



NIHR's visions on Proposed Law on addition of a new article No. (350, bis) to the Criminal Law promulgate by Decree-by-Law No. (15) of 1976

Introduction:

In appreciation for the efforts exerted by the esteemed Council of Representatives in relation to the issues for human rights in its capacity as the constitutional body charged with protecting public rights and freedoms; and with all due respect to the considerations sought by the proposed Law on addition of Article No. (350, bis) to the Criminal Law promulgate by Decree-by-Law No. (15) of 1976; and based upon the request of the Council's Committee on Foreign Affairs, Defense and National Security, the National Institution for Human Rights hereby refers to you its visions regarding the proposed law taking into account the relevant provisions of the Constitution, international and regional conventions on human rights.

Whereas, the above-mentioned proposed law consists of two articles in addition to the preamble implying the addition of a new article under No. (350, bis) to the Criminal Law issued by Decree-by-Law No. (15) of 1976 on criminalizing each person imitating to the opposite sex in any form, in addition to an executive article.

Whereas, the mandate of the NIHR pursuant to provisions of Law No. (26) No. 2014 on Establishing the National Institution for Human Rights; especially, paragraph (b) of article (12), which stipulates that the NIHR has the competence....

"To examine legislation and regulations enforced in the Kingdom which are related to human rights, and recommend amendments as it deems fit, particularly in connection with the consistency of such regulations with the Kingdom's international obligations in the human rights field. NIHR shall be empowered to recommend enacting new legislation related to human rights".

Thereupon, the NIHR will limit its visions regarding the proposed law to the aspects that may relate to or influence the basic human rights and freedoms and the legal problems that may interfere with the application of

the proposed law in its current formula. This also includes the indication to the trends adopted by the international standards related to human rights in this regard.

This is detailed as follows:

Article No. (350, bis) of Criminal Law issued by virtue of Decree-by-Law No. (15) of 1976:

The text as mentioned in the proposed law reads:

Each person imitating the opposite sex in any way shall be punished by imprisonment for a period not more than one year and a fine of not more than one thousand BD or either Crimnality.

NIHR's visions:

1. As a principle, the NIHR agrees with the legal and factual principles, foundations and aims of the proposed law through the importance of developing a legislation that criminalizes acts and conduct contradicting with public order or the Islamic Sharia considering it as a primary source for legislation as determined by Article No. (1) of the Constitution.
2. In addition, the NIHR deems it important to develop legislations that regulate, remedy or criminalize any acts or conduct that assist in keeping public order and public morals when such acts and conduct represent a prevalent social phenomenon that warrants legislative intervention. At such time, the purpose of the legislation will not be punishment for deterrence, but it will remedy such phenomenon in the various aspects thereof, as well.
3. As a principle, there is no doubt that the imitation of the opposite sex behavior that contradicts public order and the public morals within the State and shall be confronted by legislations to criminalize such conduct. However, at the same time, these are acts that shall be remedied by addressing the physical and physiological aspects of the person accused of the imitation crime.
4. By reference to the stipulation mentioned in the proposed law, it is noted that the formula thereof is loose and inaccurate as it grants authority to the judicial seizure officer, especially in the stage of collecting inferences, an estimative poser to arrest and refer to the



public prosecution, while there is no clear and specific definition of the (imitation action). This approach encourages the process of establishing individual and personal principles to arrest the persons, who imitates the other gender, based upon the clothes, movements, method of speaking, hair external appearance or the physical structure of the person. This contradicts with the general principles of formulating the legislations and criminal statutes that necessitate the consideration of the legitimate punishment (no crime and no punishment except according to the law). In addition, these are principles established by paragraph (a) of article No. (20) of the constitution and postulates determined by the international conventions of human rights; especially, the right to enjoy fair trial guarantees and not just (prevailing custom) as stated in the explanatory memorandum of the Proposed law.

5. Therefore, while the forms of imitation of the opposite sex represents in in some cases breaches public order and public morals prevailing in the society, which necessitate to be Punishable thereof and the deterrence of commission thereof. However, in the other cases, these acts may be caused by physical or physiological elements that require the specialized medical intervmain to determine the physiological behaviors of the individuals, their natural and acquired tendencies, which are generated in some cases by the educational methods or social upbringing or as result of pathological cases necessitates the therapeutic intervention not the not the rhythm of the sentence.
6. Thereupon, the behavior of (imitation of the other sex) may be result of pathological case, where the (imitator) needs to be presented to a specialized medical committee to determine the type of the case that the person is subjected to, the extent of considering that such cases may be deemed as imitation or not and the method of dealing with such cases. Consequently, all of this will represent guide for the judge according to his estimative power to apply the suitable Criminalty or to refer to the medical or physiological treatment, as required.
7. The Honorable Committee is hereby informed that State of Kuwait has approved an amendment to the Provisions of Law No. (16) of 1960 on issuing the Criminal Law by amending article No. (198) thereof in accordance with Law No. (36) of 2007 on criminalization of act of imitation of the opposite gender in any way. This causes this legislation to be subject to criticism by civil society organizations as well as international organizations working in field of human rights depending upon the generalization of the act of imitation contradicts decisively

general principles of human rights; especially " The Yogyakarta Principles" on application of the International Law of Human Rights in relation to the sexual orientation and gender identity adopted by some experts working in field of human rights.

Thereupon:

With full appreciation for the principles and bases of the proposed law for the addition of Article No. (350, bis) to the Criminal Law issued promulgated by Decree-by-Law No. (15) of 1976, which includes the criminalization of any act of imitation of the opposite sex in any way, because it's aimed at developing a legislation that criminalizes acts and behaviors which contradict public order or the Islamic Sharia being a primary source for legislation. However, this proposal in the current form thereof is loose and imprecise with regard to the act of imitation of the opposite sex and without consideration of the physical and physiological aspects that the imitating person may suffer from. Therefore, this law should be reformulated as per the above-mentioned considerations.

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