Dissolution Power is no longer immune from Judicial Review: The Case of Kuwait

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Abstract: The dissolution of Parliament is one of the most important prerogatives of the Executive in Parliamentary and Semi-Presidential Systems. Nevertheless, most comparative legal systems have long regarded the use of such a prerogative as a '*non-justiciable*' question for its political nature. This article examines the possibility of subjecting the Dissolution Power to judicial review of Constitutional Courts to ensure its compatibility with constitutional principles and safeguards. In doing so, the article will highlight two landmark decisions of the Constitutional Court of Kuwait leading to an important legislative amendment that confirms the right of the Constitutional Court to review Emiri Decrees of Dissolution.
Keywords: Dissolution; Separation of Powers; Kuwait; Constitutional Court; Parliament

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A. Introduction

Due to its political nature, the Executive's exercise of the Dissolution Power has long escaped judicial scrutiny in major legal systems. This article seeks to examine the possibility of subjecting the Dissolution Power to judicial review. In addressing our inquiry, we focus on the recent development in Kuwait's legal system that has resulted in the expansion of the Constitutional Court's scope of judicial power to include reviewing Dissolution Decrees.

Section B of this article explores the scope of the Dissolution Power in general terms. Section C identifies the types of dissolution procedures specified in the Kuwaiti Constitution and distinguishes these procedures from other analogous constitutional procedures that may lead to the removal of the Parliament.

Section D investigates the Courts' capacity to review Dissolution Decrees. It will be divided into two parts. Part one will examine the possibility of subjecting Dissolution Power to judicial review in a number of Comparative legal systems such as Egypt, France, and the United Kingdom. Part two will investigate Kuwait's legal system and constitutional prece-

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dents of the Constitutional Court of Kuwait (Al-Mahkama Al-Dusturia المحكمـــة الدســـتورية) *(hereinafter* KCC) to identify the legal grounds for subjecting Dissolution Decrees to judicial review as well as the scope of this judicial review power.

Part E concludes with a call to subject the Dissolution Power of the Executive to judicial review to avoid any potential abuse of the power of dissolution and to ensure that the exercise of such power is compatible with constitutional safeguards and principles.

B. What is the Power of Dissolution?

Although Parliaments would normally be dissolved at the end of their scheduled terms of office, most comparative constitutions sanction premature dissolution of Parliaments by the Executive before the completion of their term through what is known as *the Power of Dissolution*. Accordingly, the Power of Dissolution refers to the power of the Executive branch of the Government to end the term of office of parliamentary members, thus allowing for a new parliamentary election to take place.[1]

This power has always been connected to the Government formation and removal rules in Parliamentary and Semi-Presidential regimes, which are grounded on a careful balance of reciprocal trust between the Executive and Legislative branches of the Government. It is considered the constitutional equivalent of Parliament's power to hold the government accountable or to withdraw its support through a vote of no confidence.[2]

Comparative Constitutions vary substantially, however, in terms of the range of Dissolution Power.[3] While some Constitutions confer upon the Executive a wide discretionary power to dissolve the Parliament,[4] other Constitutions tend to limit the ability of the

1 *Yehia Al-Gamal*, The Constitutional System in Kuwait (Al-Nezam Al-Dostouri Fi Al-Kuwait – النظام الدستوري في الكويت) Kuwait 1971, p. 398; *Othman Abd AL-Malek Al-Saleh*, Constitutional System and Political Institutions In Kuwait (Al-Nezam Al-Dostouri We Al-Moaasasat Al-Seyaseya Fi AL-Kuwait النظام الدستوري والمؤسسات السياسية في الكويت) Kuwait 2003, p. 705; *Aly Al-Baz*, Public Authorities in the Kuwaiti Constitutional System (Al-Sultat Al-Ama Fi Al Nezam Al-Dostouri Al-Kuwaiti السلطات العامة في النظام الدستوري الكويتي), Kuwait 2012, pp. 182-185; *Edward A. Freeman*, The Power of Dissolution, North American Review 129 (1879), p. 156.

2 *Al-Gamal*, note 1, pp. 398-400; see also *Al-Said Ahmed Al-Said / Essam Said El Ebaidi,* The Right to Dissolve Majlis Al-Ummah in the Kuwaiti Constitutional System (Haq Hal Majlis Al-Ummah Fi Al-Nezam Al-Dostouri Al-Kuwaiti حق حل مجلس الأمة في النظام الدستوري الكويتي), Kuwait Law Review 1 (2021), pp. 285-315; *Alaa Abdelal,* The Dissolution of Parliament in Comparative Parliamentary Constitutional System (Hal Al-Barlman Fi Al-Anzema Al-Barlmania Al-Dostouria Al-Moquarna حل البرلمان في الأنظمة البرلمانية الدستورية المقارنة), Alexandria 2004, pp. 85-90.

3 International Institute for Democracy and Electoral Assistance, Dissolution of Parliament 16, International IDEA Constitution-Building Primer, https://www.idea.int/sites/default/files/publications/dissolution-of-parliament-primer.pdf. (last accessed on 03 June 2024), pp. 9-13, hereinafter referred to as IDEA Primer.

4 See, e.g., Art. 12 of the Constitution of France, promulgated on October 4, 1958 (*hereinafter* the Constitution of France). As shall be discussed later in this article, Art. 12 the French Constitution confers upon the President of the Republic a broad power to dissolve the Parliament at will.

Executive to use such power by laying down several circumstances and conditions, only under which dissolution would be permissible.[5]

In addition, dissolution may serve a variety of purposes according to the rules and circumstances specified in each Constitution.[6] For instance, some Constitutions provide for a wide latitude of Dissolution Power as a means to enhance and strengthen the position of the President of the Republic.[7] Others provide for the same power as a means to break down deadlocks inside the Parliament or between the Government and the Parliament,[8] as a means to overcome repetitive objections of the Parliament in the Government formation process,[9] or as a way to check public opinion on major issues, such as the removal of the head of the State.[10]

Finally, due to the grave consequences the usage of such power normally entails – including temporary suspension of the Parliamentary life and complete transferal of legislative power to the Executive - Comparative Constitutions tend to delimit the Executive scope of power to dissolve parliaments with some constitutional safeguards that aim to preclude any potential encroachment or abuse of power from the Executive.[11] These constitutional safeguards vary considerably from Constitution to Constitution, including consultation with other authorities or institutional actors before dissolving the Parliament,[12] setting out the date of election of the next Parliament,[13] identifying periods where the

5 See, e.g., Art. 76 of the Constitution of Malta 1964, (rev. 2016). The article vests the Dissolution Power in the President, subject to the binding advice of the Prime Minister; see also Articles 155 & 225 of the Constitution of Poland 1997, which only allows the Head of the State to dissolve the Parliament in two cases; when a new government fails to attain a vote of confidence, or when the Parliament fails to approve the draft budget.

6 IDEA Primer, note 3, p. 4.

7 Art. 12. of the Constitution of France.

8 Art. 102 of the Constitution of Kuwait, 1962 (Reinstated 1992) (*hereinafter* the Constitution of Kuwait).

9 Art. 146 of the Constitution of Egypt 2014, as amended in April 2019 (*hereinafter* the Constitution of Egypt).

10 Art. 161 of the Constitution of Egypt.

11 IDEA Primer, note 3, p. 9.

12 See, e.g., Art. 12 of the Constitution of France requires the President to consult the Prime Minister and the Presidents of the two Assemblies before ordering the dissolution of the Parliament. But their opinion is of a consultative nature, meaning that the President is not bound to act according to the advice given by these authorities.

13 See, e.g., Art. 107 of the Constitution of Kuwait requires the election of the new Parliament to take place within two months of the date of the dissolution.

dissolution of the Parliament is impermissible,[14] or the prohibition of the dissolution on the same ground twice.[15]

C. Constitutional Procedures of Dissolution in Kuwait's Legal System

Kuwait is one of the first established emirate states in the Gulf region. Its current Constitution, promulgated in 1962, provides for the establishment of a special system of government that combines features of Parliamentary and Presidential regimes.[16] State governmental authority in Kuwait is divided between the Executive Branch, the Legislative Branch (*Majlis Al-Ummah*), and the Judicial Branch.

Although Kuwait's system of government is founded on the basis of the separation of powers between the three branches of the Government along with their collaboration,[17] the Constitution introduces a distinctive system of checks and balances between the Legislative and Executive branches with the following two characteristics:

First, despite the Constitution's assurance of the ministerial responsibility to Majlis Al-Ummah, the no-vote confidence procedure specified by the Constitution is only applicable to ministers on an individual basis,[18] and not the Prime Minister or the cabinet.[19]

Second, the power to dissolve the Parliament is entrusted to the Head of the State, the Emir. However, given that the Constitution provides that the Emir can only exercise his

14 See, e.g., Art. 172 of the Constitution of Portugal 1976 (rev. 2005), which forbids dissolution of the Parliament in a number of circumstances, such as during the six months following its election, during the last six months of the President of the Republic's term of office, or during a state of siege or emergency.

15 See, e.g. Art. 107 of the Constitution of Kuwait which explicitly forbids the dissolution of the Parliament on the same ground twice; See also Art. 29 (1) of the Constitution of Austria 1920 (reinstated 1945 and revisited 2009) which reads "The Federal President can dissolve the National Council, but he may avail himself of this prerogative only once for the same reason."

16 See the Explanatory Note of the Constitution of Kuwait (Al-Mozakera Al-Tafsirya Le Dostour Dawlet Al-Kuwait - المذكرة التفسيرية لدستور دولة الكويت)) November 1962 (*hereinafter* The Explanatory Note of the Constitution of Kuwait), https://www.kna.kw/Democratic/ExplanatoryNote/15/18 (last accessed on 03 February 2025). The Framers of Kuwait's Constitution deliberately adopted this special system of government in Kuwait after a careful weight of merits and deficiencies of parliamentary and Presidential systems. This is reinforced by what the framers of Kuwait's Constitution explicitly noted in the Explanatory note of the Constitution, which reads "The Keen desire to preserve the unity of the homeland and the stability of government has led to the adoption of a middle-ground course between the Parliamentary and Presidential Regimes, with much more inclination towards the Parliamentary former, as the latter is only applicable in Republics."

17 Art. 50 of the Constitution of Kuwait; see also *Saba Habachy,* A Study in Comparative Constitutional Law: Constitutional Government in Kuwait, Columbia Journal of Transnational Law 3 (1964), pp. 122-123.

18 Art. 101 of the Constitution of Kuwait

19 Art. 102 of the Constitution of Kuwait stipulates "The Prime Minister does not hold any portfolio; nor shall the question of confidence in him be raised before the National Assembly…"

Constitutional powers by the medium of his ministers, the Dissolution Decrees must be co-signed by the Prime Minister after obtaining the approval of the Cabinet.[20]

The following section shall first identify the types of dissolution procedures specified in the Kuwaiti Constitution, and shall, secondly, distinguish the Dissolution Power from other analogous constitutional procedures.

I. Types of Dissolution in Kuwait's Constitution

Kuwait's Constitution, unlike many other Constitutions in the Arab Region,[21] provides for two constitutional procedures to be followed if the Emir decides to dissolve the Majlis:

1. Dissolution on the Ground of Art. 102 of Kuwait's Constitution

The first procedure to dissolve Majlis Al-Ummah is stipulated in Article 102 of the Kuwaiti Constitution which lays down the circumstances under which dissolution is permissible.[22]

The Dissolution in this article is used as a way to resolve deadlocks between the Cabinet and Majlis Al-Ummah in cases where the latter decides that it can no longer cooperate with the Prime Minister.

In such instances, the Majlis shall refer the whole matter to the Emir who, acting as an arbitrator between the two authorities, could either relieve the Prime Minister of office and appoint a new Cabinet or dissolve the Majlis.

However, in the event of dissolution, if the newly elected Parliament decides by an absolute majority vote that it cannot cooperate with the said Prime Minister, the latter shall be considered to have resigned as from the date of the decision of the new Majlis in this respect, and a new Cabinet shall be appointed.

20 This requirement has been confirmed by the KCC in its decision No. 6 & 30 of 2012 on the grounds of Articles 54 and 55 of the Constitution, which confer upon the Emir of the State an *inviolable* status and does not authorize him to exercise his powers except through his ministers. Therefore, the Dissolution Decree should be co-signed by the Prime Minister, who shall solely bear the political responsibility that may arise out of that action. For more details, see KCC Decision No. 6 & 30 of 2012, 6 June 2012, published by the Technical Office of the Kuwait Constitutional Court, in the Collection of Ruling handed down by the Court in the Electoral Appeals, Volume 6, Part 3, From January 2009 to December 2015, pp. 155-165.

21 See, e.g., Art. 104 of the Constitution of Qatar, 2004, Articles. 58 bis 19 of Constitution of Oman 1996 (revisited 2011), Art. 42(b) of the Constitution of Bahrain 2002 (revisited 2017).

22 Art. 102 of the Constitution of Kuwait stipulates that "[t]he Prime Minister shall not be responsible for any Ministry and the casting of a vote of confidence in the Assembly shall not be applicable to him. However, should the National Assembly, in the manner prescribed in the preceding Article, deem it impossible to cooperate with the Prime Minister, the matter shall be referred to the Head of State; and in that case the Amir shall either relieve the Prime Minister and form a new Cabinet or dissolve the National Assembly. Should, after dissolution, the new Assembly return with the same majority a motion of non-cooperation with the Prime Minister, the latter shall be deemed relieved of his post from the date of the Assembly's decision and a new Cabinet shall be formed."; see also *Al-Said / El Ebaidi*, note 2, p. 307.

2. Dissolution on the Ground of Art. 107 of Kuwait's Constitution

The second procedure of dissolution is incorporated in Article 107 of the Constitution. Although this procedure entrusts the Emir with a broad power to dissolve the Parliament through an Emiri Decree, the Constitution provides for several safeguards that the Emir must respect while exercising the power of Dissolution on the basis of this article.[23]

The first safeguard is that which requires – as noted earlier – Dissolution Decrees to be cosigned by the Prime Minister.

The second safeguard is that which requires Dissolution Decrees to include the grounds prompting the Dissolution. Although the KCC has consistently asserted that the Emir enjoys considerable discretion in determining these grounds, it has emphasized that there are a variety of grounds that could justify the dissolution of the Parliament on the basis of this article, such as in cases of necessity, deadlocks, non-cooperation, or breakdown of mutual trust or confidence between the Legislative and the Executive branches of the Government.[24]

The third safeguard is that which prohibits the dissolution of the Parliament on the same grounds or the same reasons twice. This safeguard is intended to protect the Majlis from unwarranted dissolutions.

Finally, the article incorporates a number of constitutional safeguards to restore parliamentary life as early as possible. In doing so, the same article requires the new Majlis's election to be held within a period not exceeding two months from the date of dissolution. If the elections are not held within this period, the dissolved Majlis shall be restored as if the dissolution never happened and shall continue to perform its functions until a new Majlis is elected.

Unlike dissolution under Art. 102, which has rarely taken place in Kuwait's political history, the dissolution of Majlis Al-Ummah under Art. 107 has been frequently used to resolve political deadlocks between the Cabinet and Majlis Al-Ummah. This includes the Dissolution of Majlis Al-Ummah in 1999 for the excessive use of Parliament's instruments of oversight and control against the Prime Minister and his Cabinet, the 2003 Dissolution against the backdrop of a political crisis triggered by the amendments of the Electoral law, the 2006 Dissolution for conflict over naturalization issues and expenditure of Prime Minister's office, the 2008 Dissolution for unwarranted interference of the Majlis with the Executive powers, the 2011 Dissolution for the excessive use of force by the security forces

23 Art. 107 of the Constitution of Kuwait enshrines that "[t]he Amir may dissolve the National Assembly by a decree in which the reasons for dissolution are indicated. However, dissolution of the Assembly may not be repeated for the same reasons. In the event of dissolution, elections for the new Assembly are held within a period not exceeding two months from the date of dissolution. If the elections are not held within the said period, the dissolved Assembly is restored to its full constitutional authority and meets immediately as if the dissolution had not taken place. The Assembly then continues to function until the new Assembly is elected."; see also *Al-Said / Said El Ebaidi*, note 2, p. 297.

24 See the KCC decision No. 11 of 2022, 19 March 2023, p. 7.

against peaceful protestors who were calling for an early parliamentary election and removal of the Prime Minister, the 2016 Dissolution due to the increased numbers of interpellation addressed by members of the Majlis to the Minister of finance and Minister of justice.[25]

The latest dissolution under Art. 107 took place took place by means of the Emiri Decree No.16 of 2024 on February 15, 2024.[26] The rationale behind this dissolution was, however, quite different from the preceding ones.[27] As noted in the Decree, the main impetus was the parliament's violation of the long-standing constitutional principle of the Emir's "inviolable" status.[28]

II. Distinguishing the Emiri Dissolution Power from other analogous constitutional procedures

Dissolution of Majlis Al-Ummah by the Emir - as identified in the previous section - varies from other analogous constitutional procedures which may also lead to the removal of the Parliament or the suspension of its sessions.

1. Dissolution Power vs. Prorogation Power

Although they are both monarchial prerogatives entrusted to the Head of State with the aim to control the Parliament, the Prorogation power, unlike the Dissolution Power, does not lead to the termination of the Parliament or the removal of its members from office but only suspends temporarily session of the Parliament.[29]

25 For more on the History of Dissolution of Majlis Al-Ummah in Kuwait, See *Mirza Al Khouwaylady*, The Third Suspension of Kuwaiti Majlis Al-Ummah, and its 13th Dissolution" (Al-Taaliq Al-Thaleth Le Majlis Al-Ummah Al Kuwaiti … Wel Al 13 Fi Tarikho), (التعليق الثالث لمجلس الامة الكويتي ... والحل ال 13 في تاريخه), https://aawsat.com/ التعليق الثالث لمجلس الامة الكويتي ... والحل ال 13 في تاريخه (last accessed on 14 May 2024); *Al Jazeera,* Dissolution of Kuwaiti Majlis Al-Ummah … incidents and Reasons, 17.10.2016, (Hal Majlis Al-Ummah Al-Kuwaiti … Al-Halat we Al-Asbab حل مجلس الأمة الكويتي ... الحالات والأسباب), https://www.aljazeera.net/encyclopedia/2016/10/17/ حل مجلس الأمة الكويتي ... الحالات والأسباب (last accessed on 14 May 2024).

26 The Emiri Decree No. 16 of 2024 with relevance to the Dissolution of Majlis Al-Ummah, 15.02.2024, https://www.kna.kw/News/NewsDetail/5/22/1335 (last accessed on 14 May 2024).

27 *Sean L. Yom*, Will Kuwait's Next Parliament Be Its Last?, Journal of Democracy, https://www.journalofdemocracy.org/online-exclusive/will-kuwaits-next-parliament-be-its-last/ (last accessed on 14 May 2024); *Vivian Nereim*, Kuwaiti Emir Suspends Parliament, Citing Political Tumult, New York Times, 10.05.2024, https://www.nytimes.com/2024/05/10/world/middleeast/kuwait-emir-parliament-suspension.html, (last accessed on 14 May 2024).

28 The Emiri Decree No. 16 of 2024, note 26.

29 Art. 106 of the Constitution of Kuwait codifies that "[t]he Amir may, by Decree, prorogue the National Assembly's session for a period not exceeding one month. Prorogation shall not be repeated in the same annual session save with the Assembly's consent and for once only. The prorogation period shall not be reckoned in the session's term."

2. Dissolution Power of the Emir vs. Judicial Dissolution

Dissolution of the Parliament by an Emiri Decree further differs from Judicial Dissolution of the Parliament recognized in Kuwait,[30] as well as some Arabic constitutions such as Egypt.[31] Although they would eventually lead to the termination of service of Parliament's members and the election of a new Parliament, Judicial Dissolution does not result as a consequence of political turmoil between the Executive and legislative powers, but rather as

30 See, e.g., the KCC decision No 15 of 2012, 16 June 2013. The Court, after concluding that the Decree-Law No. 21 of 2012 with Relevance to the Establishment of the Superior National Election Committee and the Amendment of some Provisions of Law No. 35 of 1962 with Relevance to Electoral Law of Majlis Al-Ummah were unconstitutional, annulled the results of the parliamentary elections held on the basis of this Decree and dissolved consequently the 2012 Parliament. See also the KCC decision No. 11 of 2022, 19 March 2023, note 24. In this Case, the KCC found unconstitutional the Emiri-Decree No. 136 of 2022 Dissolving the 2020 Parliament. As a result of this finding, the Court concluded that the 2022 parliamentary election held right after the dissolution took place was void and ordered therefore the dissolution of the 2022 elected parliament along with the restoration of the previous Parliament.

31 See, e.g., the Egyptian Supreme Constitutional Court decision No. 131 of Judicial year 6, 16 May 1987, (the Court in this case ruled unconstitutional art. 5 bis, art. 6 (para.1), and art. 17 (para.1) of Law No. 38 of 1972 with relevance to the People's Assembly as amended by Law No. 114 of 1983, reasoning that the adoption of the *Party-list* system (*known also as* the *Closed*-list system) as the sole electoral system for the election of the Egyptian Parliament deprives citizens who are not affiliated to any of the existing political parties from running for office, and therefore violate a number of constitutional articles of the Constitution (*the 1971 Constitution*), such as Art. 62 which confers upon every citizen the right to vote and the right to run for public offices, Art. 40 which asserts the right of all citizens to equality before the law, and Art. 8 which stresses the state's obligation to guarantee equality of opportunity to all citizens. As a result of this decision, the 1984 Assembly which was entirely elected on the basis of the *Party*-list system was dissolved three years after it was held in 1987. It is worth mentioning that following this decision the Egyptian Electoral law was amended as to combine between the *Party-list* system (for the 2/3 of Parliament's seats) and the *Independent-list* system (for the remaining 1/3 of Parliament's seats). *See also* the Egyptian Supreme Constitutional Court decisions No. 37 of Judicial year 9, 19 May 1990, and also the Egyptian Supreme Constitutional Court decision No. 20 of Judicial year 34, 14 June 2012. In those later two decisions, the Supreme Constitutional Court dissolved the 1990 and the 2012 Parliament on similar grounds after a finding that the Egyptian Electoral law articles (Law No. 38 of 1972 with relevance to the People's Assembly as amended by the Law-Decree No. 120 of 2011) allowing for candidates affiliated with political parties to compete not just against each other in the *Party-list* system, but also against independent candidates unaffiliated to political parties in the *Independent-list* system, enabled political parties to win more seats then initially intended by the constitutional framers and were unconstitutional for violating a number of constitutional principles including the principles of equality before the law, equal opportunities, and fair competition. For more commentaries on the Egyptian Supreme Constitutional Court decisions with respect to dissolution of Parliament, see *Mohamed Fadel*, The sounds of silence: The Supreme Constitutional Court of Egypt, constitutional crisis, and constitutional silence, International Journal of Constitutional Law 16 (2018), pp. 936–951.

a consequence of Constitutional Courts' decisions invalidating electoral laws, regulations, or procedures.[32]

3. Dissolution Power vs. Suspension of some Constitutional Articles

The dissolution power of the Emir also differs significantly from the practice of "*suspending some Constitutional articles* or *suspending the parliamentary life*." This later practice, which was seen as unconstitutional action – since it finds no basis in the constitutional system of Kuwait - has taken place more than once in the modern history of Kuwait,[33] the latest of which was on May 2024 by an Emiri Decision.[34]

These suspension decisions do not just entail the dissolution of the Parliament but usually include many other tougher measures, such as the suspension of several constitutional articles pertaining to the composition and the jurisdiction of the Parliament and the suspension of the parliamentary life with a complete transferal of the legislative power to the Emir and his Cabinet for a transitional period.[35]

D. Could the Dissolution Power Be Subject to Judicial Review?

Having highlighted the legal rules regulating the Dissolution of the Parliament in Kuwait, the following section shall attempt to answer the main inquiry of this paper on the possibility of subjecting the Emiri Prerogative of dissolution to judicial review. In addressing this inquiry, this section will be divided into two parts. Part one will examine the possibility of subjecting Dissolution Power to the Judiciary in Comparative Law. Part two will investigate Kuwait's legal system and constitutional precedents of the KCC to identify the legal grounds for subjecting Dissolution Decrees to judicial review and the scope of this judicial review power.

32 See *Omar Alabdali / Luai Allarkia*, Speculation Is Rife About the Future of Kuwait's Parliament, News Lines Magazine, 27.06.2024, https://newlinesmag.com/argument/speculation-is-rife-about-the-future-of-kuwaits-parliament/ (last accessed on 29 June 2024).

33 See in this Respect the Emiri Decision with relevance to amending the Constitution, promulgated in Al-Seif Castle on 29 August 1976; and the Emiri Decision with relevance to dissolving Majlis Al-Ummah, promulgated in Al-Seif Castle on 6 July 1982.

34 Emiri Decision, promulgated on 10 May 2024; Although the decision was grounded on the public interest of the State, The Emir further justified the measures taken by the decision in a televised speech by holding that the political turmoil in Kuwait required a "hard decision to save the country" and that "he will not permit for democracy to be exploited to destroy the State." For more details on the grounds of the Emiri Decision, see e.g. *Nereim*, note 27.

35 Articles 1, 2 and 3 of the Emiri Decision, promulgated on 10 May 2024.

I. Judicial Review of Dissolution Power in Comparative Law

The following part shall investigate the possibility of questioning the constitutionality of dissolving decisions by the Judiciary in several comparable legal systems, including Egypt, France, and the United Kingdom.

1. Judicial Review of Dissolution Decisions in the Egyptian Legal System

The right of the Executive to dissolve the Parliament has always been one of the main foundational elements of the Egyptian political system both as a monarchy and as a Republic following the 1952 Revolution. It was included in almost all the Constitutions Egypt has witnessed since 1923.[36]

In the current 2014 Constitution, the Dissolution Power of the Executive is vested in the hands of the President of the Republic. This power, however, may not be exercised in an unfettered way; Article 137 of the Constitution requires several safeguards for the legitimate use of such power, such as limiting the scope of the Dissolution Power to cases of necessity, requiring dissolution decisions to include reasons warranting the dissolution, and prohibiting the dissolution of the Parliament on the same grounds twice. The article further requires Presidential decisions of dissolution to be subsequently approved in a nationwide referendum.[37]

It is worth mentioning that the 2014 Egyptian Constitution allows for an "Automatic Dissolution"[38] of the Parliament in two other scenarios; the first of which is in cases of failure twice to form a Government enjoying the confidence of the Parliament.[39] The

36 See, e.g., Art. 38 of the 1923 Constitution of Egypt, 2 April 1923; Art. 38 of the 1930 Constitution of Egypt, 22 October 1930; Art. 111 of the 1956 Constitution of Egypt, 16 January 1956; Art. 91 of the 1964 Interim Constitution of Egypt, 24 March 1964; Art. 136 of the Constitution of Egypt, 11 July 1971; Art. 127 of the 2012 Constitution of Egypt, 25 December 2012.

37 Art. 137 of the Constitution of Egypt 2014 says that "[t]he President of the Republic may not dissolve the House of Representatives except, when necessary, by a causal decision and following a public referendum. The House of Representatives may not be dissolved for the same cause for which the previous House was dissolved. The President of the Republic must issue a decision to suspend parliamentary sessions and hold a referendum on dissolution within no more than 20 days. If voters agree by a majority of valid votes, the President of the Republic issues the decision of dissolution and calls for early parliamentary elections to take place within no more than 30 days from the date of the decision's issuance. The new House convenes within the 10 days following the announcement of the referendum results."

38 IDEA Primer, note 3, p. 22, ('Automatic Dissolution' means that Parliament is legally dissolved with no action needed from the President).

39 Art. 146 of the Constitution of Egypt stipulates that "[t]he President of the Republic assigns a Prime Minister to form the government and present his program to the House of Representatives. If his government does not obtain the confidence of the majority of the members of the House of Representatives within no more 30 days, the President appoints a Prime Minister based on the nomination of the party or the coalition that holds a plurality of seats in the House of Representatives. If his government fails to win the confidence of the majority of the members of the House of

second occurs in situations where the Parliament proposes to withdraw confidence from the President of the Republic before the completion of his term. In this latter scenario, the Parliament's motion to withdraw confidence from the President should be submitted to a public referendum. If the majority approves the Parliament's decision to withdraw confidence, the President of the Republic is removed from office. However, if the majority refuses to withdraw confidence, the Parliament is automatically dissolved, and new elections are called.[40]

Nevertheless, neither the 2014 Constitution nor its predecessors have explicitly or implicitly allowed for the judicial review of dissolving decisions of the parliaments. In addition, nothing in the laws of judicial bodies, including the law of the Supreme Constitutional Court,[41] the law of the Judicial Authority,[42] and the law of the State Council,[43] could be construed as extending the jurisdiction of any judicial courts to cover such a matter.

This silence of the Egyptian legal system with respect to the possibility of judicial review of dissolution decision explains, perhaps, why there hasn't been any judicial decision in this respect so far. It has also led many Egyptian legal scholars to conclude – in light of the Sovereign Acts Doctrine embraced by the Supreme Constitutional Court –[44] that these

Representatives within 30 days, the House is deemed dissolved, and the President of the Republic calls for the elections of a new House of Representatives within 60 days from the date the dissolution is announced. In all cases, the sum of the periods set forth in this Article shall not exceed 60 days. In the event that the House of Representatives is dissolved, the Prime Minister presents the government and its program to the new House of Representatives at its first session. In the event that the government is chosen from the party or the coalition that holds a plurality of seats at the House of Representatives, the President of the Republic may, in consultation with the Prime Minister, choose the Ministers of Justice, Interior, and Defence."

40 Art. 161 of the Constitution of Egypt codifies that "[t]he House of Representatives may propose to withdraw confidence from the President of the Republic and hold early presidential elections upon a causal motion signed by at least a majority of the members of the House of Representatives and the approval of two-thirds of its members. The motion may only be submitted once for the same cause during the presidential term. Upon the approval of the proposal to withdraw confidence, the matter of withdrawing confidence from the President of the Republic and holding early presidential elections is to be put to public referendum by the Prime Minister. If the majority approves the decision to withdraw confidence, the President of the Republic is to be relieved from his post, the office of the President of the Republic is to be deemed vacant, and early presidential elections are to be held within 60 days from the date the referendum results are announced. If the result of the referendum is refusal, the House of Representatives is to be deemed dissolved, and the President of the Republic is to call for electing a new House of Representatives within 30 days of the date of dissolution."

41 Law No. 48 of 1979 with relevance to the Supreme Constitutional Court, as amended by Law No. 137 of 2021, 15 August 2021.

42 Law No. 46 of 1972 with relevance to Judicial Authority, as amended by Law No. 77 of 2019, 26 June 2019.

43 Law No. 47 of 1972 with relevance to State Council, 5 October 1972.

44 The Egyptian Supreme Constitutional Court, Decision No. 20 of 34, June 14, 2012. According to the Court's ruling, the Constitutional review power carried out by the Court in accordance with the Constitution and Law No. 48 of 1979 with relevance to the Supreme Constitutional Court finds

types of decisions are non-justiciable due to their political nature and therefore fall beyond the jurisdiction and competence of Egyptian courts.[45]

2. Judicial Review of Dissolution Declarations in the French Legal System

Despite being qualified as a semi-presidential system, the Dissolution Power in France can be traced back to the 17th century when it was incorporated in the 1814 French Constitutional Charter.[46] The current in-force Constitution, which is the 1958 Constitution, places the power of dissolution in the hands of the President of the Republic who may resort, in most circumstances, to such power at his own will. This stands true even though Art. 12 of the Constitution requires the President to consult the Prime Minister and the Presidents of the Houses of Parliament before proceeding to dissolve the Parliament because their role in this process is merely consultative and their opinion is not binding in any respect upon the President.[47]

Although the same article provides for several constitutional guarantees for the exercise of such power, the most important of which is forbidding the dissolution of the newly elected parliament in the following twelve months,[48] nothing in the French Constitution in particular, nor the French legal system in general, could be construed as to allow French courts to question the constitutionality of the Presidential Declaration of Dissolution.

Such a finding has been ascertained by the French Constitutional Council (le Conseil Constitutionnel) whose members explicitly refused to review the constitutionality of dis-

its basis in the principles of legitimacy and the rule of law which are the basis of governance in the State. Yet, these principles are not absolute. One recognized exception to these principles - according to the consistent settled case law of the Court - is the Sovereign Acts Doctrine which limits the ability of national courts to hear political questions due to their intimate connection with the political regime of the State and its sovereignty.

45 *Ibrahim Abd El Aziz Chiha*, The Administrative Jurisprudence, principle of Legitimacy and Organization of Administrative Judiciary (Al-Qadaa Al Idary, Mabdaa Al-Mashrouya , Tanzim Al-Qadaa Al Idaryالقضـاء الإداري، مبدأ المشـروعية وتنظيـم القضـاء الإداري) Alexandria 2017, p. 187; see also *Ibrahim Abd El Aziz Chiha*, The Role of the Executive Authority in Comparative Political system (Wadaa Al-Sulta Al-Tanfizia fi Al-Anzema Al-Seyasya Al-Moaseraوضـع السـلطة التنفيذيـة في الأنظمـة السياسية المعاصرة), Alexandria 2006, p. 79.

46 Art. 50 of the French Constitutional Charter of 1814, 4 June 1814.

47 Art. 12 of the Constitution of France enshrines that "[t]he President of the Republic may, after consulting the Prime Minister and the Presidents of the Houses of Parliament, declare the National Assembly dissolved. A general election shall take place no fewer than twenty days and no more than forty days after the dissolution. The National Assembly shall sit as of right on the second Thursday following its election. Should this sitting fall outside the period prescribed for the ordinary session, a session shall be convened by right for a fifteen-day period. No further dissolution shall take place within a year following said election".

48 Examples of other guarantees incorporated into the French Constitution are those aiming to restore the parliamentary life without delay, such as the requirement to hold the new election within 40 days from the date of the dissolution and the requirement that the newly elected Parliament meet the second Thursday following its election.

solving declarations in the case of Rosny Minvielle de Guilhem de Lataillade, reasoning that Dissolving Declarations fall outside its jurisdiction because the Constitution does not bestow upon the Council any power to question the validity of dissolving declarations.[49]

This decision has been seen by many as pertaining to the Sovereign Acts Doctrine embraced by the Constitutional Council, which forbids any judicial institution in France from reviewing the constitutionality of a number of the executive decisions, especially those with relevance to the relationship between the executive and legislative branches of the government, such as the President's use of the veto power, or the President's decision to suspend or to resume sessions of the parliament.[50]

3. Judicial Review of Dissolution Decisions in the United Kingdom Legal System

The Right to Dissolve the Parliament has always been one of the most important inherent Royal Prerogatives in the United Kingdom.[51] Being as old as the parliament itself, this power was deemed as a Royal check to preserve the Monarchy against parliamentary abuse of powers.[52] Over the years, it has been the subject of a number of developments that limited its scope. Nevertheless, this power remained within the hand of the sovereign who, by modern convention, could only exercise such a power upon a request from the Prime minister.[53]

49 Conseil Constitutionnel Décision n° 88-4 ELEC du 4 juin 1988, "Considering that no provision of the Constitution grants the Constitutional Council the authority to rule on the above-mentioned request."

50 *Bruno Genevois,* L'étendue de la compétence du juge de l'élection [A propos des décisions du Conseil constitutionnel des 4 juin et 13 juillet 1988], Revue française de droit administratif (1988), pp. 702-712.

51 See *Thomas Poole*, United Kingdom: The Royale Prerogative, International Journal of Constitutional Law 8 (2010), p.146. Having their origin in the Common law, there has never been any precise or strict legislative definition of the term *Royal Prerogative.* It refers in general to those powers recognized for the Crown to exercise with no further authorization or consultation from other authorities, including, but not limited to, the right to declare war, to sign treaties, to dissolve parliament, to appoint some high ranked officials, and to award honours. It should be noted that there have been some scholarly attempts to define the scope of *Royal Prerogatives* such as that of Blackstone who viewed royal prerogatives "...in its nature singular and eccentrical that it can only be applied to those rights and capacities which the king enjoys alone...and not to those which he enjoys in common with any of these subjects", see Blackstone's Commentaries on the Laws of England , Oxford 1778, p. 232

52 *James Strong*, The Fixed-term Parliaments Act (FTPA): an 'in memoriam,' of sorts, 01.04.2022, https://ukandeu.ac.uk/ftpa-an-in-memoriam-of-sorts/ (last accessed on 06 June 2024).

53 *Robert Blackburn,* The prerogative power of dissolution of Parliament: law, practice, and reform, Public Law 4 (2009), p. 769.

In 2011, however, a tremendous shift happened. The Fixed-Term Parliaments Act, known also as the *FTPA*, superseded this longstanding prerogative and placed the power of dissolution within the hands of the Parliament itself.[54]

A few years later, the Royal Prerogative to Dissolve the Parliament was once again reinstated by the Dissolution and Calling of Parliament Act of 2022 which repealed the FTPA[55] and "ma(de) express provision to make the prerogative powers relating to the dissolution of Parliament, and the calling of a new Parliament exercisable again, as if the 2011 Act had never been enacted."[56]

Perhaps the most significant innovation introduced by the new legislation was the rule pertaining to the Court's ability to review Dissolution Decisions. Unlike other prerogative powers which may be subject to judicial review – in terms of their existence, their scope, and whether or not they have been exercised legally or rationally[57] – Art. 3 of the Dissolution and Calling of Parliament Act has been formulated very broadly to preclude all possibility of judicial review over either 1) the exercise or the purported exercises of the Dissolution Power; 2) decisions or purported decisions relating to this power; or 3) the limits or extent of this power.[58]

This latter provision, which forbids the Court from reviewing "the limits or the extent" of the Dissolving Power was seen as being the most significant.[59] It was intended by the drafters of the Act to exclude the earlier type of judicial review adopted by the Supreme Court's decision over the scope of the Prorogation Power in Miller v. Prime Minister.[60] In this case, the Court imposed an important limitation on the sovereign's power of proroga-

54 Art. 3 (1) (2) of the fixed-term Parliaments Act 2011, published September 15, 2011.

55 Art. 1 of the Dissolution and Calling of Parliament Act 2022, published 28 March 2022.

56 Explanatory Notes of the Dissolution and Calling of Parliament Bill (Bill 8-EN, 58/2, 12 May 2021), para 18; Art. 2(1) of the Dissolution and Calling of Parliament Act 2022, published March 28, 2022 states that "[t]he powers relating to the dissolution of Parliament and the calling of a new Parliament that were exercisable by virtue of Her Majesty's prerogative immediately before the commencement of the Fixed-term Parliaments Act 2011 are exercisable again, as if the Fixed-term Parliaments Act 2011 had never been enacted."

57 *Lorne Sossin*, The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black v. Chritien, McGill Law Journal 47 (2002), pp. 435-436.

58 Art. 3 of the Dissolution and Calling of Parliament Act 2022, published 28 March 2022.

59 See Chapter 2 of The Independent Review of Administrative Law Report, CP 407 (March 2021); https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/IRALreport.pdf (last accessed on 06 June 2024); see also Select Committee on the Constitution Dissolution and Calling of Parliament Bill, 8th Report of Session 2021-22, 19.11.2021, HL Paper 100, https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/100/10002.htm (last accessed on 06 June 2024). The majority of the Joint Committee believed that Parliament "should be able to designate certain matters as ones which are to be resolved in the political rather than the judicial sphere, and Parliament should accordingly be able to restrict, and in rare cases, entirely to exclude, the jurisdiction of the courts."

60 R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland [2019] UKSC 41.

tion by requiring the government to provide a reasonable justification, subject to review by courts, in cases where the prorogation decision frustrates or impedes the Parliament from carrying out its functions.[61]

II. Judicial Review of Dissolution Decrees in Kuwait's Legal System

The following Part shall examine the possibility of questioning the constitutionality of Emiri Dissolution Decrees by the KCC in Kuwait. In doing so, this part will first overview the KCC scope of jurisdiction to inquire if there is any legal basis for the Court to exercise such authority or not. It will then consider two of the KCC's recent landmark decisions that reveal the Court's perception on this matter. It will further discuss the impact of such decisions and highlight the critiques they have engendered. It will finally explore the scope of the newly approved legislative amendment of the KCC scope of judicial review power.

1. Is there a Legal Basis for the KCC to Review Dissolving Decrees?

Similar to many other Arab countries in the Region,[62] Kuwait's legal system allocates the power to decide constitutional litigations to a centralized Court, which is the KCC.[63]

According to its establishment law, Law No. 14 of 1973 (*hereinafter* the Constitutional Court Law), the KCC has three types of exclusive jurisdiction,[64] as follows:

(a) The authority to interpret any constitutional provisions at the request of either Majlis Al-Ummah or the Cabinet. Such a request shall identify the article/s to be interpreted and the reasons prompting the submission of the request.[65]

61 "For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course", see Ibid., at para. 50.

62 See, e.g., Arts. 191-195 of the Constitution of Egypt, Art. 140, the Constitution of Qatar, and Art. 106 of the Constitution of Bahrain, see also in this respect *Islam Ibrahim Chiha / Abdel Hafiz el-Shimy*, Is It Possible to Overrule a Constitutional Precedent in the Egyptian Legal System?, Arab Law Quarterly 38 (2021), pp. 140-41.

63 Art. 173 of the Constitution of Kuwait. This article provides for the establishment of a judicial body to decide upon the constitutionality of laws and regulations (Al-Qawanin wa Al-Lawa'h القوانين واللوائـح) with binding and final decisions. The same article confers upon the legislator the authority to determine further powers of the Court and procedural rules to be followed before it.

64 Law No. 14 of 1973 with relevance to the establishment of the Constitutional Court, 9 June 9 1973, Art. 1 (*hereinafter* the Constitutional Court Law).

65 Decree with relevance to the Constitutional Court Regulation, Art. 1, 12 May 1974 available in Arabic at https://www.cck.moj.gov.kw/ar/laws/%D9%85%D8%B1%D8%B3%D9%88%D9%85%

(b) The authority to decide Constitutional challenges of Laws, Regulations, and Decree-Laws (known also as the *Necessity Regulations)*. As originally enacted, the law did not allow for direct constitutional challenges to be brought before the KCC. Rather, it identified two procedures to enable the Court to exercise such a power,[66] either (a) at the request of Majlis Al-Ummah or the Cabinet; or (b) at the request of a court of merit (a national court or judicial body), if such a court found, in the course of an ongoing litigation, whether on its own initiative, or upon a serious argument made by one of the litigants, that deciding the case requires a decision on the constitutionality of a law, decree-law, or regulation that might apply in the litigation. In such an instance, the court of merit would adjourn the case and transfer the constitutional matter to the KCC for judicial review.

(c) In 2014, however, the Constitutional Court Law was amended to confer upon every natural or moral person the right to bring constitutional challenges directly on an original claim before the Constitutional Court. The authority to decide Electoral Appeals with relevance to the election of Majlis Al-Ummah or the validity of its membership; these appeals shall be submitted to the Court directly or through Majlis Al-Ummah in accordance with the established procedures in this regard.

Having examined the KCC's scope of jurisdiction, one can hardly infer any jurisdiction for the KCC to review the constitutionality of Dissolution Decrees.

After all, such decrees cannot fall within the first category of jurisdiction as they are not part of the constitutional text and hence cannot be subject to any interpretation request.[67]

They also do not fall within the category of laws, regulations, and decree laws that could be susceptible to constitutional challenges because they differ in terms of nature and content. Unlike these later legislative tools which contain general and abstract rules, Dissolution Decrees are, by their nature, directed towards dissolving the legislative authority based on specific facts.

There is a further difference between Dissolution Decrees and Decree-Laws. These later types of decrees are a form of regulations that have the force of laws once approved by the Parliament. They could only be issued by the Emir provided that, first, there exists

20%D8%A8%D8%A7%D8%B5%D8%AF%D8%A7%D8%B1%20%D9%84%D8%A7%D8%A6%D8%AD%D8%A9%20%D8%A7%D9%84%D9%85%D8%AD%D9%83%D9%85%D8%A9%20%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A%D8%A9.pdf (last accessed on 19 October 2024).

66 Art. 4 of the Constitutional Court Law.

67 *Fathi Fekry*, The Jurisdiction of the Supreme Constitutional Court over Interpretive Requests (Ekhtesas Al-Mahkama Al-Dostouria Al-Olia Bealtalab Al-Asly Leltafsirاختصاص المحكمة الدستورية العليا بالطلب الأصلي للتفسير-), Cairo 2011, pp.47-48; *Mohamed El Feily*, The Original Jurisdiction of the Constitutional Court To Interpret Constitutional Text in Kuwait Constitutional system (Al-Ekhtesas Al-Asly le Al-Mahlkama Al- Dostouria Betafsir Al-Nosous Al-Dostouria Fil Al- Nezam Al Dostouri Al-Kuwaitiالاختصاص الأصلي للمحكمة الدستورية بتفسير النصوص الدستورية في النظام الدستوري الكويتي -), Alexandria 2008, p. 26.

an extreme urgency or force majeure that requires taking measures of utmost urgency, and secondly, the Majlis al-Ummah is absent.[68]

Finally, at first sight, it is hard to construe the Electoral Appeal provision in the KCC Law as to acknowledge any reviewal power for the KCC over the Dissolution Decree of a former Majlis. As formulated, this provision was meant to cover electoral process litigations of a newly elected Majlis or challenges to parliamentary memberships of its members, and not to cover constitutional challenges of Dissolution Decrees of a former Majlis. In addition, it is also implausible that the newly elected Majlis will challenge the Dissolution Decree of the former Majlis, as it has no standing in doing so.

2. The KCC Perception with Respect to Reviewing Dissolution Decrees

Despite the lack of any explicit legal basis in the Constitutional Court Law provisions – as highlighted in the previous section – to question the constitutionality of Dissolution Decrees in Kuwait's Legal system, the KCC jurisdiction has, nevertheless, asserted the right of the Court to review these decrees in two of its landmark constitutional precedents in 2012 and 2023.[69]

The following section shall underline the legal grounds identified by the KCC to review Dissolution Decrees. It will then thoroughly analyze the two constitutional precedents establishing the KCC judicial review power over Emir Dissolution Decrees.

a) The Legal grounds relied upon by the KCC to Review Dissolution Decrees

In reviewing the Dissolution Decrees, the KCC has broadly interpreted the Electorate Appeal provision in the Constitutional Court Law, viewing that its jurisdiction over this type of appeal is of a comprehensive nature that enables the Court to extend its judicial oversight over the entire phases of the election process— from pre-election procedures to the final stages of election, to ensure the fairness and validity of the whole election.[70]

Hence, if a new election were to be held following a premature dissolution of the parliament by the Emir, the Dissolution Decree in such instances should be treated as among the pre-election decisions or procedures leading up to the new election and could therefore be subject to the KCC Judicial Review to ensure its conformity with the Constitution in the course of an ongoing electoral litigation.[71]

68 Art. 71 of the Constitution of Kuwait.

69 See the KCC Decision No. 6 & 30 of 2012, note 20; *See also* the KCC decision No. 11 of 2022, note 24.

70 Ibid.

71 Ibid.

b) The KCC Decision No. 6 & 30 of 2012

This case arose out of a challenge submitted before the Court to invalidate the results of the 2012 parliamentary elections on the ground that the Dissolution Decree of the former Parliament leading up to the challenged parliamentary elections was unconstitutional.

The appellant contended that the Dissolution Decree violated the Constitution because the dissolving request was initiated by a Cabinet who had already resigned from office, while the Constitution requires that such a request be submitted by a responsible Cabinet. He maintained that the newly appointed Prime Minister who co-signed the Dissolution Decree had sought approval of the ministers in the resigned Cabinet before he even selected members of his Cabinet. Based on the above, the appellant argued that this constitutional violation rendered the Dissolution Decree unconstitutional and the whole electoral process conducted on its basis void.[72]

On the other side, the Government challenged the jurisdiction of the KCC to review the Dissolution Decree under the pretext that this type of decree is among the political acts pertaining to the relationship between the Executive and Legislative branches of the Government and therefore falls under the category of Sovereign Acts Doctrine that cannot be adjudicated by the Courts for the sake of protecting the state sovereignty and its national interests.[73]

In asserting its jurisdiction to review the constitutionality of the Dissolution Decree, the Court reasoned that it is unacceptable to contend that the Constitutional system of Kuwait, which has founded the constitutional review system over the laws, regulations, and Decree-Laws promulgated by either the Legislative or the Executive branches of the Government, and which has established the KCC as the ultimate arbiter of the constitution, has failed to secure subjecting some of the Executive's pre-election decisions or procedures - including Dissolution Decrees - to the Court's jurisdiction in the course of deciding electoral appeals litigations to ensure their conformity with the Constitution. To claim otherwise or impede the Court from extending its jurisdiction over such decisions and procedures, would be to say that the Dissolution Decrees have a higher status and more privilege than the law itself.[74]

72 See KCC Decision No. 6 & 30 of 2012, note 20, p. 156; See also the Dissolution Decree No. 443 for 2011, 6 December 2011. The appellant in this case explained that the Emir, on November 28, 2011, had accepted the resignation of the Prime Minister Sheikh Naser Al Sabah and his Cabinet from office by an Emiri Decision which tasked them to continue in their offices until a new Cabinet is formed. Two days later, and specifically on November 30, the Emir appointed a new Prime Minister, Sheikh Jaber Al Sabah, who was charged with selecting candidates of his Cabinet to be approved by the Emir. Nonetheless, the New Prime Minister, instead of forming his new Cabinet, had sought approval from members of the old Cabinet to request the dissolution of the Parliament. This is supported by the Preamble of the Dissolving Decree No. 443 for 2011 which explicitly recorded the approval of the Government.

73 KCC Decision No. 6 & 30 of 2012, note 20, p. 159.

74 Ibid. p, 162.

The Court then rejected the defendant's contention that litigations involving Dissolution Decrees are political questions and, therefore, non-justiciable. In doing so, the Court, although acknowledging the constitutional right of the Executive branch to Dissolve the Parliament as an important tool to maintain the balance between the Executive and Legislative branches, drew a careful distinction between assessing the appropriateness or the soundness of Dissolution Decrees and the mere violation of constitutional provisions, holding that while the Court has no business to interfere in the former matter because it is inherently discretionary, it must strike down Dissolution Decrees when they are repugnant to the Constitution. It further asserted that rules and safeguards specified in the Constitution cannot be abandoned, neglected, or disregarded under the guise of being political.[75]

Applying the above to the facts of the case, the Court observed that the fact that the Dissolution Decree was requested by the newly appointed Prime Minister upon the consent of an already resigned Cabinet that is no longer in command constitutes a violation of the Constitution and makes the Dissolution Decree unconstitutional.[76] On the above ground, the court ruled void the entire election process conducted in the wake of the Dissolution and ordered the restoration of the dissolved Parliament as if the dissolution never happened.[77]

c) The KCC Decision No. 11 of 2022

Similar to the former Precedent, but ten years later, this case also evolved from a challenge to invalidate the results of the Parliamentary elections of 2022 on the ground that the Dissolution Decree of the preceding Parliament was unconstitutional.[78]

The alleged constitutional violation was, however, quite different from the one raised in the earlier precedent. In this case, the appellant contended that the challenged Dissolution Decree violated the Constitution because it was unwarranted. He argued that the justifying reasons maintained by the government to dissolve the Parliament - which centered on the existence of "discrepancies, non-cooperation, and non-harmonization" between the Executive and Legislative branches of the Government - were far from being accurate because the Cabinet requesting the dissolution was a new Cabinet that had been appointed just one day before the promulgation of the Dissolution Decree. Therefore, it is inconceivable to infer - in such a short period - any sign of disagreement or non-cooperation between this Cabinet and the Parliament that could warrant such dissolution.[79]

75 Ibid. p. 161.

76 Ibid. pp. 164-65.

77 Ibid. p.165.

78 The KCC decision No. 11 of 2022, 19 March 2023, note 24.; See also Dissolution Decree No. 136 of 2022, 2 August 2022.

79 The KCC decision No. 11 of 2022, 19 March 2023, note 24, p.2. The appellant further explained although there has been a stark disagreement between the former Cabinet headed by the Prime Minister Sheikh Al-Sobah Hamed Al-Sobah and Majlis al-Ummah, it is presumed to have vanished upon the resignation of this Cabinet. Therefore, the succeeding Cabinet's reliance, in the wake

In resolving the case, the Court, proclaiming itself as the guardian of the Supremacy of the Constitution, re-asserted its jurisdiction to review the constitutionality of Dissolution Decrees to ensure their compliance with constitutional safeguards specified in Article 107 of the Constitution, including that which requires Dissolution Decrees to be premised upon genuine grounds. The Court further asserted that it is the province of the Court to ensure the existence of factual grounds to avoid any constitutional violations and to prevent the Executive from abusing its dissolution powers.[80]

Having highlighted the above, the Court opined that the alleged grounds of "discrepancies, non-cooperation, and non-harmonization" upon which the Dissolution Decree was premised were erroneous.

In reaching this belief, the Court relied heavily on the fact that the request to dissolve the Parliament was submitted by the new Cabinet on the same day of its appointment, holding that this fact rendered the government's allegations of non-cooperation flawed.[81] The Court further noted that the newly appointed Cabinet could not rely on allegations of disagreements between the preceding Cabinet and the Parliament to request the dissolution of the Parliament, because such allegations were presumed to have vanished once the resignation of the former Cabinet was accepted. Therefore, these allegations can no longer also constitute valid grounds for the succeeding Cabinet to dissolve the Parliament.[82]

Based on the above, the Court struck down the Dissolution Decree for not being premised upon genuine grounds and voided consequently all actions taken on the grounds of this decree including the 2022 parliamentary election results.[83]

3. The Impact of the KCC Decisions

Although the above-discussed Court's decisions have been highly unanticipated in the way they invoked the constitutional principle of "Judicial Review", They have been deemed by some commentators as an unlawful attempt "judicial overreaching" for not being supported by means of any explicit or even implied terms in neither the Kuwaiti Constitution nor the Constitutional Court Law.[84]

of its appointment, on this prior disagreement to dissolve the Parliament rendered the Dissolving Decree repugnant to the Constitution for not being grounded on factual reasons.

80 Ibid. p.7.

81 Ibid. p.8.

82 Ibid. p.9.

83 Ibid. pp.9-10.

84 See for example *Youssef Al Youssef*, Two Contradictory Opinions in the Constitutional Court Decision reinstating the 2009 Parliament (Rayan Motadan Fi Hokmeha Beeadet Majlis 2009 رأيـــــــان متضـــادان في حكمهـا بإعـادة مجلـس 2009), https://alwatan.kuwait.tt/articledetails.aspx?id=204992 (last accessed on 01 November 2024).

In addition, these decisions have been also criticized on the ground that they are affecting the Court's legitimacy for improperly interfering into the political thicket.[85] In other words, such decisions have been seen by some as compromising the legitimacy of the Court because they affected the way it is perceived by the public. Instead of being perceived as a unique and independent institution, especially in political turmoil or charged times, these decisions have made the Court to appear as "just another political institution."[86]

We, however, do not agree with the above arguments for the following two reasons: First, in contrast to the assertion that there are no constitutional or legislative provisions supporting the Court's jurisdiction to review dissolution decrees, it has been demonstrated that the Court has grounded its jurisdiction in both decisions, on the Constitutional Court Law, and more particularly on the Electorate Appeal provision. According to this provision, the Court was bestowed with an exclusive and a comprehensive jurisdiction to extend its judicial oversight over the entire phases of the elections, including the constitutionality of dissolving decrees if such elections were held following a premature dissolution of the Parliament.

Second, the other argument with relevance to the Court's legitimacy is similarly not accurate. Claiming that interference in political arena renders the Court as an "another political institution" and strips it of its' legitimacy is highly debatable. In fact, interference in such arena is sometimes warranted to protect the rule of law and preserve the Supremacy of the Constitution. Legitimacy of Courts is secured, as noted by one scholar, "so long as the Justices reach their decisions through principled decision-making processes, as opposed to behaving strategically, which the public may perceive as politically motivated. The man on the street does not care that the Court appears to side with one party over the other. He only cares that the Court follows a principled process" and this is typically what happened in both precedents."[87] This is typically what happened in the Case of Kuwait. As noted in the above section, despite the existence of a ten-year time lapse between the two rulings, the Court has maintained the same rationales and holdings in both decisions, refusing to stray from the settled norms.

Indeed, we, in contrast to the above position, strongly believe The KCC's insistence on monitoring Dissolution Decrees is largely inspired by the Court's desire to vindicate the rule of law and constitutional legitimacy over political considerations.

The Court's approach in both precedents is premised on the *Manifesting Error* Doctrine adopted by the constitutional jurisprudence in Kuwait and many other civil law

85 Ibid.

86 Ibid.; *James L. Gibson / Michael J. Nelson,* Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?, Journal Empirical Legal Studie 14 (2017), p. 592.

87 *Luis Fuentes-Rohwer*, Taking Judicial Legitimacy Seriously, Chicago Kent Law Review 93 (2018), p. 507.

countries.[88] Although this Doctrine does not generally empower Constitutional Courts to decide political questions nor exercise discretion beyond its competencies, it entitles them to void political actions in cases where they significantly violate a procedural or substantial safeguard stipulated in the Constitution. In other words, this doctrine limits the scope of judicial review over political actions to check the conformity of such actions with the Constitution, not to assess their appropriateness or soundness on behalf of the Executive.

The ruling of the KCC in the Dissolution Decree precedents confirmed our above observation. As revealed in the discussed precedents, only the constitutionality of the Dissolution Decrees, and not their appropriateness or suitability, was subject to judicial review. This is supported by the fact that Dissolution Decrees were not invalidated on the grounds of their unsuitability, inappropriateness, or unsoundness, but rather because they violated constitutional safeguards requiring such decrees to be requested by an in-command Cabinet (2012 ruling) and to be premised upon factual reasons (2023 ruling).

In the end, we believe that the KCC's rulings in the Dissolution Decree precedents are significant in many respects. First, these rulings make the State of Kuwait the first country in the Arab region to subject Dissolution Decrees to judicial review. Second, they may have a profound impact on the Doctrine of Sovereign Acts in Kuwait's legal system because they could serve as a legal premise for the KCC to scrutinize many other political actions – that have long been deemed nonjusticiable - to ensure their consistency with the Constitution. Third, these rulings demonstrate the importance of judicial review as a means to enforce the limits of the Constitution on one hand and to compel other governmental branches to recognize the limits of their powers on the other hand.

III. The 2023 Legislative Amendment of the Constitutional Court Law

This last section will, first, highlight the newly approved amendments of the Constitutional Court Law with respect to the KCC's authority to review Dissolution Decrees and, second, emphasize our remarks concerning these amendments.

1. Codification of the KCC Judicial Review Power over Dissolving Decrees

The Dissolution Decree decisions prompted an important legislative intervention in 2023 when some members of the parliament proposed an amendment to the Constitutional Court Law. Although the amendments, as originally proposed, were aimed at precluding the Court from questioning the validity of Dissolving Decrees on the grounds of their political

88 For more on the Manifesting Error Doctrine see *Zaki Mohamed Al-Nagar,* The Idea of Manifesting Error in the Constitutional Jurisprudence - Comparative Study (Fekrat Al-Ghalat Fi Qadaa Al-Dostouria – Derasa Moqarna فكرة الغلط في قضاء الدستورية – دراسة مقارنة), Cairo 1997.

nature,[89] the majority of the Parliament rejected this proposal and opted instead for an amendment of the same law that upheld the Court's reviewing power over these Decrees.[90]

The approved amendments were translated into the newly added article *4 bis* which includes two main provisions.

The first provision confers upon the Court an exclusive jurisdiction to decide constitutional challenges of Dissolution Decrees. These challenges could be raised by any individual with a personal interest via the direct constitutional Challenge process, provided that the challenges are submitted to the Court within ten days from the date of their publication in the Official Gazette. The provision further urges the Court to decide upon those challenges within ten days of the expiration of the appeals time.[91]

The second provision, however, prohibits the KCC from considering the constitutionality of Dissolution Decrees once the parliamentary election results have been announced. This later provision was intended to immunize Majlis Al-Ummah after the Election Process had ended and to preclude KCC's earlier practices of questioning the constitutionality of Dissolution Decrees in the course of electoral appeal proceedings.[92]

2. Our Remarks on the 2023 Legislative Amendments

We believe that the Constitutional Court Law amendments constitute an important step toward upholding the rule of law and the Supremacy of the Constitution because they empower the Court to act as a backstop against the unconstitutional exercise of the Dissolution Power.

Recognizing the KCC's ability to question the Constitutionality of Dissolution Decrees should not be construed, however, as allowing the Court to make policy judgments on behalf of the Executive or to examine the appropriateness or the soundness of political considerations beyond the promulgation of Dissolution Decrees. Rather, the Court's scope of judicial review over these Decrees should be limited, as illustrated by the KCC Case law, to situations where such decrees are repugnant to the Constitution or hinder any of its safeguards.

We also believe that the legislative amendments render the KCC more accessible to individuals for two reasons. First, the KCC, before the amendment, could only have reviewed

89 *George Sadek*, Kuwait: Members of Parliament Propose New Amendments to Constitutional Court Law, https://www.loc.gov/item/global-legal-monitor/2023-07-12/kuwait-members-of-parliament-propose-new-amendments-to-constitutional-court-law/ (last accessed on 12 June 2024).

90 The amendments were included in the Law No. 119 of 2023 amending Law No. 14 of 1973 with relevance to the establishment of the Constitutional Court, promulgated on 27 August 2023.

91 See the Constitutional Court Law, note 64, art.4bis (a); For more on the Direct Constitutional Challenge procedure before the Constitutional Court, see *Khalifa Thamer Alhamida*, Direct Constitutional Challenges in Kuwait, Yearbook of Islamic and Middle Eastern Law Online 21 (2022), pp. 3-7.

92 Art. 4bis (b) of the Constitutional Court Law.

constitutional challenges of Dissolution Decrees if raised during ongoing litigations of electoral appeals, which meant that such challenges would be held inadmissible if raised in any other proceedings before the KCC. However, the amendments allow individuals to challenge Dissolution Decrees via the direct constitutional challenge process without requiring them to establish any connection between these challenges and electoral appeal litigations.

Second, individuals who were entitled to raise constitutional challenges of Dissolution Decrees, before the amendments were only those who had *Locus standi* in electoral litigations. However, the amendments paved the way to challenge Dissolution Decrees, not just for parties in electoral litigations, but for every individual with a personal interest.

That being noted, we do have the following remarks with respect to the amendments: Although the amendment was hoped to ensure the full implementation of constitutional legitimacy, it has only allowed the KCC to consider challenges of these decrees if raised within 10 days of their publication in the Official Gazette. If challenges were submitted to the Court after this period or after the election results have been announced, the KCC must dismiss them. Such a period is too short for the parties concerned to file their constitutional claims and prepare their arguments. Therefore, we believe it is important to prolong this period. Even though the scope of the KCC's judicial review power over Dissolution Decrees seems to be very broadly worded in the legislative amendment, we believe that it should not be construed to allow the Court to make policy judgments on behalf of the Executive or to examine the appropriateness or the soundness of political considerations beyond the promulgation of Dissolution Decrees. Accordingly, we believe that it would have been sounder if the amendment had explicitly limited the Court's scope of judicial review over these Decrees, as illustrated by the KCC Case law, to situations where such decrees are repugnant to the Constitution or hinder any of its safeguards.

We further believe that, due to the political nature of Dissolution Decrees, it would have been more convenient to adopt an *ex-ante* reviewing system as opposed to the currently adopted *ex-post* review. In this proposed *ex-ante* review, the KCC would be seized on a mandatory basis to review these decrees before their promulgation upon a referral from the Emir or the Government. Adopting this model of review could alleviate any potential risk of embarrassment for the KCC while interfering in political relations between the Executive and Legislative branches and would avoid possible violations of the Constitution before they materialize.

E. Conclusion

The article has attempted to examine the possibility of subjecting the Dissolution Power to judicial review. In addressing this inquiry, we discovered that although major legal systems such as Egypt, France, and the United Kingdom have– via explicit legal provisions or Constitutional Court decisions – opted to eliminate all forms of judicial review over the exercise of the Dissolution Power due to their political nature, there has been an emerging

approach in Kuwait's legal system to subject Dissolution Decrees to the judicial review of the Constitutional Court.

As emphasized in this article, this legal development in Kuwait was initiated via two landmark decisions of the KCC in which the Court affirmed its jurisdiction to question the constitutionality of Dissolution Decrees, provided that challenges to these Decrees were raised in the course of electoral appeal litigations. However, the scope of judicial review over these Dissolution Decrees – as noted by the Court - is limited to ensure the compliance of these decrees with the Constitution and does not in any respect empower the Court to examine the appropriateness or the soundness of these decrees.

The KCC's rulings have prompted an important legislative amendment in which the Parliament has expanded the judicial review power of the Constitutional Court by explicitly entrusting the Court with the power to examine the constitutionality of Dissolution Decrees.

It is our point of view that subjecting the Dissolution Power to a judicial review model, similar to that established in Kuwait, is the most, if not the only, effective means to ensure that constitutional limits and safeguards surrounding the exercise of this power are enforced.