

State of Kuwait
The Constitutional Court

In the name of Allah, the Most Gracious, the Most Passionate

In the name of H.H. Emir of Kuwait
Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah
The Constitutional Court

In the session held in public in the court dated 15 Muharam 1439 aH,
corresponding to 5 October 2017 AD

Presided by the Honorable/ Yousif Jassim Al-Mutawah, Head of the Court

With membership of the Honorable/ Khalid Salem Ali, the Honorable/
Mohammad Jassim Bin Naji, the Honorable/ Khalid Ahmad Al-Waqayan, and
the Honorable/ Ibrahim Abdul Rahman Al-Saif

In presence of Mr./ Abdullah Saad Al-Rukhais, Session secretary

The following judgment has been rendered:

**In the direct challenge of non-constitutionality of the law No. (78) for year
2015 with regard to DNA**

Filed by: Adel Safar Mohammad Abdulhadi

Registered in the record of the Constitutional Court under No. (9) for year 2016
"Direct Constitutional Challenge"

Facts

The appellant (Adel Safar Mohammad Abdulhadi) filed for appeal – before this court – by means of the direct, original litigation of non-constitutionality of the Law No. (78) for year 2015, with regard to DNA, pursuant to an initiatory

pleading being lodged in the Clerks' Department of this court, dated 21/9/2016, that the appeal was registered in its record under No. (9) for year 2016, and the appellant built his appeal on a ground of saying that the challenged law was issued, aiming to establishing a database designated for keeping the DNA resulting from the vital samples which are taken from the persons who are subject to its provisions, which the concerned authority would use in the identification of suspects and owners of unknown corpses, so that, through it, all citizens, residents and visitors and all persons, entering the Kuwaiti territory, were obligated to give the sample necessary for carrying out the test when requested from them, where the law addressed in its article (1) the provision that in implementation of the provisions of this law, the following words and phrases shall have the following definitions provided for each one:

DNA: it is the map of biological genes which indicate the personality of the individual and distinguish him from others, and it represents the biological features or genetic line of the highly-clear non-encrypted sites in the chromosomal nuclear acid, which are resulted from analysis of the nuclear acid in the biological samples. **Biological sample:** The part which is taken from the human body or its vital secretions, with an aim of carrying out the comparison for identification. **DNA Database:** A computer system in which the data is stored, which contains the genetic features of the nuclear acid for the persons whom data is stored. **Minister:** Minister of Interior. **Ministry:** Ministry of Interior.

The article (2) obligated the Ministry of Interior to establish a database designated for keeping the DNA resulting from the vital samples which are taken from the persons who are subject to this law, and the article (3) of the law referred to the executive regulation the organization of the provisions of taking vital samples, stipulated in the previous articles, that this article requires that the registration would be done in the DNA database within one year as of the date of issuance of this executive regulation, provided that the minister of

interior shall issue a decision for coordination with the Ministry of Health for determining the persons entrusted to take the vital samples and the places determined thereto, and the article (4) obligated the persons who are subject to the provisions of this law to give the sample necessary for carrying out the test when requested from them, within the time specified for each one of them, with obligation of all authorities and bodies of the State to assist the competent persons in taking the necessary vital samples, and the article (5) clarified the cases of using the DNA database, and the article (6) added confidentiality to the data registered in this database; also classified them as official documents, and the article (7) permitted exchange of data and information with regard to DNA with foreign judicial authority and international organizations as per the provisions of the laws applicable in the State, provided there is reciprocity, and the articles (8), (9) and (10) stipulated the penalties for the offensive acts according to this law, and the article (11) determined the scope of validity of the same law and the persons subject to its provisions, and the article (12) entrusted the Council of Ministers – based upon the presentation of the concerned minister – to issue the executive regulation of the law, within three months as of its effectiveness, and the article (13) stipulated to implement this law effective from its date of publishing in the official gazette.

The appellant built his appeal against the aforementioned law, on a ground outlined in the following:

First: that the drafting of the articles of this law came with wide general expressions which lack defining specific regulations to its implementation and lack the elements of substantive provisions, comprising concealment, ambiguity and ignorance that leads to non-clarity in their meaning. The debate is aroused with regard to the reality of their content, and that this ignorance would lead to breaching rights guaranteed by the constitution such as the rights related to personal liberty stipulated in article (30) of the constitution, since the persons subject to its provisions are compelled to submit their bodies for taking

vital samples from them for the purpose of obtaining the DNA, then storing these DNA in the location determined by the Ministry of Interior indefinitely with the possibility of exchanging them internationally, and this is due to that the DNA is considered the natural private storage specific for each human being, which contain the finest details about his formation, life, traits and trends and refer to its family and diseases, therefore collecting the DNA sample in the manner contained in the law affect the right of the individual of non-infringing his privacy, and his right to protect his body from assault, and protecting him from publishing information about elements of his privacy without his permission, and this is clearly evidenced by that the European court of human rights had ordered the British police authorities to erase and destroy the database which it established for DNA of persons not convicted of any crime, considering that forcing the human being to submit his DNA and keeping it, is considered a gross violation to human rights, his humanity and privacy and family rights.

Second: Violation of the law of the principle of innocence which is assumed in each human being and the constitution was devoted to stipulate it in its article (34), where the law assumes that all citizens, residents and visitors are accused and they shall submit the proof of their innocence by submitting a vital sample of their bodies for obtaining the DNA and test it.

Third: Violation of the law of the principle of enforcement of international conventions and the obligation of the State to comply with them in violation to the articles (70) and (177) of the constitution, where the law breached the provisions of the International Covenant on Civil and Political rights, which was ratified by Kuwait on 21 August 1996, which stipulated in article (17) that: " 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks".

The appellant added that he is a Kuwaiti national, and one of the persons who are subject to this law, having interest entitling him to appeal on its non-constitutionality, and he concluded from all the aforementioned requesting the adjudication of the non-constitutionality of the above said law.

Whereas this appeal had been presented to the court – in the deliberation room – on 17/10/2016, and it decided to hear it in the session of 21/12/2016, and the appeal was registered in the record of the court under No. (9) for year 2016 "a direct constitutional challenge", and it was observed as set forth in the minutes of sessions, and the court decided to issue its judgment in today's session.

The court

After reviewing the papers, hearing the pleading and after deliberation.

Whereas in respect of what is attributed by the appellant in his appeal on non-constitutionality of the law No. (78) for year 2015 with regard to DNA, that it was issued in violation to the constitution since it obligated all citizens, residents and visitors and all persons entering the Kuwaiti territory to give the necessary sample for carrying out the test when requested from them during the period specified for each one, and it imposed a penalty on whoever abstains intentionally and without an acceptable excuse from giving this sample, for the purpose of establishing a DNA database designated for keeping the DNA resulting from the vital sample which are taken from the persons who are subject to its provisions, as per provisions included in the law which have been drafted with extremely wide and general expressions lacking the specific determination of the regulations of their implementation, involving violation to personal liberty, infringement to his privacy, and his right to protect his body

from assault, in violation to articles (30) and (31) of the constitution, which taints the entire law with non-constitutionality.

Whereas article (2) of the law No. (78) for year 2015 with regard to DNA stipulates that "At the Ministry of Interior shall be established a DNA database designated for keeping the DNA resulting from the vital samples which are taken from the persons who are subject to this law ".

Article (4) of the same law stipulates that "the persons who are subject to the provisions of this law are not permitted to abstain from giving the sample necessary for carrying out test when requested from them and within the time specified for each one ...”

Also, article (8) of the law stipulates that "to be punished with imprisonment for a period not exceeding one year and with a fine not exceeding Ten Thousand Dinars or by one of those two penalties, whoever abstains intentionally and without an acceptable excuse from giving the vital sample pertaining to him or to the persons under his guardianship or custody ".

Article (11) of it stipulates that "the provisions of this law shall apply to all citizens, residents and visitors and all persons entering the Kuwaiti territory as regulated by the executive regulation".

Whereas the constitution affirmed the personal liberty as a natural right of the human rights, it stipulated in its article (30) that "the personal liberty is guaranteed", and it stipulated in article (31) that " No person may be arrested, imprisoned, searched, have his residence restricted or be restrained in liberty of residence or of movement save in conformity with the provisions of the Law. No person shall be subjected to torture or to ignominious treatment", demonstrating by that that it considers the personal liberty as a foundation to other public liberties and a fundamental right of the human being, and it embodies those rights where personal liberty is not completed in their absence, such as the right of the individual to protect his dignity and preserve his private

matters which he devotes to prevent from the intervention of other people through non-degrading them nor violating his secrets related to them, in implementation to his right of respecting the elements of his privacy since there are elements and private aspects of the individual that represent areas not permitted to penetrate, and shall never be intruded by anyone in order to secure its privacy and protect its sanctity, all that is pertaining to the privacy of the individual is a part of his entirety, no one is permitted to affect it or monitor it except by his express permission. Although the organization of the personal liberty falls under the scope of the discretionary authority of the legislator in the subject of organizing the rights, however it is not allowed that the legislator imposes, under the pretext of such organization, restrictions that extend to refuting such right or reducing it or emptying it from its content.

Whereas it is decided – in the adjudication of this court – that where the ambiguity of the general legislative provisions makes them defected, however the ambiguity of the provisions, specifically those related to special penal provisions and their non-clarity taints them with non-constitutionality due to violating the legal penal aspects of their values, regulations, objectives and procedural rules, which are considered tightly associated with the personal liberty.

Whereas further to the above, and the legislator, pursuant to the above said articles of the DNA law No. (78) for year 2015, imposed on all citizens, residents and visitors and all persons entering the Kuwaiti territory, an obligation to give the vital samples necessary for carrying out the test of DNA when requested from them during the time specified for each one, and imposed a penalty on whoever abstains from giving this sample intentionally and without an acceptable excuse, and obligated recording the results of the test which are carried out in this regard in the DNA database established at Ministry of Interior designated for keeping all DNA, to the effect that these records which contain the DNA database would become records that reveal the private

matters of life of whoever came to the Kuwaiti territory, considering that the DNA of every human being contains his personal features which distinguish him from others, and indicate his kinship, family, genetic diseases, and his hidden medical secrets, which represents a massive infringement to the personal liberty which the constitution devoted to protect it; also, the mentioned provisions, in general, came to be applied to all aforementioned persons without their acceptance to what they were ordered to do or even the issuance of a prior consent or permission from them related to a right belonging to them which is one of the rights associated with the person by virtue of his humanity, infringing therefore the right of personal privacy; also, the law authorized the testing without limiting it to giving the necessary minimum limit of information, which is sufficient to reach the objective for which the law was issued and without demonstrating how it shall be dealt with after death and the way to archive the information taken from the DNA and without giving the necessary protection to the samples, contending to only stipulating their confidentiality, while the matter is different between the protection and confidentiality, which taints the law with non-constitutionality, and this shall not be altered by what the law may contribute, if implemented, in maintaining national security and assistance in revealing the crimes, identifying the personality of their perpetrators, and identifying the unknown corpses since the practice of the State of its right to protect national security is limited when the individual's constitutional right is practiced in guaranteeing his personal liberty, with what is required for preserving his dignity and respecting his elements of privacy by non-breaching or infringing his secrets without cause, which requires adjudicating the non-constitutionality of the articles (2), (4), (8) and (11) of the law No. (78) for year 2015 with regard to DNA.

Whereas further to the above, and the remaining articles of the above said law were related to the definition of the expressions mentioned in the law, and issuance of its executive regulation, the method of using the DNA

databases, the confidentiality of the data, the method of exchanging it with foreign authorities, the penalty of disclosure, and the falsification of related instruments, and they are associated with the articles ruled unconstitutional by a tight and inseparable correlation which result, accordingly, in the invalidity of the remainder of the aforementioned articles of the law, without need – furthermore – to refer to the remaining legal points raised by the appellant in respect of the non-constitutionality of the remaining provisions of the law since the challenged articles are void by virtue of this court’s adjudication of non-constitutionality and the invalidity of the remaining articles of the law.

For these reasons

The court adjudicated:

First: the non-constitutionality of the articles (2), (4), (8) and (11) of the law No. (78) for year 2015 with regard to DNA.

Second: invalidity of the remaining articles of the law for tight and inseparable correlation of these articles with the articles ruled unconstitutional.

Session Secretary
(Signed)

Head of the Court
(Signed)

Seal of the Constitutional Court