Guarantees and Challenges of Judicial Independence: The Constitutional Courts of Kuwait and Bahrain as Case Studies

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Abstract
This chapter examines the constitutional and legal framing of judicial independence in the two case studies of Kuwait and Bahrain, with a specific focus on considering the extent to which the constitutional courts of Kuwait and Bahrain are empowered to exercise their judicial powers independently. The chapter begins with an outline of relevant constitutional provisions, followed by an examination of the primary and secondary legislation governing constitutional court judges' selection and appointment, terms of service and tenure, training and qualification, and discipline and removal procedures. As part of this examination, the chapter considers the effectiveness of these existing governing frameworks in enabling or limiting the exercise of judicial independence by the constitutional judiciary in Kuwait and Bahrain. The two states are shown to share broad similarities in their constitutional and legal systems but also to diverge in their legislation and the different ways in which political decision-makers use legal tools to exert indirect influence on judicial composition and outcomes.

1. Introduction

Judicial independence is universally recognized as an essential prerequisite for the functioning of a judicial system that upholds justice and the rule of law. Practically, it is a means towards realizing justice, ensuring institutional accountability, and promoting public confidence in the judiciary and the broader legal system. Judicial independence is guaranteed in the vast majority of national constitutions across the globe and in key international law instruments, including the Universal Declaration of Human

Rights and the International Covenant on Civil and Political Rights.[1] The United Nations Basic Principles on Independence of the Judiciary in turn were formulated to assist United Nations Member States in securing and promoting the independence of the judiciary in national legislation and practice.[2] These principles take into account judges' selection and appointment procedures, qualifications and training, conditions of service and tenure, professional secrecy and immunity, and procedures for discipline and removal.[3] These categories are particularly helpful in assessing the extent to which institutional judicial independence is secured by legal stipulations. It is broadly recognized as well that formal instruments and mechanisms are alone insufficient to guarantee the impartiality of judges and judicial decision making, which is highly dependent on the political context, power dynamics, and strength of institutions in any given context.

The constitutions of all Arab Gulf States incorporate broad guarantees of the independence of the judiciary and the rule of law. The constitutions of Kuwait, Bahrain, the United Arab Emirates, and Qatar, as well as the Basic Laws of Saudi Arabia and Oman, all provide for the independence of judges and prohibit interference with the operation of courts.[4] In turn, each of these constitutions leaves the application of the principle of judicial independence and the details of its institutional mechanisms to be determined and elaborated by ordinary law. They regulate their judiciaries by means of detailed legal instruments that create the structures and procedures that govern the selection and tenure of judges, as well as the judicial procedures and administrative operation of these courts. This article is a brief examination of the institutional independence of judges in two of the Arab Gulf States, Kuwait and Bahrain, with a particular focus on constitutional court judges sitting at the apex of these two states' judicial hierarchies. The article provides an overview of the constitutional and

1 See *Universal Declaration of Human Rights*. General Assembly Resolution 217 A (III), art. 10, U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*. General Assembly Resolution 2200A (XXI), art. 14, December 19, 1999, 999 U.N.T.S. 17.

2 *Principles on the Independence of the Judiciary. Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan*, U.N. Doc. A/CONF. 121/22Rev.1 (1985). The Principles were endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

3 Ibid.

4 *Basic Law of Saudi Arabia* (1992), art. 46; *Constitution of Kuwait* (1962), art. 163; *Constitution of Bahrain* (2002), art. 104; *Constitution of Qatar* (2004), art. 130; *Basic Law of Oman* (1996), art. 60; *Constitution of the United Arab Emirates* (Permanent, 1996), art. 94.

legal framework governing the constitutional judiciary in each state and analyzes their legal and procedural implications, with the understanding that questions of impartiality, closely related to the personal independence of judges, would require a separate in-depth inquiry into the wider political, historical, and social contexts in which these courts operate.

The article begins with an outline of relevant constitutional provisions, followed by an examination of the primary and secondary legislation governing constitutional court judges' selection and appointment, terms of service and tenure, training and qualification, and discipline and removal procedures. As part of this examination, the article will consider the extent to which these existing governing frameworks work to enable or limit the exercise of judicial independence by the constitutional judiciary in Kuwait and Bahrain. As will be shown below, the two states share broad similarities in their constitutional and legal systems but also diverge in their legislation and the different ways in which political decision-makers use legal tools to exert indirect influence on judicial composition and outcomes.

2. *Kuwait*

2.1. *The constitutional and legal framework*

Enacted in 1962, the Constitution of Kuwait became the first among the Arab constitutions to mandate the establishment of a dedicated and specialized court to review the constitutionality of legislation.[5] The Kuwait model was largely replicated elsewhere in other Gulf countries and across the Arab world.[6]

The 1962 Kuwaiti Constitution provides for the establishment of a "specialized judicial body" to review the constitutionality of laws, decrees, and regulations but leaves the structure and jurisdiction of this body, as well as its governing procedures and judicial appointments process, to be deter-

5 *Constitution of Kuwait* (1962), art. 173. For a discussion of the political context and the legal debates surrounding the establishment of the Kuwaiti Constitutional Court, see, e.g., Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*. Cambridge: Cambridge University Press, 2006: 129-186.

6 The constitutions of Bahrain (2002), Qatar (2004), and Oman (1996) provide for the establishment of a designated judicial body to review the constitutionality of laws.

mined by law.[7] Article 173 on constitutional review further emphasizes that the law shall ensure the right of both the government and interested parties to challenge the constitutionality of laws and regulations and that a law or regulation that is determined to be unconstitutional by "that said body" shall be considered null and void.[8]

While the Constitution of Kuwait does not use the term "court" explicitly, the Explanatory Memorandum to the Constitution is insightful in revealing the intention of the draft that a specialized court be established to rule on constitutional disputes.[9] The Memorandum also reveals the drafters' full awareness that a guarantee of the independence of the court is central to its effective empowerment to review legislation in order and avoid "conflict of opinions in interpreting legislation" and confusion that may result from "exposing laws to [the risk of] being struck down without taking into account different arguments and considerations."[10] The Kuwaiti Constitutional Court was established eleven years later, in 1973, with the enactment of Law No. 14 Establishing the Constitutional Court ("Kuwaiti Constitutional Court Law").

The Constitution of Kuwait includes several provisions that enshrine the independence of the judiciary. Article 50 of the Constitution provides for the separation of powers, while Article 53 provides that judicial powers are vested in the courts, which exercise their powers in the name of the Emir and within the bounds of the Constitution. Article 163 of the Constitution prohibits "any authority" from yielding dominion over judges in the administration of justice or interfering with their performance, and provides that the law shall guarantee the autonomy of the Judiciary and define the Judges' warranties and the conditions governing their immunity from dismissal.[11] The Constitution provides that the organization, jurisdiction, and functions of the courts shall be determined by law.[12] Further, Article 165 provides that all court hearings shall be public, save in "exceptional cases" to be determined by law.

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7 Records of the discussions of the Constituent Assembly are available in Arabic at http://www.kna.kw/clt-html5/run.asp?id=1568.

8 *Constitution of Kuwait* (1962), art. 173.

9 *Introductory Memorandum to the Constitution of Kuwait* (1962), art. 173. Records of the discussions of the Constituent Assembly are available in Arabic at http://www.kna.kw/clt-html5/run.asp?id=1568.

10 Ibid.

11 *Constitution of Kuwait* (1962), art. 163.

12 *Constitution of Kuwait* (1962), art. 164.

The primary legislation regulating the functions of the Constitutional Court is the Constitutional Court of 1973 and its bylaws, whereas the appointments, functions, immunities, and independence guarantees of all judges, including Constitutional Court judges, are governed by Law No. 23 of 1990 Organizing the Judiciary ("Kuwaiti Judiciary Law"). The Kuwaiti Constitutional Court Law empowers the Court to determine the procedures of bringing and adjudicating cases and to set its own litigation fees in its bylaws, which are issued by means of an Emiri Decree.[13]

The Kuwaiti Constitutional Court Law establishes an "independent court" with the mandate of "interpreting constitutional text, adjudicating disputes related to the constitutionality of laws, decrees, regulations, and National Assembly election disputes…"[14] It affirms the supremacy of the rulings of the Kuwaiti Constitutional Court, declaring them binding on all other courts.[15] The Constitutional Court Law also specifies that rulings of the Constitutional Court must be issued by a majority vote of its seven members, and that any dissenting opinion of the minority of judges shall be noted and attached to the Court's ruling.[16]

Disputes can be raised to the Constitutional Court in three different ways: First, legislation may be referred to the Court prior to enactment by the Cabinet of Ministers or the National Assembly (abstract review); second, specific cases or controversies may be referred to the Court by any of the lower courts or by any party to a case, if it was determined there was a constitutional issue with the applicable law or regulation (concrete review); and third, a natural or a juridical person may dispute the constitutionality of a law, decree, or regulation before the Court, provided that this person has a specific interest that is impacted by the legal instrument in question.[17] Among the Arab Gulf countries, Kuwait affords the greatest accessibility to the Constitutional Court and remains the only one to empower natural and legal persons (private entities) to bring direct challenges

13 See *Emiri Decree* (no number) of 1974, issued May 13, 1974 Issuing the Bylaws of the Constitutional Court.

14 *Kuwaiti Constitutional Court Law* (1973), art. 6. Kuwait is the only Gulf country that grants its constitutional court the mandate to adjudicate election disputes.

15 *Kuwaiti Constitutional Court Law* (1973), art. 1.

16 *Kuwaiti Constitutional Court Law* (1973), art. 3.

17 *Kuwaiti Constitutional Court Law* (1973), arts. 4 and 4(R). The ability of persons to bring direct challenges to the court was incorporated in 2014 by way of a legal amendment to the *Constitutional Court Law*; see *Law No. 109 of 2014 Amending the Constitutional Court Law of 1973*.

to the Constitutional Court, independent of the existence of an ongoing court dispute.

The Kuwaiti Constitutional Court Law includes broad guidelines with respect to the composition of the court, whereas rules of judicial appointment, responsibilities, immunities, and dismissal, are all governed by the Kuwaiti Judiciary Law of 1990. A key feature of the Kuwaiti Constitutional Court Law is that it empowers the High Judicial Council to shape the composition of the Constitutional Court by selecting its members from senior members of the Kuwaiti judiciary.[18] The Constitutional Court Law provides that the Constitutional Court is composed of five judges, in addition to two additional alternative judges to be chosen by the High Judicial Council from among the senior judges by secret ballot.[19] All seven judges must be Kuwaiti nationals. [20] Upon appointment by Emiri Decree, the seven judges form the bench of the Constitutional Court, and Court rulings are issued by a majority vote of judges.[21]

Judges of the Constitutional Court undertake their duties in addition to their original appointments at the Cassation Court or High Appeals Court.[22] Significantly, once judges are appointed, the Kuwaiti Judiciary Law guarantees their immunity from dismissal, except in accordance with disciplinary procedures outlined in the law, and by decision of a disciplinary panel composed of senior judges.[23] The law does not specify term limits for Kuwaiti Constitutional Court judges. Nothing in either the Constitutional Court Law or the Judiciary Law prevents the appointment of women as judges. However, to date, there has not been any woman appointed to the Bench of the Kuwaiti Constitutional Court.[24]

As Constitutional Court judges are selected by the High Judicial Council from among senior members of the Kuwaiti judiciary, it is useful

18 *Kuwaiti Constitutional Court Law* (1973), art. 2.

19 Ibid.; senior judges include judges in the Cassation Court and High Appeals Court.

20 Ibid.

21 *Kuwaiti Constitutional Court Law* (1973), art. 3.

22 *Kuwaiti Constitutional Court Law* (1973), art. 2.

23 *Kuwaiti Judiciary Law* (1990), art. 23; see Section VI of the *Law on Disciplinary Procedures*.

24 Kuwait appointed its first batch of eight women to the judiciary on 5 July 2020, in a historic move that followed decades of activism by women and strong opposition by Islamist forces. The women were initially appointed as public prosecutors in 2014. See e.g., "Kuwait: Why the Delay in Appointing Women to the Judiciary?" (in Arabic) *BBC Arabic* (2 July, 2020), https://www.bbc.com/arabic/middleeast-53257876.

to trace the process of appointment of senior judges as outlined in the Kuwaiti Judiciary Law. This law establishes a High Judicial Council responsible for the administration of the judiciary. Specifically, the High Judicial Council is mandated with managing the appointments, promotions, and transfers of judges in the manner specified in the law, in addition to providing its opinion in matters related to the judiciary and the public prosecution, either on its own initiative or by request of the Minister of Justice.[25] The Kuwaiti Judiciary Law provides that the High Judicial Council is composed of nine members: President of the Cassation Court (who shall be the President of the Council), Vice-President of the Cassation Court, President of the Court of Appeals, the Public Prosecutor,[26] Deputy of the Court of Appeals, President of the Courts of First Instance, the two longest-serving Kuwaiti judges, and the Undersecretary of the Ministry of Justice.[27] Article 18 of the Law further provides that the Minister of Justice may attend meetings of the High Judicial Council, although he cannot vote in these meetings.[28]

With the exception of the Constitutional Court, the Minister of Justice and the High Judicial Council share the responsibility of appointing judges at all court levels in Kuwait. Specifically, Article 20 of the Kuwaiti Judiciary Law (as amended in 1996), grants the Minister of Justice the primary responsibility for nominating all new judges, which are appointed by an Emiri Decree after the approval of the High Judicial Council. Promotion of judges to senior judicial positions, such as the positions of President and Vice-President of the Cassation Court and Presidents of the High Court of Appeals and Courts of First Instance, are also issued by an Emiri Decree based on a proposal of the Minister of Justice and approval of the High Judicial Council.[29] These senior judges in turn form the core membership of the High Judicial Council, which select appointees to the Constitutional Court. Lower court judges are generally appointed from amongst members of the public prosecution, and the law states that the promotion system shall be based on both experience and qualification.[30]

The process of appointment to the judiciary reserves to the executive branch, represented by the Minister of Justice, the power to exercise indi-

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25 *Kuwaiti Judiciary Law* (1990), art. 17.
26 The Public Prosecutor is appointed by an Emiri Decree upon nomination by the Minister of Justice.
27 *Kuwaiti Judiciary Law* (1990), art. 16, as amended by *Law No. 10 of 1996*.
28 *Kuwaiti Judiciary Law* (1990), art. 18.
29 *Kuwaiti Judiciary Law* (1990), art. 20.
30 *Kuwaiti Judiciary Law* (1990), arts. 21 and 22.

rect influence over the selection of members of the Courts. In view of the composition of the High Judicial Council – to include two direct executive appointees (the Public Prosecutor and the Undersecretary of the Ministry of Justice) and seven members essentially selected by the executive and later approved by the judiciary – it is difficult to imagine Constitutional Court appointments taking place without the political approval of executive leadership.

The Kuwaiti Judiciary Law recognizes the importance of training and capacity building for judges,[31] and the 1996 amendment to the law declares enrollment in training programs to be a fundamental duty of a judge.[32] The Law Establishing the Kuwait Institute for Judicial and Legal Studies (Decree No. 37 of 1994) tasks the Institute with providing in-service training as well as induction training for judges, judicial nominees, members of the public prosecution, and judicial assistants. The Institute reports to a Board of Directors, which sets its general policies and operational priorities, determines its organizational structure and proposed budget, approves all hiring decisions of training and teaching staff, and defines its programs and annual training plans.[33] The Minister of Justice serves as the Chairman of the Board of the Institute and the Institute itself is placed under full legal and administrative supervision of the Ministry of Justice. [34] The Minister of Justice also appoints the Director of the Institute, by consent of the High Judicial Council, allocates an operational budget to the Institute from the budget of the Ministry, and issues a decree organizing the operation of the Institute.[35]

Administratively, Articles 3-8 of the Kuwaiti Judiciary Law grant significant administrative discretion to Minister of Justice, including the power to determine compensation and bonuses of judges across all courts. Financial compensation of judges of all levels – including non-Kuwaiti judges on temporary contracts – are determined by the Cabinet of Ministers upon proposal of the Minister of Justice, and the Ministry of Justice directly recruits and hires all support staff in courts and regulates their operation.[36] More broadly, powers to issue and administer all human resources policies

31 See *Explanatory Memorandum to Law No. 10 of 1996 Amending the Kuwaiti Judiciary Law (1990)*, Section IV.
32 *Kuwaiti Judiciary Law* (1990), art. 72.
33 *Kuwait Institute for Judicial and Legal Studies Law* (1994), art. 5.
34 *Kuwait Institute for Judicial and Legal Studies Law* (1994), art. 3.
35 *Kuwait Institute for Judicial and Legal Studies Law* (1994), arts. 3 and 5–8.
36 *Kuwaiti Judiciary Law* (1990), art. 67.

with respect to the courts are delegated to the Ministry of Justice.[37] No administrative staff member may be demoted or dismissed from the courts without an order by the Minister of Justice.[38]

The budget of the judiciary in Kuwait is allocated by the state as part of the budget of the Ministry of Justice. The Judiciary Law empowers the Minister of Justice to determine the proposed budgetary allocation of the courts upon consulting with the High Judicial Council.[39] Under Article 69 of the Law, the proposed budgetary allocation is then submitted to the Ministry of Finance for inclusion in the draft state budget, which requires the approval of the National Assembly.[40] Budgetary allocations of the court are classified under the heading of expenses and transfers by the Ministry of Justice.[41]

2.2. Legal and institutional challenges

The Kuwaiti Constitutional Court is said to enjoy a relatively high degree of legal and functional independence in comparison to its counterparts in the Gulf region. Nonetheless, achieving full judicial independence remains subject to some significant legal and institutional challenges. A key feature of the Kuwaiti Constitutional Court Law is that it empowers the judiciary, represented by the High Judicial Council, to select the bench of the Constitutional Court. The process of appointment to the judiciary itself, however, grants the executive branch, represented by the Minister of Justice, significant indirect influence over the selection of members of the Court. The composition of the High Judicial Council includes two direct executive appointees (the Public Prosecutor and the Undersecretary of the Ministry of Justice), while the remaining seven are essentially selected by the executive and later approved by the judiciary. It is difficult to imagine a scenario whereby an appointment to the bench could occur without executive approval.

Once appointments are made, the law takes steps to ensure that judges on the Constitutional Court are shielded from undue influences on their decision-making. The lack of term limits and the protection from dismissal except by disciplinary proceedings are notable in that regard. Ensuring that

37 *Kuwaiti Judiciary Law* (1990), art. 70.
38 *Kuwaiti Judiciary Law* (1990), art. 67.
39 *Kuwaiti Judiciary Law* (1990), art. 69.
40 Ibid.
41 *Kuwaiti Judiciary Law* (1990), art. 67.

all members of the court bench are tenured judges is a further protection from external pressures on the person of a judge. While non-Kuwaiti Arab judges are regularly appointed to serve in the judiciary and may serve in their professional capacity on the High Judicial Council, the Constitutional Court Law, in particular, ensures that only Kuwaiti judges may serve on the Constitutional Court and excludes non-tenured judges – non-Nationals on temporary contracts – who may be more vulnerable to pressure.

In order for a judicial authority to maintain a degree of autonomy, it is essential to have in place an institutional structure that allows the judiciary to regulate its own affairs, including appointments, termination of service, impeachment, and procedures. Kuwait – like most Arab Gulf States – has historically followed a civil law model where the executive branch of government is involved in regulating and overseeing the administration of judicial affairs through the Ministry of Justice. A problematic feature in the Kuwaiti Judiciary Law, which directly impacts the functional independence of the Kuwaiti Constitutional Court as well as its serving judges, is the wide discretion of the Minister of Justice to make financial and administrative decisions with respect to the operation of the courts. Institutionally, courts remain dependent on the budgetary allocations controlled by the Ministry and judges themselves are compensated and trained in accordance with the will of the executive. Training programs available to judges, and optional training bonuses, also fall under the control of the Ministry of Justice.

3. Bahrain

3.1. The constitutional and legal framework

Bahrain adopted a centralized system of judicial review in its amended Constitution of 2002,[42] which explicitly provides for the establishment of a specialized constitutional court that was granted the sole power to conduct constitutional review of legislation.[43] Article 106 of the Constitution of Bahrain specifies that the Court "shall comprise a President and six members" but leaves the term of appointment and procedures to be followed

42 The post-independence Constitution of 1973 did not mention a constitutional court, and was suspended two years after its enactment.

43 *Constitution of Bahrain* (2002), art. 106. The Bahraini Constitution of 1973, later suspended in 1975, did not include any mention a constitutional court.

by the court to be determined by law. It instructs the lawmaker, nonetheless, to "ensure that members of the court are not liable to dismissal."[44] The Constitution provides that challenges to the constitutionality of law can be brought to the court by either the Government, either chamber of the bicameral National Assembly,[45] "notable individuals," and others, including lower courts in the context of an ongoing judicial dispute, e.g. when the constitutionality of legislation is in question. The King may also refer any legislation to the court prior to its enactment to rule on its constitutionality. The Constitution states that a ruling of unconstitutionality by the Court shall have an immediate effect, unless the Constitutional Court specifies otherwise, and that rulings of the Court are binding on all courts and state authorities.[46] The Constitution of Bahrain recognizes judicial independence; Article 104 of the Constitution of Bahrain declares the judiciary to be "independent and free from any interference." Articles 33 and 34 of the Constitution provide for the separation of powers and vests judicial powers in courts, which issue their rulings in the name of the King, who is also the President of the High Judicial Council.

The Constitutional Court of Bahrain was established soon afterwards in pursuant to Law No. 27 of 2002 ("Bahraini Constitutional Court Law"). The Bahraini Constitutional Court Law outlines the structure of the court, appointment procedures, and general rules governing the exercise of the Court's powers. Article 3 of the Bahraini Constitutional Court Law provides that the Court shall be composed of seven judges appointed directly by the King by a Royal Decree. The Law also grants the King the power to name the Constitutional Court's president and vice-president.[47] The Bahraini Constitutional Court Law does not prevent non-nationals – Arab judges serving on temporary contracts – from serving on the bench of the Constitutional Court. The Law sets strict term limits for Constitutional Court judges. In the original 2002 version, the term limit for Constitutional Court judges was set at nine years, and it was not renewable. In 2012,

44 *Constitution of Bahrain* (2002), art. 106.

45 The National Assembly of Bahrain consists of a lower elected Chamber of Deputies and an upper Shura (Consultative) Council, directly appointed by the King. Each chamber consists of 40 members. *Constitution of Bahrain* (2002), arts. 33 and 52–61.

46 *Constitution of Bahrain* (2002), art. 106.

47 *Bahraini Constitutional Court Law* (2002), art. 3.

an amendment to the law reduced the term limit to five years and made it renewable for one additional term.[48]

The Constitutional Court Law departs from the procedure of appointing ordinary judges, regulated by Article 33(h) of the Constitution and Decree No. 42 of 2002 promulgating the Judicial Authority Law ("Bahraini Judicial Authority Law"), which states that judges shall be appointed by Royal Decree upon nomination by the High Judicial Council.[49] Instead, the Constitutional Court Law does not explicitly provide for a role for the Council in the selection of judges, nor does it offer guidelines on the process or criteria of selection of Constitutional Court judges.[50] The King retains full power to shape the composition of the Court by unilaterally appointing Constitutional Court judges.

The Bahraini Constitutional Court Law permits the appointment of non-serving judges to the bench of the Constitutional Court, requiring simply that judges on the Court be qualified to practice law and should have not less than fifteen years of legal experience.[51] The Law does not specify mechanisms for the selection of judges, nor does it mention specific qualifications or specific relevant judicial experience. From the text, it appears that no training in constitutional law or constitutional adjudication, for example, is required.[52] As per the law, Constitutional Court judges may not hold any other public appointment while serving on the Court's bench.[53] For the duration of their limited appointment terms, judges may not be dismissed or transferred without their consent.[54] In 2007, Bahrain became the first among the Arab Gulf States to appoint a woman to the bench of its Constitutional Court.[55] The current composi-

48 *Bahraini Constitutional Court Law* (2002), art. 3; *Law No. 38 of 2012 Amending the Constitutional Court Law*.

49 *Bahraini Judiciary Law* (2002), art. 24; the High Judicial Council is appointed by the King according to article 33 of the Constitution.

50 See also, for example, *Royal Order No. 46 of 2002 Appointing Members of the Constitutional Court*; *Royal Order No. 41 of 2013 Appointing the President of the Constitutional Court*.

51 *Bahraini Constitutional Court Law* (2002), art. 4.

52 Ibid.

53 *Bahraini Constitutional Court Law* (2002), art. 11.

54 *Bahraini Constitutional Court Law* (2002), art. 9.

55 *Royal Order No. 17 of 2007*. Bahrain was also the first Arab Gulf country to appoint a female judge in 2006 pursuant to *Royal Decree No. 15 of 2006*. As of 2016, women occupied 9% of judicial positions in Bahrain. See "Women in the Judiciary in Arab States: Removing Barriers, Increasing Numbers," *E/ESCWA/ECW/2019*, https://undocs.org/pdf?symbol=en/E/ESCWA/ECW/2019/2.

tion of the Court also includes one female judge on the bench, appointed in 2016.[56]

The Bahraini Constitutional Court Law states that the Court shall have administrative and budgetary independence, yet the budget allocation of the Court shall be determined in agreement with the Minister of Finance and that internal budgetary allocation of the Court shall follow the guidelines of the state budget – issued by the Minister of Finance.[57] Financial compensations, including regular salaries and bonuses, of judges, are determined by a decision of the King and pursuant to a Royal Decree.[58] On the other hand, the Bahraini Constitutional Court Law grants the Court administrative independence from the Civil Service Bureau with respect to the hiring, management, and dismissal of staff.[59]

In terms of training and capacity building, a Judicial and Legal Studies Institute was established pursuant to Decree No. 69 of 2005 ("Judicial and Legal Studies Institute Law") as part of the Ministry of Justice, to manage and administer training and capacity building programs for all judges, judicial nominees, and prosecutors.[60] The Institute reports to a Board of Trustees, headed by the Minister of Justice.[61] The Bahraini Judicial and Legal Studies Institute Law provides for a role for the High Judicial Council in approving the training programs mandatory for judges and prosecutors, as well as approving the appointment of the Director of the Institute.[62] The Minister of Justice, however, retains full financial and administrative control over the Institute by determining its budget allocation and issuing its internal bylaws and operational guidelines.

3.2. Legal and institutional challenges

Similar to the Kuwaiti judiciary model, the Constitution of Bahrain provides broad guarantees of judicial independence and leaves the means by

56 Current Members of the Constitutional Court, Official Website of the Bahraini Constitutional Court (Arabic), http://www.ccb.bh/ccb/Pages_ar/MemberList.aspx?encr=1B3A&mtype=TQ.
57 *Bahraini Constitutional Court Law* (2002), art. 8(R).
58 See *Royal Decree No. 40 of 2012*, specifying the salaries of judges of the Constitutional Court.
59 *Bahraini Constitutional Court Law* (2002), art. 8(R).
60 *Judicial and Legal Studies Institute Law* (2005), arts. 1 and 2.
61 *Judicial and Legal Studies Institute Law* (2005), art. 3.
62 *Judicial and Legal Studies Institute Law* (2005), art 4.

which this independence is to be achieved for the determination of the legislator. In the political context of Bahrain, broadly characterized by a weak institutional culture and a disproportionately strong influence by the executive leadership over other branches of government, this creates greater flexibility for the executive leadership to influence the legislation governing the judicial branch. Structurally, a weak institutional culture combined with structural limitations to the legislature – of which one chamber is directly appointed by the executive leadership and another chamber is elected on the basis of carefully-crafted districts – translates into a wide margin of influence by the executive over the basic defining parameters of the courts, including Constitutional Court composition and case dockets.

Article 106 of the Constitution of Bahrain, for example, provides that term limits of Constitutional Court judges are to be determined by ordinary legislation and does not set a minimum limit. In Bahrain and beyond, term limits broadly are considered to be a restricting factor that could restrain judges' independence and their ability to exercise impartial judgment, in the absence of the career and financial security afforded by lifetime appointments. The short limits on the terms of service for judges – recently reduced to five years instead of nine – is atypical even for the Arab Gulf countries and raises concerns of the possibility of rendering judges vulnerable to excessive executive influence. Similar concerns arise with the possibility of appointing non-nationals – mostly Arab judges on temporary contracts – to serve on the bench of the Constitutional Court.[63]

One other feature of the Constitutional Court Law that poses a threat to judicial independence is the opaque selection process of judges. Notwithstanding Article 33(h) of the 2002 Constitution, which provides that "the King shall appoint judges by nomination of the High Judicial Council," the Constitutional Court Law – unlike the Judicial Authority Law – is silent on the nomination or selection mechanism of Constitutional Court Judges. Further, the High Judicial Council itself is appointed by a Royal Order, and the Judicial Authority Law does not outline any nomination mechanism, nor does it mandate any form of consultation before issuing appointments, thus further entrenching executive control over judicial composition at all levels.[64]

63 Currently, all judges on the Court are Bahraini nationals.

64 See, for example, *Royal Order No. 56 of 2016* appointing the High Judicial Council. Judicial Council Members are appointed for a limited term of three years that may be renewed once.

The rules governing adjudication and court administrational and management are also passed by ordinary legislation, in contrast to the Kuwait model where the Constitutional Court is empowered to issue its own bylaws. The Bahrain model allows for further executive influence over the functions of the courts. For example, in terms of budgetary allocations, the Constitution of Bahrain grants Parliament the authority to set the judiciary's budget. In view of the weak prerogatives of Parliament, this has meant that the executive effectively retains control of the financial resources available to the judiciary.[65]

4. Conclusions

Constitutional review has been most effective in liberal democracies, where it serves as a constitutional check on the will of the majority to ensure that elected government institutions do not usurp their constitutional limits. This requires an effective separation of powers and an independent exercise of power by each branch of government, so the courts may act as an umpire between these conflicting powers, relying on their constitutional grants of independence and enforcement powers that permit the exercise of this mandate. Broadly speaking, political systems in both countries remain dominated by strong executive branches that overshadow all other political actors, and the exercise of political power in all Arab Gulf States remains subject to extra-constitutional sources of power, with dynastic and tribal exercises of influence permeating all state institutions and political dynamics. This tradition of weak institutional checks continues to dominate, despite the current constitutions' ostensible commitments to the separation of powers. State institutions, including the legislature, continue to function as subsidiaries of the executive branch and depend on its willingness to cooperate, and yield very limited enforcement power except on politically weaker actors.

The constitutions of both Kuwait and Bahrain include provisions that promise independence of the judiciary, of which the constitutional courts are an integral part, but leave the details of the mechanisms of guaranteeing this independence to ordinary law. Yet none of the legislatures in the Gulf are fully elected, with Bahrain's National Assembly consisting of two

65 See, for example, report of a "50% increase in the Salaries of Judges by Royal Decree" (Arabic), *Al-Ayam*, 12 October, 2012, http://alayam.com/newsdetails.aspx?id=101388.

chambers, a lower elected chamber and a higher appointed one, and with Kuwait having the highest ratio of elected members (the ratio varies with the number of government ministers, who sit in Parliament as deputies). In turn, this structural relative weakness of the legislatures results in significant influence by the country's executive leadership over lawmaking. One can easily observe that across the broad legislation governing the judiciary continues to reserve to the executive branch significant powers to nominate the pool from which constitutional court judges are selected, to nominate or appoint the high judicial councils responsible for selecting judges, and to undertake administrative functions with respect to all judges' financial compensation, and in the case of Bahrain, appointment terms.

Notwithstanding formal guarantees of independence, textual provisions that permit formal executive interference combined with the political realities of traditionally strong executives dominated by highly influential dynastic and tribal powers leave ample room for the executive branches to influence judicial decisions and – if they choose to – even alter the composition of these courts in order to ensure or prevent certain outcomes. This issue is compounded by historically weak state institutions that function in large part under the patronage of the Head of State, rather than wielding their own constitutional sources of power. Going forward, it is difficult to envision any legal changes that would expand the powers or independence guarantees of either of the two constitutional courts, absent significant shifts in the political dynamics, locally and regionally. In the meantime, it remains to be seen whether political forces in the National Assembly of Kuwait succeed in their attempts to amend the Kuwaiti Judiciary Law, which has been the subject of discussions and government resistance for years,[66] and whether these amendments effectively strengthen the independence of the courts, including the Constitutional Court, in practice.

66 See latest proposed draft of an amended *Kuwaiti Judiciary Law*, available in Arabic at http://www.aljarida.com/articles/1462219661155004600/.