of the reform and rehabilitation center shall consider the circumstances of each individual case.

Upon request of the institution's director, the sentence execution judge may give an exit permission to an inmate in case of a deceased relative to the second degree to follow the funeral or attend the mourning ceremony, or in any other case as estimated by the institution's management.

And in all cases, procedures of the visit **or exit** as well as terms of merit, duration **and controls** thereof shall be determined by the executive regulation.

² Principle (18) of the Principles on the Protection of all Persons Exposed to any Form of Detention or Prison