

**Consultative Opinion of National Institution for Human Rights on
Draft Law on Amendment of Some Provisions of Criminal Procedures
Law promulgated by Decree-by-Law No. (46) of 2002, accompanied
with Decree No. (124) of 2011**

**(Reduction of Period of Custodial Detention for the accused and
granting him the right to complain)**

Introduction:

In appreciation of the efforts exerted by the esteemed Shura Council in relation to the issues connected to Human Rights; and with all due respect to the objectives aimed at by the Draft Law on **the reduction of period of custodial detention for the accused and granting him the right to complain**, and based upon the request of the Council's Committee on Foreign Affairs, Defense and National Security for the opinion of the NIHR reading the above subject, it is necessary to highlight a set of guiding concepts that should be referred thereto and they are summarized as follows:

First: Custodial detention is a pre-trial preventive measure, according to which the accused is detained in a specific location by order of the competent judicial entity and for legally determined period, during which the competent entities shall ensure whether the crime is established or not. Such detention in may not be considered in any waya form of punishment; but it is a precautionary measure toward the accused included within the powers of the criminal investigation authorities, because it is an investigation procedure not a trail procedure.

Second: Custodial detention is one of the most serious investigation procedures and most relevant to the freedom of the accused, whereby the freedom of the individual is restricted for a time period, the period passed during custodial detention. This means that such detention represents a drastic infringement of personal freedom required and justified by for the interest of investigation. In most cases, such procedure can't be avoided to protect the society and the public interest.

Third: Custodial detention in custody is subject of dispute between two contradictory interests; i.e. the interest of the individual, who is entitled to enjoy his freedom as a right guaranteed for him pursuant to the international covenants for human rights and the national legislations and the interest of the group, which is entitled to reach to the fact.

Fourth: As the restriction of freedom of the accused is considered as exclusion of the basic principle of the presumption of innocence, it is necessary not to apply such restriction except in the narrowest limits. In addition, such procedure should have a special regulation that distinguishes it from the other investigative procedures due to its seriousness thereof. This procedure should include guarantees that ensure the protection of the accused subject to such procedure from any arbitrariness or utilization on part of the authority that undertakes the same.

First: Reduction of Period of Custodial Detention

Article No. (147) as concluded by resolution issued by the Council of Representatives:

The order issued by the Public Prosecution should be valid only for period of seven days following handing it over to the accused. If the Public Prosecution decided to extend the period of detention in custody, before expiry of the period of seven days, the papers should be presented to the court of the minor court to issue his order after heading the statements of the Public Prosecution and the accused ruling the extension of the detention for successive period(s) **not more than thirty (30) days in total. It is provided that each period may not exceed fifteen (15) days**; otherwise, the accused shall be released with or without bail.

Regarding the crimes provided for in Part One of section related to Penal Law, the Public Prosecution **shall** enjoy the powers of the minor court judge provided for in the preceding paragraph.

Article No. (148) as concluded by resolution issued by the Council of Representatives:

If the investigation is not over and the Public Prosecution decided to extend the detention in custody beyond the period determined in the preceding article, before the expiry of the determined period, the papers should be referred to the major criminal court held in the counseling room to issue its order after hearing the statements of the Public Prosecution and the accused regarding the extension of the detention for successive periods not **more than thirty (30) days for each**, if so is required by interest of the investigation; otherwise, the accused shall be released with or without bail.

However, the issue should be presented to the prosecutor, if it is ruled to detain the accused in custody for three months to take the procedures deemed sufficient for terminating the investigation.

In all cases, the period of detention in custody shall not exceed six (6) months, unless the accused has been informed of referring him to the competent court before expiry of such period. If the crime attributed to the accused is a felony, the period of detention in custody shall not exceed six (6) months, unless before expiry of such period an order is procured from the competent court ruling the extension of the detention for period not more than **thirty (30) days** extendable for other similar periods; otherwise the accused shall be released.

The NIHR's opinion on the reduction of the period of Custodial Detention in Article No. (20), paragraph No. (c) of Bahraini Constitution stipulates:

" An accused person shall be presumed innocent until proved guilty in a legal trial in which the necessary guarantees for the exercise of his right of defense in all the stages of investigation and trial are ensured in accordance with the law."

In addition, article No. (9), item (3) of International Covenant for Civil and Political Rights that the Kingdom of Bahrain has accede to thereto pursuant to Law No. (56) of 2006 has referred to such guarantees represented in necessity to present the accused to the trial rapidly, without delay and within reasonable period by stating: **" Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other**

officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

The Human Rights Committee formed in accordance with the International Covenant for Civil and Political Rights, which is entrusted with interpreting the provisions of this Covenant, has commented on paragraph (3) of article (9) above:

2. it shall be considered in case of arresting or detaining any person in the criminal cases that he has be referred immediately to a judge or an officer legally authorized to practice the judicial power. In most member states, the law sets forth more accurate time limits and the committee thinks that the delay may not exceed few days.

3. The detention in custody shall be exceptional procedure and the period thereof shall be short as possible ...).

In the same context, Article No. (14), paragraph (3) of the mentioned covenant confirms:

**"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
c. To be tried without undue delay."**

Human Rights Committee said further in interpretation of the above stipulation regarding the trial stages that:

(10. All stages shall be made "without undue delay" and in order to make such right effective, there shall be procedures applicable for guaranteeing that the trial will be made without undue delay in both first instance and appeal equally).

The group of principles related to the protection of all persons subjected to any form of detention or imprisonment, issued pursuant to resolution of UN General Assembly No. (173/43) dated on 09th December 1988, in the principle No. (38) show that:

"The person detained due to a criminal charge shall be entitled to be tried within a reasonable period; otherwise he shall be released pending to his trial".

Thereupon, the National Institution for Human Rights thinks **that shortening the period of the detention in custody guarantees the non-prejudice to the right of the accused to enjoy the freedom from one side and to procure the guarantee of the just trial from the other side.**

Therefore, the resolution concluded by Council of Representatives on both Articles No. (147) and (148) on reduction of period of the detention in custody is in line with the international standards for human rights aforementioned in this regard.

Second: Granting the accused the right to complain from the resolution of the detention in custody:

Stipulation of Article No. (149) as concluded by resolution of Council of Representatives:

The public prosecution may order the temporary release of the accused detained in custody at any time at its own initiative or upon request of the accused, provided that the accused shall undertake to attend whenever so is required from him and not to escape from the execution of any judgment to be passed against him.

The accused shall be entitled to request from the competent prosecution to release him and if his request is rejected, the accused shall be entitled to submit complaint to the Attorney General, then the Senior Attorney General and then Prosecutor. **It is provided that each of them shall decide the complaint within period of three days as of date of submittal thereof and the passage of the three days period without deciding the complaint shall be deemed as objection thereof resulting in presenting the complaint to the higher authority automatically.**

NIHR opinion on granting the accused the right to complain against the resolution of the custodial detention:

Article No. (2) of International Covenant on Civil and Political Rights that Kingdom of Bahrain has Joined thereto according to Law No. (56) of 2006 stipulates:

"(3) Each State Party to the present Covenant undertakes:

- 1. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy....."**

In addition, article No. (9), paragraph (4) of the above covenant referred to the right to complain from the resolution of the detention in custody represented in reconsidering the detention stipulating that:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

The group of principles related to the protection of all persons subjected to any form of detention or imprisonment, issued pursuant to resolution of UN General Assembly No. (173/43) dated on 09th December 1988 referred to this meaning, as the principle No. (32) showed:

"1. The detained person of his lawyer shall be entitled at any time to file according to the local law a lawsuit before the judicial authority or any other authority to contest the legality of detaining him with purpose of procuring order of releasing him without delay, if his detention isn't legal".

Principle No. (37) showed that:

"The detained person, who is accused with criminal accusation before a judicial authority or another authority stipulated by the law, shall be brought as soon as possible upon arresting him and such authority shall decide the legality and necessity of the detention without delay".

In addition, Principle No. (38) showed that:

"The person detained for criminal crime shall be entitled to be tried within reasonable period or to be released pending the trial".

Thereupon, the NIHR hereby finds that the resolution of the Council of Representatives regarding article No. (149) grants the accused the right to complain from the resolution ruling his detention in custody is in line with the rights of the accused as approved by the international convention for human rights in this regard.

However, entrusting the power of deciding the complaint to the (**Attorney General, then the Senior Attorney General and then Prosecutor**) is just compliant before **one judicial authority only**, because article No. (50) of the Decree by Law No. (42) of 2002 on issuing the Law of Judicial Authority stipulates:

"The public prosecution may not be divided as an investigation authority or accusation authority and each member thereof shall supersede the other and complete the procedures commenced by his persecutor subject to the competence rules".

This means that the complaining in such way may not be deemed as "effective complaining", which shall be in form of hierarchical complaint beginning from the entity that issues the resolution of detention in custody reaching to the other judicial entity to guarantee the avoidance of seizing the resolution and the possibility of arbitrariness thereof.

Thereupon, the **NIHR hereby finds that the last paragraph of article No. (149) shall be reformulated** to become as follows:

The public prosecution may order the temporary release of the accused detained in custody at any time at its own initiative or upon request of the accused, provided that the accused shall undertake to attend whenever so is required from him and not to escape from the execution of any judgment to be passed against him.

The accused shall be entitled to request from the competent prosecution to release him and if his request is rejected, the accused shall be entitled to submit complaint **to the prosecutor and then the competent court. It is provided that each of them shall decide the complaint within period of three days as of date of submittal thereof and the passage of the three days period without deciding the complaint shall be deemed as objection thereof resulting in presenting the complaint to the higher authority automatically.**

