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Parliamentary Immunity and its Dimensions In the Light of the Case of Disclosing the Kuwaiti Prime Minister's Checks in 2009 in the Parliamentary Questioning

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Abstract:

The importance of this study consists in the verdict, in question, issued against the Kuwaiti Member of Parliament (MP), Faisal al-Musallam; Second Defendant in the filed lawsuit "disclosure of bank secrets", who, on the occasion of parliamentary questioning regarding Prime Minister, revealed a check submitted by Prime Minister to one of the members of parliament.

This ruling is a novel interpretation of parliamentary immunity in its substantive part; its seriousness lies in the fact that it voids substantive immunity of its real content. One of the most important consequences of this ruling is that the parliament member, in general, has become threatened that the views and ideas he/she presents in parliament may be in violation of the Kuwaiti Constitution, established rules, parliamentary norms, international conventions, and most importantly the will of nation contemplated when drafting constitution, including ensuring the right of MP to express his/her views and ideas that have grounds for the disclosure of documents supporting his/her claims, otherwise MPs charges brought against government shall be non-proved and unfounded, especially when taking into account that the disclosed document is a check issued by Prime Minister for the benefit of one of the members of National Assembly who are entrusted with monitoring government and holding it accountable.

Introduction

This study discusses the dimensions and perspectives of the judicial judgment issued against the Kuwaiti MP, Faisal al-Musallam, after his disclosure of a photocopy of check issued by Prime Minister, Sheikh Nasser al-Mohammad, for a member of National Assembly in 2009. Afterwards, the relevant bank filed a complaint against the said MP on the basis that he had disclosed banking secrets. In the hearing held in High Court/Misdemeanor Department on 30/3/2011, the Court sentenced both: 1-.....(First Defendant) and 2-Faisal al-Musallam (Second Defendant) to the following: First: Each of the two Defendants shall be fined KWD 200 for the charge of disclosure of banking secrets and participation therein; Second:.....; Third,.....; and Fourth:.... in the lawsuit filed by Public Prosecution on the basis of complaint filed by agent of complainant on 09/11/2009, under no. 963/2009. First Defendant was punished as being principal in the crime of disclosing banking secrets; a violation of the provisions of Article (85), Law No. (28) of 2004 amending certain provisions of Law No. (32) of 1968 concerning currency, Central Bank of Kuwait and organization of banking business. MP, Faisal al-Musallam, was punished according to the provision of Article (48) of Penal Code as being a partner with First Defendant, by way of incitement, agreement and assistance, in committing the crime, subject of first charge and second charge before its occurrence, since he had instigated and agreed with First Defendant to do that.

The Court's ruling in the case of MP, al-Musallam, went on to read that "The court points out that Second Defendant's assistance to disclose bank information in a public session in National Assembly is, along with the availability of legal elements of this charge, considered a penalized act within "National Assembly Hall" this act is not covered by parliamentary immunity and so the actor may be held accountable for it... This has nothing to do with the acknowledgments of Second Defendant during investigations that he was practicing his powers of monitoring the actions of members of executive authority and holding them accountable for that".

This phrase is a misinterpretation of what the idea of immunity has been settled on, jurisprudentially and judicially, and even directly contradicts with many principles upon which Kuwaiti judiciary has been based.

The paper will be arranged as follows:

I. Constitutional Protection.

A- Substantive Immunity.

B- Separation of power.

C- Confidentiality of Banking Transaction against Constitutional Rights to Monitoring.

II. Legislative protection.

A. Professional Commitment.

B. Former Participation.

C. Convention against Corruption.

I. Constitutional Protection:

The provisions of Constitution articles, particularly those addressing the relationship between authorities, are provisions binding to all authorities⁽¹⁾, including the judiciary as being supervisor over valid application of these provisions and constitutional guarantor of associating application with provision and bringing them together so as to reflect the Constitution provisions and not to originate any new right neither known by constitutional legislator nor contemplated by nation's will⁽²⁾.

We will elaborate the constitutional protection in relation to incident, subject of study, according to the following:

A- Substantive Immunity:

When the will of nation went on to give Member of Parliament the right to freely express opinions and ideas in the National Assembly or its committees according to the provision of Article (110), "Member of the National Assembly shall be free to express views and ideas in the

(1) Preuss, Ulrich K. "Constitutional powermaking for the new polity: some deliberations on the relations between constituent power and the constitution." Cardozo L. Rev. 14 (1992): 639.

(2) See Kramer, Larry D. The people themselves: popular constitutionalism and judicial review. Oxford University Press, 2004. P93

Assembly or its committees and may not in any way be penalized for doing so"; the legislator has been given this immunity, even if it results in the MP's violation of one of the provisions of Kuwaiti legislations. However, as being a binding constitutional exception, the grounds of this case are represented in the desire to give legislator full freedom to monitor the actions of executive authority, as long as he/she is motivated by the public interest.⁽³⁾ This provision is a message and clear obligation for judicial authority in particular, because in the state of law, penalization is decided only by virtue of judicial rulings and preceding penal proceedings. Constitutional legislator has undertaken to oblige all authorities, including the judiciary, not to violate this fundamental constitutional right derived from Constitution and granted to MP in his/her capacity as representative of nation, the source of the authorities, in accordance with the provision of Article 6 of Kuwaiti Constitution.

Substantive immunity, contrary to what is contained in the court's conviction ruling of MP, Faisal al-Musallam, includes statements, ideas, inference and proof of facts by evidence if these views and ideas are an indictment addressed to a member of executive authority according to the following evidences:

First:

If substantive immunity is focused on statements made by MP in the parliament⁽⁴⁾, this can be due to being the possible means for MP to monitor the executive authority's actions and hold it accountable in accordance with the principle of monitoring and accountability.⁽⁵⁾ The statements made by MP may prejudice the responsibility of minister or prime minister whenever they include raising issues condemning or making any minister subject of indictment by National Assembly and therefore he/she shall be held accountable by activating the tool of questioning in preparation for vote of no-confidence in such minister or not to cooperate with prime minister once the political charge has been

(3) Dr. Jalal al-Sayed Bendari - Interrogation as a Means of Parliamentary Control in Egypt - Ph.D. thesis - Faculty of Law, Cairo University (1996), p. 111

(4) Seghetti, Michael R. "Speech or debate immunity: Preserving legislative independence while cutting costs of congressional immunity." *Notre Dame L. Rev.* 60 (1984): 589.

(5) Dr. Wafa al-Sabah, *Parliamentary Interrogation in Kuwaiti Constitutional System*, Dar al-Ketub (2011), p. 105

proven on any minister. MP can not prove his/her statements unless these statements are accompanied by material evidence of documents and papers condemning minister, subject of accountability. Therefore, if we concede that substantive immunity is limited to statements without being extending to papers and documents presented by MP, this would disable MP or make him/her reluctant to submit any document that may be a subject of accountability and so MP would be restricted to make valueless loose statements as long as they are not supported by official papers and documents, and would not be able to convince representatives of the nation to condemn any minister with mere loose statements.

Therefore, the adequate legal interpretation⁽⁶⁾, which can be derived from the constitutional provision of Article (110) is that although substantive immunity is the statements, views and ideas expressed by MP in parliament without acts,⁽⁷⁾ its concept does include MP's submission of documents proving his/her statement, which can be considered part of the statement as long as being in the course of proving statement and so covered by substantive immunity.

Second:

Established legal principle states that if there is an ambiguity in, uncertainty about, or division of opinion on the concept of a constitutional provision, it shall be referred to the explanatory constitutional norms which indicate the permissibility of constitutional provision surrounded by some ambiguity or uncertainty and so removing the doubt about its content.⁽⁸⁾ In view of the stage of forming the constitutional norm⁽⁹⁾, there must be a material element represented in recurrence of incident by a member of public authorities as well as moral element represented in belief in the obligation of incident. Jurisprudence satisfies with obligation element only when public authorities do not oppose such constitutional

(6) See Whittington, Keith. "Constitutional interpretation: Textual meaning, original intent, and judicial review." (1999).

(7) Dr. Saad Asfour, Constitutional System of Egypt - Constitutions of 1971 and 1980, p. 200.

(8) Dr. Abdul Fattah Hassan, Principles of Constitutional System in Kuwait, Dar al-Nahda al-Arabiya Beirut, (1986), p. 47

(9) Grey, Thomas C. "Do we have an unwritten Constitution." Stan L. Rev. 27 (1974): 703.
Albert, Richard. "How Unwritten Constitutional Norms Change Written Constitutions." Dublin ULJ 38 (2015): 387.

incident. When we look at the extent of the availability of a norm explaining Article (110), we note the availability of such constitutional norm explaining the existence of its both physical and moral elements. The meetings of National Assembly are full of incidents proving that some Assembly members provided documents some of which were obtained by other than legal means without being questioned by law or prevented from their disclosure. Also, one of the interrogation sessions prove that one of the MPs disclosed photos of some citizens, and such disclosure was in the context of proving his statements condemning one of ministers and proving corruption in his ministry and therefore there are parliamentary precedents represented in one of MPs' disclosure of documents not obtained by legal way in order to demonstrate his statement, which can be regarded as a material element of explanatory norm. As for the moral element of explanatory norm, it is to be proved through the non-objection of public authorities. If we applied the incident of disclosure of check by MP, Faisal al-Musallam, we would find that no member of executive or legislative authority objected to such disclosure. On the contrary, the government urged and incited al-Musallam to disclose such check to prove his saying, as stated by the then Minister of State for Cabinet Affairs, Mr. Rowdan al-Roudhan. Also, we find there are MPs who had appeared in several television interviews urging al-Musallam to disclose the check to strengthen the credibility of his claim.

In addition, al-Musallam did not find any objection and handed the photocopy of check to the secretariat of Assembly who viewed it through projector inside the Hall of Abdullah al-Salem.

Above all, the government did not object or asked the deletion of the incident of check projection from the session record that was to be ratified two weeks after the session. However, the record, including the incident of check projection, was ratified, which reinforces the most likelihood that government itself was convinced that MP was exercising his powers in accordance with the established constitutional frameworks and parliamentary norms in most countries.

Third:

President of National Assembly and MPs exercise political control to the effect of respecting Constitution provisions and preventing any

MP from deviating from such provisions in Assembly. This political control is well-established in Kuwait and various constitutional systems.⁽¹⁰⁾ If the incident of al-Musallam's disclosure of check, with the objective of strengthening his claim of the real existence of checks issued by Prime Minister for the benefit of MPs, is contrary to legal provisions and departing from substantive immunity of MP, President of Assembly would exercise his regulatory powers to warn MP⁽¹¹⁾ and prevent him from submitting the check. MP is free to express any views and ideas, but this is subject to controls. If MP got out of the ordinary limits of session, parliament would apply to him/her the provisions contained in the Rules of Procedure of National Assembly (Articles 86-89), including: 1- Warning, 2- Blaming, 3- Preventing from speaking during the rest of session, 4 - Forcing exiting from meeting room, and 5 - Deprivation of participation in the work of Assembly and its committees for a period not exceeding two weeks.

If there was a feeling that what MP, al-Musallam had done, is reprehensible matter and out of the rules of political accountability during the discussion of interrogation, President of Assembly would apply to him the previous regulatory provisions, but this did not happen and al-Musallam was given the opportunity to present check without being a subject of any regulatory penalty, which makes the disclosure and projection of check in Assembly among the powers of this MP when exercising his constitutional powers in the control of executive body⁽¹²⁾.

Fourth:

We conclude from several judicial rulings and statements of specialists in constitutional law a broad trend in the concept of substantive immunity, making it absolute to the extent that it includes words of insult and slander that if being issued by ordinary person, he/

(10) Richard D. Batchelder Jr., *Chastain v. Sunquist: A Narrow Reading of the Doctrine of Legislative Immunity*, 85 Cornell L. Rev. 383 (2000)

Fluri, Philipp, and Hans Born, eds. *Parliamentary oversight of the security sector: Principles, mechanisms and practices*. DCAF, 2003.

(11) Dr. Adel al-Tabtabaei, *Constitutional System of Kuwait, Fifth Edition -Revised*, (2009), p. 837

(12) Mulgan, Richard. *Holding power to account: accountability in modern democracies*. Springer, 2003.

she would be held criminally liable other than the previous judicial ruling, which has made it restricted without providing the appropriate legal reason for this restriction. We will state the manifestations of that:

1. Judicial Rulings:

Example: Proceedings before Court of Appeal, No. 1278/2010 - Civil 3. The Court decided that:

(It is decided according to the provision of Article (110) of Kuwaiti Constitution that member of National Assembly (MP) is free to express whatever views and ideas in Assembly or its committees and so can not be penalized for that in any way. It is firmly settled that the rule of non-responsibility for parliamentary acts is among the rules on which the parliamentary traditions have been established, without which it is impossible for MP to feel free and calm while doing his/her job. This rule means that the representative of nation can not be held criminally or civilly accountable for ideas, opinions or statements he/she expresses in National Assembly or its committees, which are necessary for the performance of his/her parliamentary function, even if they include insult or slander of third party. Neither Public Prosecution can proceed with public proceedings nor harmed party can demand compensation for damage caused by such insult or slander, but Assembly can penalize MP within the limits prescribed by the bylaws if it is found that he/she has exceeded the legitimate limits.... Whatever the opinion in these statements is, the respondent shall not be criminally or civilly charged as long as he/she has expressed them in Assembly and on the occasion of exercising his/her parliamentary function, which makes the case established on unconstitutional deniable provisions.

According to this ruling, MP may not be penalized for his/her parliamentary activities in any way, that is, MP may not be criminally or civilly prosecuted by any person who has been harmed by this MP's performance of his/her parliamentary work. Neither Public Prosecutor nor harmed person shall have the right to initiate such proceedings in any way. As stated in the ruling, there shall be no deterrent but the punishment of MP in accordance with the regulatory sanctions as we have mentioned earlier.

2 - The Jurisprudence:

Jurisprudence has been originally based on the provisions of Constitution and judiciary applications on the definition of the meaning of substantive immunity in a clear and unambiguous way.

Dr. Othman Abdul-Malik went on to say:

"This immunity is absolute.. against criminal liability and civil and political responsibility, and it is continuous, permanent or extended in the sense that it continues and extends beyond the expiration or termination of membership for any reason"⁽¹³⁾

He also said:

"He/She may, within that limits, express any statements, opinions and ideas regardless of whatever punishable offenses it implies if they are issued by an ordinary person. He/She may accuse an employee, minister or colleague of him/her of fraud, bribery, exploitation of power, treason or otherwise without being criminally or civilly liable, because Constitution protects him/her from this liability."⁽¹⁴⁾

Other jurists went on to say:

"Protection is decided by nation and represented by nation's representatives in parliament. If MP commits a crime of insult or slander within parliament or one of its committees, this act shall be interpreted for considerations of public interest; an exception from the circle of illegal act to the circle of permissible, and sometimes necessary, act if being one of the requirements of constitutionally determined monitoring and accountability. It is not privilege for the personality of Member of Parliament, but it is decided as a basic pillar of the parliamentary function for the benefit of society as a whole."⁽¹⁵⁾

They also said,

"Legislator balanced between two interests; the interest of parliamentary work and sincere representation of nation along with the

(13) Dr. Othman Abdul-Malik, Constitutional System and Political Institutions in Kuwait, Dar al-Kutub Foundation, Second Edition 2003, p. 576.

(14) Dr. Othman Abdul-Malik, op. Cit., p 575

(15) Dr. Ramadan Batikh, Parliamentary Immunity and its Applications in Egypt, Dar al-Nahda al-Arabiya, 1994, p12

Mahmoud Abu Al-Saud Habib, Guarantees of Members of Parliament in Egyptian Constitution, Dar al-Nahda al-Arabiya, 2000, p 57.

relevant requirement that the legislative authority should stand in the position of strong counterpart or partner with the rest of other authorities so as to manage the helm of government, and the interest of party harmed by whatever saying or thinking issued by MP, then he/she outweighed first interest over the second as being more important, which is normal".⁽¹⁶⁾

But, jurisprudence and judiciary decide that MP shall not be asked about his sayings or ideas even after the end of his/her membership for any reason.

"Immunity against parliamentary responsibility not only covers all current members of parliament, whether elected or appointed, but also covers any statement or opinion issued by Member of Parliament whose term of membership in Assembly or the term of representation has been ended".⁽¹⁷⁾

Substantive immunity sanctions representative of nation for whatever opinion or statement he/she expresses when exercising his/her parliamentary work, even if this opinion or statement constitutes a crime as long as it is exercised in parliament or one of its committees.

"In this scale, MP enjoys a broad freedom to say whatever he/she wants, even if this saying implies insulting, slander or invitation for committing a crime, favoring such acts, or even calling for a strike or revolution".⁽¹⁸⁾

Accordingly, jurisprudence, which explicitly agrees with Constitution and judiciary judgments, states that neither concerned party nor Public Prosecution has the right to initiate any action, civil or criminal, against MP:

"It is forbidden for judiciary in such a case to call MP for hearing his/her testimony or discussing the opinion or statement he/she has expressed in parliament in the context of practicing his/her parliamentary work. If there is MP who deliberately defamed his/her opponent and unjustly and aggressively dumped him/her with a flood of insult and

(16) (Ramadan Batikh, op. Cit., p. 52)

(17) (Ramadan Batikh, op. Cit., p. 52)

(18) (Ramadan Batikh, op. Cit., p. 52)

defamation, the victim would not resort to judiciary to litigate this MP for such opinion or statement he/she had expressed regarding him/her nor Public Prosecution or judiciary can call to ask this MP about this insult and defamation out of respect of his/her parliamentary immunity".⁽¹⁹⁾

Fifth: What proves that constitutional legislator wants substantive immunity to be broad enough to guarantee MP's full freedom in monitoring and holding executive authority accountable, without fear of being subject to judicial accountability, is that in 1980, Constitutional Review Committee rejected the government's request to amend Article (110) to the following provision:

"Member of National Assembly shall be free to express whatever views and ideas in Assembly or its committees, and so may not be penalized for that in any way. However, this shall not be applied in the case of libel, insulting or incitement to or favoring the commitment of crimes."⁽²⁰⁾

Since Constitution has not been revised, MP may, in the concept of violating Constitution, accuse any minister or other MP of bribery or forgery and so, for inference purposes, he/she may reveal whatever evidence he/she has inside or outside parliament session as long as this is in the context of monitoring, which invokes the prevalence of public interest and not mere unjustified prejudice against persons.

B. Separation of Authorities:

Article (50) of Constitution stipulates that "System of government shall be based on the separation of and cooperation among authorities in accordance with the provisions of Constitution. No authority may waive all or some of its competencies stipulated in Constitution."

We can note that the ruling, subject hereof, directly guides MP, Faisal al-Musallam, when providing in page 15 thereof for:

(19) (Ramadan Batikh, op. Cit., p. 52)

In this sense also (Judgment of Kuwaiti Court of Appeal No. 1278/2010 - Civil 3)

See also (Mahmoud Abu al-Saud, ibid., p 67)

(20) Dr. Adel al-Tabtabae, op. Cit., p 836

"It would be better and more effective for (Second Defendant) to hide information established in the check which affects the private life of its holder". This runs counter to Article (50) of Constitution which acknowledges the principle of separation of authorities. Therefore, no authority may have the right to interfere with the work of another authority or direct its work conduct in a way denying the fact that authorities are separated because the subject of the case is not related to the personality of MP, Faisal al-Musallam, but to its capacity as a Member of Parliament and in the context of exercising his work in Assembly, and so this direction is considered an intervention by the judiciary in the very heart of the work of legislative authority, including monitoring and accountability⁽²¹⁾.

C- Confidentiality of Banking Transactions against Constitutional Right to Monitoring:

Court's jurisprudence accused MP, al-Musallam, of participating in the disclosure of banking secrets⁽²²⁾, and concluded that the right of MP to monitoring is restricted by the decision of Constitutional Court issued in response to the request for explanation provided by Government under No. 3/1982 on the confidentiality of the names of patients. There is no doubt that judging this ruling to reach this inference was somewhat confused by the fact that the occasion of the case, subject hereof, is (the right of MP to ask and oblige concerned minister to provide the names of some patients as well as their medical conditions) since MP's asking minister to give him the names of patients is completely different from MP's disclosing some names of patients to infer a particular matter in view of the fact that minister has the right to refrain from providing the names of patients under the pretext of confidentiality. However, this is encountered by that MP can not be penalized in any way for disclosing some names in application of the provision of Article (110).

(21) See Vile, Maurice John Crawley. *Constitutionalism and the Separation of Powers*. Liberty Fund, 2012.

Persson, Torsten, Gerard Roland, and Guido Tabellini. "Separation of powers and political accountability." *The Quarterly Journal of Economics* 112, no. 4 (1997): 1163-1202.

(22) Plombeck, Charles Thelen. "Confidentiality and Disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy." In *Int'l L.*, vol. 22, p. 69. 1988.

It would be better for Court to refer to the request for explanation submitted by government under No. 1/1986 on the right of Committee of Inquiry to oblige Minister of Finance to disclose the photocopies of the minutes of meetings of the Central Bank, including some names of beneficiaries of some decisions, but Ministry advanced the pretext of (confidentiality of banking transactions and violation of Article (28) of Central Bank Law and the privacy right in accordance with Article (30) of Kuwaiti Constitution), which are the same reasons upon which Court jurisprudence has been based in order to reach the conviction of MP, al-Musallam. However, Constitutional Court decided in this case during the interpretation of MP's right to monitoring against the commitment to banking secrecy a group of important constitutional rules:

(...As for what the government raised about the fact that regulatory right of National Assembly is restricted to non-prejudice to financial matters of bank customers or violation of financial secrets of persons of private law or public law based on Article (28) of Central Bank Law as well as respect for the right of privacy in accordance with Article (30) of Constitution; it can be rejected as it can not be considered as an absolute fact regarding constitutional right of National Assembly stated in Article (114) of Constitution since Article (28) of Central Bank Law, although prohibiting any employee in Central Bank from disclosing any information related to the affairs of bank or its clients or affairs of other banks, subject of his/her monitoring, for protecting bank secrets, this protection is imposed by a legal provision that cannot be challenged in this regard. However, in accordance with the principle of hierarchy of legal rules, a lower rule of law can not be invoked in the face of a higher rule prescribed by constitutional provision which is more formal and stronger than ordinary legal provision, thus sacrificing constitutional provision which is more deserving of care and business'..., as well as the obligation of confidentiality regarding banking profession which is not an absolute obligation at all, but there are cases justifying its violation for considerations of importance outweighing the interest of owner of secrets when the matter requires prioritizing public interest which is worthier of care than preserving secrecy).

The Constitutional Court decided several constitutional rules which must be respected as a whole:

- 1 - The rule of legislations hierarchy, which means that MP's right to monitoring is a genuine constitutional right derived directly from Constitution, since MP is a representative of the nation⁽²³⁾, and therefore it is not permissible to restrict or narrow the concept of this right by ordinary legislative provision as decided by Constitutional Court under the excuse of secrecy.
- 2 - The obligation of banking secrecy is not an absolute obligation since there are justifications which may require its infringement⁽²⁴⁾, including prevailing public interest. There is no doubt that the said MP's monitoring of head of executive branch in state and his disposal of money in favor of another person is by operation of law is monitoring of a public figure representative of the nation and it is an application of requirements of this public interest, which was stipulated by Constitutional Court in its ruling, especially when taking into account that this monitoring is the obligation of Second Defendant (al-Musallam) as determined by Constitution of Kuwait provisions and decided by constitutional oath in its operative part.
- 3 - Due to the fact that all characters related to the incident are public figures; beneficiary of check is a member of Kuwaiti Parliament, issuer of check is Prime Minister and revealer of this incident is Member of Parliament who performed his parliamentary role within Parliament and so his action is an application of requirements of public interest in addition to being covered by constitutionally prescribed substantive immunity.⁽²⁵⁾ The Kuwaiti courts decided to apply the theory of public personality in many of its provisions, which invokes a reason of permissibility for the requirements of public interest, which was decided by Criminal Department in case No. 27/2009:

(If complainant is a public figure in his capacity as Minister of Finance and in the course of exercising his powers as a public servant who has issued statements related to economic situation.. which is naturally encountered by the right of criticism and evaluation.... and if

(23) Pushaw Jr, Robert J. "Justiciability and Separation of Powers: A Neo-Federalist Approach." Cornell L. Rev. 81 (1995): 393.

(24) Nash, Chris, and Wendy Bacon. "Confidential sources and the public right to know." Australian Journalism Review 21, no. 2 (1999): 1.

(25) James L. Chan (2010) Government Accounting: An Assessment of Theory, Purposes and Standards, Public Money & Management, 23:1, 13-20,

critic, First Defendant, is member in the Kuwaiti parliament, he, in this capacity, is one of the first persons concerned with public affairs and entrusted with monitoring, criticism and accountability of members of the government, in particular, in favor of public interest. If his critique appeared in a satellite channel, this shall not deprive him of his constitutional obligation,.....which confirms First Defendant's concern with interest of society and informing public opinion of what is going on, with the intention of offending, which invokes the cause of permissibility permitted by legislator in Articles 213/First and 214/First of Penal Code).

In this case, Court rightly decided that even if criticism happened outside the session of parliament, it shall be covered by the reasons of permissibility and requirements of public interest, contrary to the decision of Court in the case of MP, al-Musallam, who was not even given the right to express opinions and ideas in the meetings of Assembly.

Kuwaiti courts rightly decided to apply the public personality theory already applied in most countries based on respect of freedom of expression and respect and activation of monitoring tools of the parliament rather than creating a weak parliament that does not have the means of monitoring except the pro forma monitoring through voiding Constitution provisions of their contents even that which is established by Kuwaiti Constitution, in particular Article (110), in a comprehensive and tight manner.

The Constitutional Court, in the context of interpreting Governmental Request No. 2/1986 for the interpretation of Article (114) on the authority of Parliamentary Investigation Committees, and by reviewing the activity of institutions of settlement of transactions relating to the term-shares of companies and the names of beneficiaries of loan contracts concluded between institution of settlement of transactions of term-shares and one of the banks, Court decided:

(... Based on the above, subject of loan is not immune from the task of Parliamentary Investigation Committee in all its procedures and associated data without restriction. This is not influenced by what the loan contract includes regarding the restriction of confidentiality since the mentioned contract is binding on the parties thereto, but it can not in

any way erect a wall of secrecy in the face of constitutional right to constitutional monitoring"..... For these reasons, Court decided that the right of National Assembly to conduct a parliamentary investigation under the provisions of Article (114) of Constitution, which covers each subject within its legislative or regulatory authority, including the activity of settlement of transactions related to term-shares of companies. Investigation Committee has the right to activate its supervisory powers over loan contract concluded by the said institution in its procedures and associated data, including the names of beneficiaries of the loan.

There is no doubt that loan contract is worthier of protection than checks because check is held and implies the property of circulation, unlike loan which is closer to the financial guarantee of person, and persons of private law are worthier of protection than ministers and MPs. However, Constitutional Court did not exempt the loan contract or the signatories of loan contracts from being subject to monitoring of legislative authority and so disclosing their names and the nature of their transactions, even though they were not public figures, as is the case in the incident in question.

II. Legislative Protection:

MP has been convicted, as explained in preamble, of charge of ex-participation in violation of the provisions of Article (85) (bis) of Law (28) of 2004 on currency, Central Bank of Kuwait and organization of banking professions which provide for "No member of board of directors, director, worker or employee of bank shall disclose any information during or after leaving his/her office regarding the affairs of relevant bank or other banks, which he/she might have access to by virtue of office, except as otherwise authorized by law.)

A- Professional Commitment⁽²⁶⁾:

We can note that the provision of the above Article singles out those concerned with its provision, that is, members of boards of directors,

(26) M. Linsley, Philip, and Philip J. Shrivs. "Transparency and the disclosure of risk information in the banking sector." *Journal of Financial Regulation and Compliance* 13, no. 3 (2005): 205-214.

directors, workers, and finally employees in the sense of workers of the bank, which is a subject of criticism.⁽²⁷⁾ This obligation of non-disclosure is professional obligation limited to persons who practice this profession in particular, and it is similar to the obligation of lawyer not to disclose the secrets of his/her clients and the doctor's obligation not to disclose the secrets of patients. In no case may the ordinary person, considered third party in relation to this profession, be a subject of provisions regulating this profession. Professions are a set of rights and duties, and there are certain requirements for person to be able to have the title of this profession, and so if he/she fulfills them, he/she shall be eligible for its rights and obligations in particular. Due to the fact that Second Defendant is MP who never worked as a bank clerk in the complaining bank, he is not in a position to be addressed by the provisions of these professional provisions and so he has no legal obligation towards non-disclosure of banking secrets, especially when considering that he obtained them through his own mail as being MP for the nation. However, banking secrecy is deteriorating in terms of both governance systems and through international agreements.⁽²⁸⁾

For example, Article (11) of Law No. (42) of 1964 on the Organization of the Legal Profession before the Courts, amended by Law No. (62) of 1996, stipulates that lawyer is subject to the oath of preserving confidentiality and honor of profession. In addition, Article (35) states that disclosing the secret of client is a violation of the profession's principles. The same applies to the duty of doctors to preserve the secrets of patients. Decree Law No. (25) of 1981 regarding the Practice of Human and Dentistry Medicine states that doctor should not disclose a private secret that came to his/her knowledge through his/her profession.

Accordingly, none can be penalized for the disclosure of secrets in professional crimes and obligations except those who hold the title, fulfill the requirements, enjoy the advantages and bear the burden of this

(27) Hughes, S. J. (1991), Policing money laundering through funds transfers: A Critique of Regulation under the Bank Secrecy Act. *Ind. LJ*, 67, 283.

(28) Johannesen, Niels, and Gabriel Zucman. 2014. "The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown". *American Economic Journal: Economic Policy*, 6 (1): 65-91.

profession. Therefore, MP, Faisal al-Musallam cannot be asked about the professional obligations related to the staff of banks and accountants, unless he was working in banking job, which is not right for Second Defendant.

B- Former Participation:

MP, al-Musallam, has been charged with former participation, while it would be better to be charged with (albeit not being subject) of subsequent participation. However, as a result of Constitutional Court's annulment of criminalizing subsequent participation (Article 49: First), complainant had no choice but to hold MP accountable for former participation which supposes MP's knowledge of check before its arrival to the possession of principal, which has not been proved from the facts of case or statements of witnesses. On the contrary, Court considered the MP's acknowledgment that he got photocopy of check through his private mail in Parliament, that is, all elements of crime of disclosure had been established and completed before MP's knowledge thereof through First Defendant's sending photocopy of the check.

Court of Cassation decided these rules in Appeal No. (76) of 1990 that (the ruling concluded to proving participation in issuing a bounced check, which does not at all justify believing that its issuance was the result of a previous agreement between drawer and partner, which is a deficiency and corruption in inference requiring cassation).

It also decided in Appeal No. (183) of 2004 that "participation with agreement is achieved by uniting the intentions of both actor and partner to commit the agreed upon act."

Additionally, it decided in the same appeal that "participation with assistance is achieved by the intentional interference of partner's will with actor, which achieves the meaning of facilitating the crime commission, which legislator considers a justification for the punishment of partner).

It is clear that the case is free of any evidence that the intention or will of Second Defendant, MP "Faisal al-Musallam" had intervened with committing the act before the arrival of check to the possession of principal. On the contrary, the judge inferred and approved the acknowledgement of Second Party that he received photocopy of the check through his personal mail in Parliament on page 15 of the ruling.

Accordingly, all elements of crime, which is the disclosure by sending photocopy of check through mail, are present. There no aspect of participation in the case filed against MP because of the completion of crime (if being correct in respect of First Defendant) before the MP's reception of mail.

C- Convention against Corruption:

It is one the United Nations conventions signed by the State of Kuwait in 2003 and approved by National Assembly in 2006. Article (70) thereof states that "Prince shall conclude treaties by decree and immediately communicate them to National Assembly accompanied with appropriate statement. Treaty shall have the force of law after its conclusion, ratification and publication in the Official Gazette." Article (15) of Convention against Corruption, having the heading "Bribery of National Public Employees", provides that bribery may not be offered or used in public office, in accordance with the following provisions:⁽²⁹⁾

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses the following acts: (1) promising, offering or granting public servant an undue advantage, either directly or indirectly, for the benefit of servant himself/herself or another person or entity, in order for the employee to do or refrain from doing something while performing his/her official duties, (2) The solicitation of or acceptance by a public servant, directly or indirectly, of an undue advantage, whether for the benefit of servant himself/herself or another person or entity in order for the employee to do or refrain from doing something while performing his/her official duties".⁽³⁰⁾

According to the rule that subsequent provision cancels the former, the banking secrecy of Prime Minister cannot invoked as long as Convention is subsequent to Law of Central Bank and have become part of Kuwait's domestic law. Article (19) of Convention against Corruption, entitled (Job Abuse), also provides that:

(29) Kubiciel, M. (2009), Core Criminal Law Provisions in the United Nations Convention against Corruption. *International Criminal Law Review*, 9(1), 139-155.

(30) Philippa Webb; The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?, *Journal of International Economic Law*, Volume 8, Issue 1, 1 January 2005, Pages 191-229,

"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offense the public servant's intentional misuse of his/her job or position, that is, doing or not doing something while performing his/her jobs in order to obtain an undue advantage for his/her own benefit or for the benefit of another person or entity, which constitutes a violation of laws".

Article (24) also states that it is not permissible to hide things obtained from crimes contemplated by Convention, including crime of bribery, as follows:

"Without prejudice to the provisions of Article (23) of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offense the concealing or maintaining property, following committing any of the acts criminalized in accordance with this Convention and without participation in such acts, while the concerned person is aware that such property is derived from any of the acts criminalized in accordance with this Convention."⁽³¹⁾

The Convention also obliges state parties to protect whistleblowers in accordance with the provisions of Article (33) thereof:

"Each State Party shall consider entering into the heart of its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person informing, in good faith and for good reason, the competent authorities of any facts relating to offenses established in accordance with this Convention."

Accordingly, the state is obliged to protect whoever reports the suspicion of bribery and not to prosecute him/her in contravention of provisions of this Convention and the provisions of Kuwaiti constitution.

Article (40) provides for the creation of a transparent system in which banking secrecy can not be invoked according to the following provision:

(31) Yukins, C. (2007). INTEGRATING INTEGRITY AND PROCUREMENT: THE UNITED NATIONS CONVENTION AGAINST CORRUPTION AND THE UNCITRAL MODEL PROCUREMENT LAW. *Public Contract Law Journal*, 36(3), 307-329.

Cleveland, M., Favo, C. M., Frecka, T. J., & Owens, C. L. (2009). Trends in the International Fight against Bribery and Corruption. *Journal of Business Ethics*, 90(2), 199-244.

"Each State Party shall ensure, in the event of carrying out criminal investigations in offenses established in accordance with this Convention, that there shall be appropriate mechanisms in its domestic legal system to overcome obstacles that may arise from the application of the banking secrecy laws"

So, what was done by MP, Faisal al-Musallam, is protected according to the rules of Convention against Corruption, which has become part of Kuwaiti internal law and ratified by Parliament in 2006, and can not be held accountable for it.

Conclusion:

This ruling is an amendment of the provision of Article (110) without following the procedures stipulated in Article (174) of Constitution of Kuwait which decides the amendment of constitutional provisions. Member of Parliament has the right to express any views and ideas and to cite this along with evidence. Any MP may be blamed for issuing unfounded statement without providing proof if the subject matter of such views is indictment of any person, not to mention that the indicted person is the head of executive body in state, Prime Minister. Such serious accusation must be supported by evidence and demonstrations required by the duties of parliamentary monitoring by MP, Faisal al-Musallam, who should not be penalized in this case. It is also a priority for parliamentary work and political accountability to draw attention to the personality of the accused because the incident involves suspicion of bribery, which requires either the formation of an inquiry committee in the matter or the referral of the whole matter to Court of Ministers to clarify the ambiguity 'disambiguate' in this regard.

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