

Direct Individual Access to the Constitutional Judiciary: A Comparative Study of Iraqi and Kuwaiti Laws

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Abstract

Objectives: A few Arab constitutions have adopted direct individual access to the constitutional judiciary, most notably the Kuwaiti and Iraqi constitutions. This study aims to show how Kuwaiti and Iraqi laws regulate the requirements and procedures for individual access to the constitutional judiciary. It also aims to identify the best regulation for direct individual access to the constitutional judiciary.

Methods: The study adopted the analytical and comparative method by conducting comparative analyses to identify the strengths and weaknesses of the legal texts covering direct individual access in the Kuwaiti and Iraqi constitutions, laws, and regulations.

Results: Kuwaiti and Iraqi law made sure to organize individuals' right to direct individual access by imposing certain requirements and clarifying the related procedures to prevent the constitutional judiciary from being overburdened with complaints. However, there is a need for better legal regulation for individual access to the constitutional judiciary by amending some requirements concerning the bail amount, legal representation, and procedures.

Conclusions: There is incompetency in legally regulating direct individual access to the constitutional judiciary in Kuwait and Iraq. Kuwaiti and Iraqi laws should be amended to avoid impeding access to constitutional justice, which will develop the constitutional judiciary in Kuwait and Iraq to be able to carry out its duties in overseeing the constitutionality of laws and regulations.

Keywords: Constitution, individual access, judicial oversight, constitutional judiciary, direct access.

اللجوء الفردي المباشر إلى القضاء الدستوري: دراسة مقارنة بين القانونين العراقي والكويتي

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قسم القانون العام، كلية الحقوق، جامعة الإسراء، عمان، الأردن.

ملخص

الأهداف: أخذت قلة من دساتير الدول العربية باللجوء الفردي المباشر للقضاء الدستوري ولعل من أبرزها الدستور الكويتي والدستور العراقي. تهدف هذه الدراسة معرفة كيفية تنظيم القانون الكويتي والقانون العراقي للشروط والإجراءات المتعلقة باللجوء الفردي للقضاء الدستوري. كما تهدف إلى تحديد أفضل تنظيم للجوء الفردي المباشر إلى القضاء الدستوري.

المنهجية: استخدمت الدراسة المنهج التحليلي والمقارن من خلال إجراء تحليلات مقارنة لتحديد نقاط القوة والضعف في النصوص القانونية التي تنظم اللجوء الفردي المباشر في الدساتير والقوانين والأنظمة الكويتية والعراقية.

النتائج: تبين حرص كل من القانونين الكويتي والعراقي على تنظيم حق الأفراد في اللجوء المباشر إلى القضاء الدستوري وذلك من خلال فرض شروط معينة وتوضيح الإجراءات اللازمة وذلك لحماية القضاء الدستوري من الإغراق بالمدعى الدستورية. وعلى الرغم من ذلك فإن هنالك حاجة إلى تنظيم قانوني أفضل لحق الأفراد في اللجوء المباشر للقضاء الدستوري من خلال تعديل بعض الشروط المتعلقة بقيمة الكفالة، والتمثيل القانوني، والإجراءات.

الخلاصة: يوجد قصور في التنظيم القانوني للجوء الفردي المباشر إلى القضاء الدستوري في الكويت والعراق. لذا فإن القوانين الكويتية والعراقية يجب أن يتم تعديلها لتجنب إعاقة الوصول إلى العدالة الدستورية، وسيؤدي ذلك إلى تطوير القضاء الدستوري في كل من الكويت والعراق ليكون قادراً على القيام بمهامه في الرقابة على دستورية القوانين والأنظمة.

الكلمات الدالة: الدستور، الرقابة القضائية، القضاء الدستوري، اللجوء الفردي، اللجوء المباشر.



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1. Introduction

Judicial oversight over the constitutionality of laws is an important means of ensuring the protection of the rights and freedoms of individuals, as it is the essential pillar of the law. The constitutional judiciary serves as a protective fence for the constitution because of its important role in protecting it and preserving the rights and freedoms contained therein through its oversight of the constitutionality of laws and regulations.

There are many ways to appeal the unconstitutionality of laws, including direct complaints and a plea of unconstitutionality. The countries that maintain oversight through direct complaint differ in terms of the judicial bodies that are entrusted with that oversight. Some of them have entrusted this task to the highest court in the judicial system, and others have entrusted it to a specialized court (Al-Khatib, 2018, p. 490).

In the direct complaint, the constitutionality of laws is appealed before a specific court determined by the constitution in order to rule the law as null and void, as if it had not existed. This method does not require the existence of a specific dispute brought to the judiciary or waiting for the application of the law to challenge the same; this is why it is called an “original” or “direct” complaint (Al-Khafaji, 2009, 321-322). In the plea of unconstitutionality, a party files a complaint before the judiciary to plead the unconstitutionality of law; if the court decides that the plea is serious, it is referred to the Constitutional Court (Al-Saleh, 2003, p. 672) or sets a date on which the complaint can be filed before it (Abu Maree and Shehab, 2021, p. 151).

Comparative research on constitutional law has noted that some countries have granted individuals the right to access the constitutional judiciary, such as Switzerland in 1874, Spain in 1931 and Germany in 1949, whereas others prevent individuals from resorting to the Constitutional Court regarding laws and regulations that violate the constitution (Salman, 2014, p. 429).

A number of countries, including nations in Central and Eastern Europe, have allowed direct individual access to constitutional and supreme courts. These systems grant natural and legal persons the right to claim an infringement of fundamental constitutional rights or to request that the appealed texts or actions that infringe upon their rights be declared unconstitutional (Gentili, 2012, p. 161–162).

Many of the countries that offer indirect individual access to the constitutional judiciary allow parties to complaints filed before ordinary courts to file an exception of unconstitutionality, which the courts can accept or reject and refer to the Constitutional Court (Venice Commission, 2010, p. 18).

The constitutions of most Arab countries do not grant individuals the right to direct complaints regarding unconstitutionality. Some Arab countries have recognized direct appeals against the constitutionality of laws and regulations. For example, Jordan’s constitution grants the House of Representatives, Parliament, and the Council of Ministers the right to directly appeal to the unconstitutionality of laws and regulations. This appeal is an institutional and official one, representing institutional access that is not granted to ordinary people or private institutions of any kind (Al-Khatib & Al-Khatib, 2021, p. 68).

Limiting the right of direct appeal in Jordan to those three parties has been criticized for its lack of wisdom and its obstruction of effective oversight. Therefore, it was suggested that all legal persons and civil society institutions, such as individual parties, unions and universities, should be granted the right of direct appeal (Al-Khatib, 2017, p. 309). It has also been proposed to give individuals the right to appeal through a direct complaint, while establishing controls ensuring that cases before the court do not multiply and adding a stipulation that constitutional lawsuits cannot be waived to prevent state authorities from pressuring plaintiffs to renounce their constitutional lawsuits (Shatnawi & Hatamleh, 2013, p. 631-632).

A few Arab constitutions have adopted direct individual access to the constitutional judiciary, most notably the Kuwaiti and Iraqi constitutions. This study conducted a comparative analysis of those constitutions because they are among the leading Arab constitutions that have granted individuals the right to access the constitutional judiciary directly.

There is, however, an incompetency in legally regulating the direct individual access in Kuwait and Iraq. This makes this research of particular importance to regulate the direct individual access in legal terms in these two countries, which will develop the constitutional judiciary in both of them to be able to carry out its duties in overseeing the constitutionality of laws and regulations.

Therefore, this study examines how Kuwaiti and Iraqi laws regulate the requirements and procedures for individual access to the constitutional judiciary. The aim is to identify the best organization for direct individual access to the constitutional judiciary in order to assist countries that have already adopted such access, such as Germany and Switzerland, as well as countries that are considering adopting it, such as Jordan and Egypt.

The key research question is as follows: Does the regulation of direct individual access to the constitutional judiciary in the Kuwaiti and Iraqi constitutions (in terms of both requirements or procedures) facilitate or hinder access to the court, and does it constitute a violation of the constitutionally guaranteed right of access to the constitutional judiciary in those countries?

The study addresses those questions by conducting comparative analyses to identify the strengths and weaknesses of the legal texts covering direct individual access in the Kuwaiti and Iraqi constitutions, laws, and regulations.

The study defines individual access to the constitutional judiciary, discusses its advantages and disadvantages, and explains its legal basis in Kuwaiti and Iraqi law. Then, it investigates the requirements for individual access to the constitutional judiciary in each of the two bodies of law and outlines their strengths and weaknesses in order to determine the optimal legal organization for individual access to the constitutional judiciary, which can serve as guidance for those Arab countries whose constitutions do not grant this right.

2. The concept of direct individual access to the constitutional judiciary

First, it is necessary to clarify what is meant by “direct individual access to the constitutional judiciary” before evaluating its advantages and disadvantages.

2.1 Definition of individual access to the constitutional judiciary

Individual access to the constitutional judiciary is a direct appeal in which an individual files a complaint before the constitutional court requesting that a law be ruled invalid for violating the provisions of the constitution (Atiya, 2017, p. 641). A direct individual constitutional complaint can also be described as an appeal lodged directly against a doubtful, unconstitutional law before a court that is competent to monitor the constitutionality of laws and regulations in order to cancel it partially or completely (Al-Hilali, 2018, p. 57).

Judicial oversight through direct complaint is characterized by the individual initiative taken to file a complaint before the competent court without waiting for the law or regulation to be applied. The court rules that the law or regulation is null and void if it violates the constitution *erga omnes*, and the constitutional issue may not be raised again. Given the seriousness of this oversight, it is usually entrusted to a single court in order to avoid conflicting rulings. It is often entrusted to a constitutional court established specifically for this purpose (Abbas & AL-Mamouri, 2018, p. 655)

Any person who is harmed by legislation that contravenes the constitution when the interest requirement is fulfilled (i.e., that he has been harmed or is likely to be harmed in the future) has the right to file this complaint before the competent court, even if the legislation has not yet been applied. The court has the right to rule against it if it finds it unconstitutional; otherwise, it may rule to dismiss the complaint without prejudice to any existing dispute before another court (Badir, 2017).

Most countries do not allow “*actio popularis*” to be filed before the constitutional judiciary, which means they require an interest on the plaintiff’s part. However, a few countries, such as Croatia, allow anyone to file a constitutional complaint directly to the constitutional judiciary against any legal provision without having to prove harm or the violation of basic rights. In this case, the citizens perform their duty as guardians of the constitution (Venice Commission, 2010, p. 21-22)

Countries have adopted many different models of direct access to the constitutional judiciary and direct individual complaint. These include “*actio popularis*, which enables the individual to file a complaint directly to the constitutional judiciary without the requirement of interest; the “individual suggestion,” wherein the individual submits a proposal that the constitutional court verify the constitutionality of a law, which the court then has the right to reject or accept; and the “quasi *actio popularis*”, which does not require that the plaintiff be directly affected by the law being objected to (Venice Commission, 2010, p. 32).

The researcher suggests that direct individual access to the constitutional judiciary can be defined as the individual's right to file an original and direct complaint directly before the constitutional judiciary to appeal an unconstitutional law and obtain a ruling that it is unconstitutional.

It must be noted that the indirect individual access means allowing individuals to plea unconstitutionality during the consideration of a lawsuit filed before the courts. This is provided that the defense is submitted by one of the parties to the lawsuit and that the legal text pleaded as unconstitutional is applicable to the lawsuit, whether it is a civil, criminal, or administrative lawsuit. The judge must decide on the seriousness of the appeal and then refer it to the Constitutional Court (Atiya, 2017, p. 651; Hamad, 2019, 470).

2.2 Advantages and disadvantages of direct individual access to the constitutional judiciary

In order to discuss the importance of allowing individual access to the constitutional judiciary, it is necessary to discuss its advantages and disadvantages.

2.2.1 Advantages of direct individual access to the constitutional judiciary

One of the most prominent advantages of direct individual access to the constitutional judiciary is the ease of access granted to litigants, which enables them to defend their rights and clarify aspects of their defense before the constitutional judiciary (Adrido, 2017, p. 181). People have a natural right to obtain and defend constitutionally guaranteed rights via the constitutional judiciary. Direct access also enables citizens to play a prominent role in confronting laws that may be unconstitutional (Zaanoun, 2019, p. 18).

Individual access to the constitutional judiciary offers a shortcut that avoids the long wait required to reach the constitutional judiciary through indirect appeal. It also enables individuals to avoid the other negative aspects of indirect appeal, which constitute an obstacle to reaching the constitutional court. Perhaps the most prominent of these is the refusal of access when the substantive courts looking into the subject of the dispute are not convinced of the seriousness of the plea.

The researcher supports the advantages of the direct individual access to the constitutional judiciary, as an effective mean to protect constitutional rights and freedoms. It also saves time and shortens procedures, compared to the indirect access to constitutional judiciary. It, however, makes constitutional courts susceptible to exhaustion because of the massive number of expected complaints.

2.2.2 Disadvantages of individual access to the constitutional judiciary

One of the most significant disadvantages of direct individual access to the constitutional judiciary is its misuse, which can increase the number of complaints of unconstitutionality and prevent the constitutional court from carrying out its duties (Abu Maree & Shehab, 2021, p. 150). This can significantly increase the court's workload and affect its ability to provide timely justice for claims within its jurisdiction (Gentili, 2012, p. 206).

Salman argues that the potential for misuse of the right to litigation regarding the unconstitutionality of laws and regulations should not deprive individuals of that right but that sufficient guarantees should be put in place to prevent it. This could be done by forming a committee of court members who could examine the appeals and exclude those deemed false or malicious or by imposing a substantial fine on those who lose their case to ensure that all appeals are serious (Salman, 2014, p.430).

The researcher's opinion is to adopt the individual access to the constitutional judiciary because it has advantages, such as effective protection of constitutional rights and freedoms, easy procedures, and saving time. There are, however, disadvantages to the direct individual access, such as the massive increase in the number of complaints filed to the constitutional judiciary, which hinders its ability to carry out its duties efficiently. Such disadvantages may be controlled by setting up a committee inside the court that reviews the claims to ensure they fulfill the requirements in form before submitting them to the constitutional judiciary. A reasonable bail may also be required to be paid by the plaintiff to ensure the seriousness of the claim.

It is worth mentioning that the few states that have granted individuals direct access to a constitutional judge to file a complaint of unconstitutionality have curtailed this right with numerous restrictions to prevent abuse of this right.

3. Legal grounds for direct individual access to the constitutional judiciary in Kuwaiti and Iraqi law

The constitutional basis for the direct individual access should be identified in the Kuwaiti and Iraqi constitutions and the Kuwaiti and Iraqi laws should reflect them.

3.1. Constitutional basis for direct individual access to the constitutional judiciary in Kuwait

Article (173) of the Kuwaiti Constitution of 1962 stipulates the following: The Law shall determine the competent legal Authority to deal with the settlement of disputes with respect to the constitutionality of laws and regulations and shall determine this authority's jurisdiction and the procedure it shall follow. The Law shall guarantee to both the Government and those concerned the right to challenge the constitutionality of laws and regulations before that Authority. Where the above-mentioned Authority rules the law or the regulation to be unconstitutional, that law or regulation shall be deemed null and void.

The analysis of this legal text shows that it has come in a general form, and it does not refer at all to the right of individuals to directly enter the constitutional judiciary, but only to the right of those concerned to complain without specifying the way or means of complaining, which is left to be determined by the law.

Constitutional jurisprudence has majorly agreed that this article endorses direct complaints for appealing unconstitutionality and that this right is guaranteed. This includes individuals as well as public authorities; the law may not deprive individuals of this right, and only the law can regulate it and set requirements for it (Al-Saleh, 2003, p. 660-661).

However, the Kuwaiti Constitutional Court Law No. 14/1973 establishing the Kuwaiti Constitutional Court grants the right of direct appeal to the Cabinet of Kuwait and the National Assembly, excluding individuals. It also grants individuals the right to plead for unconstitutionality when they are a party to the substantive complaint, according to Article (4) of the law establishing the Kuwaiti Constitutional Court. It states as follows: Disputes shall be submitted to the Constitutional Court in one of the following two ways: a- At the request of the Cabinet of Kuwait and the National Assembly. b- If a court considers during the consideration of a case, whether on its own initiative or based on a serious plea made by one of the parties to the dispute, that the adjudication of the case depends on the ruling on the constitutionality of a law, a decree-law, or regulation that stops the consideration of the case and refers the matter to the Constitutional Court to adjudicate the same.

The parties concerned may appeal the ruling issued based on the lack of seriousness of the plea to the Appeals Examination Committee at the Constitutional Court within one month of the aforementioned ruling issuance, and the said committee shall decide on such appeal as a matter of urgency.

Therefore, Kuwaiti law contradicts the Kuwaiti constitution regarding the right of individuals to appeal directly. However, people have the right to submit a sub-plea for complaints being considered by the courts, whereupon the judge shall decide whether to refer the plea to the Constitutional Court (Al-Hamida, 2020, p. 207).

Al-Tabtabaee (2012) found that the rulings of the Kuwaiti Constitutional Court from 1973 to 2007 took a proactive attitude, as many complaints were dismissed because it considered that appeals by individuals through the subject matter court constituted a direct appeal and thus in violation of the law establishing the Constitutional Court, which does not allow individuals to appeal directly but allows them only to plead for unconstitutionality in the following cases:

1. If the appeal for unconstitutionality is referred to in the substantive statement of complaint: The Court ruled that the complaint was dismissed because it had been raised without using the sub-plea method, in violation of the provisions of the Constitutional Court law, because the plaintiffs made an original request to refer the plea of unconstitutionality of Decree-Law No. 131/1986 to the Constitutional Court for adjudication. Thus, the court considered that this did not constitute a plea in a substantive dispute but an original request to appeal unconstitutionality.

2. If the appeal is submitted directly to the Constitutional Court or the Appeals Examination Committee: The Constitutional Court ruled for dismissal of the appeal submitted directly to the Constitutional Court by a former member of the Municipal Council regarding the unconstitutionality of Decree-Law No. 191 of 2003 to form a committee to carry out the competencies of the Municipal Council.

3. If the Appellant expresses its defense before its opponent presents its defense in the substantive complaint, the court

ruled that it is a direct appeal for unconstitutionality if the Appellant refused permission to issue a statement to appeal for unconstitutionality before its opponent expresses its defense in the first hearing before the subject matter court in terms of the complaint filed to cancel an adverse administrative decision.

The Kuwaiti Constitutional Court adopted another concept of direct complaint of constitutionality in 2007, wherein it ruled that the plea of unconstitutionality is a substantive plea that may be presented in any case of the complaint (Constitutional Appeal No. 16/2006 hearing dated 27/5/2007) and that there is no objection to presenting it within the statement of complaint because this does not entail moving the constitutional complaint directly to the Constitutional Court but it remains for the subject matter court to assess the seriousness of the plea.

Article (4 bis), which was added to law No. (14) of 1973, as amended by law no. 109/2014, establishing Kuwait's Constitutional Court, stipulates as follows: Every natural or juridical person shall have the right to appeal directly to the Constitutional Court on an original complaint before the Constitutional Court in any law, decree by law, or regulation, if it has serious suspicions that it violates the provisions of the Constitution, and has a direct personal interest in the appeal, provided that the notice of appeal is signed by three advocates acceptable to the Constitutional Court. The Appellant shall deposit five thousand dinars upon submitting the notice of appeal as a guarantee, and the Clerk's Administration will not accept the notice of appeal without proof that bail has been posted. It is sufficient to deposit one bail in the case of multiple Appellants if they file their appeal with one notice, even if the reasons for the appeal are different. The appeal shall be presented to the court meeting held in the Consulting Chamber. If the Court sees that the appeal falls outside its jurisdiction, that it is not acceptable in form, or that it is not serious, it shall decide to dismiss it and forfeit the bail by a decision that is not subject to appeal for summary grounds that shall be recorded in the hearing minutes; and, if the court decides otherwise, it shall set minutes of hearing to review the appeal.

3.2 Constitutional basis for direct individual access to the constitutional judiciary in Iraq

The Iraqi Constitution of 2005, Article (93), stipulates as follows: The Federal Supreme Court shall have jurisdiction over the following: First: overseeing the constitutionality of laws and regulations in effect... Third: Settling matters that arise from the application of the federal laws, decisions, regulations instructions, and procedures issued by the federal authority, and the law shall guarantee the right to direct an appeal before the Court to the Council of Ministers and those concerned individuals, among others.

Here, those concerned individuals refers to anyone who has an interest in filing a complaint and who has been affected by the legislation being repealed (Atiya, 2017, p. 644). Therefore, the text clearly grants individuals the right to a direct appeal before Iraq's Federal Supreme Court.

Federal Supreme Court Law No. 30 of 2005 stipulates in Article (4)/Second as follows: "The Federal Supreme Court shall carry out the following tasks: [...] Second: Settling disputes concerning the legality of laws, decisions, regulations, and instructions... And that shall be based on a request by a court or official body, or an interested plaintiff." Article (9) of the law stipulates the issuance of an internal system for the court that defines the operating procedures, the manner of accepting applications, and the procedure regarding pleading. Iraqi's Supreme Court Law No. 1 of 2005 stipulates in Article (6) that the plaintiff shall have an interest in the subject matter of the complaint.

Article (4) of the Federal Supreme Court Law was amended by the First Amendment Law No. 25 of 2021 dated 18/3/2021. It stipulates that Article (4) of the law shall be abolished and replaced with the following: The Federal Supreme Court shall have jurisdiction over the following: First: Oversee the constitutionality of laws and regulations in effect. Second: Interpreting the provisions of the Constitution. Third: Settling matters that arise from the application of federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal before the Court to the Council of Ministers and those concerned individuals, among others.

The researcher contends that the text of Article (4) completely coincides with the constitutional text in Article (93) before it was amended. The previous text was clearer in defining the parties that have the right to appeal the unconstitutionality of a law, including allowing the interested plaintiff to appeal directly.

4. Requirements for individual access to the constitutional judiciary under Kuwaiti and Iraqi law

Direct individual access to the constitutional judiciary needs to be organized in a way that does not burden the constitutional court or supreme court with a large number of complaints (Gentili, 2012, p. 163). It also requires a set of prerequisites, such as time limits, the requirement for legal representation, and procedural prerequisites, but this carries the risk of increasing the obstacles to access (Venice Commission, 2010, p. 32). Therefore, it is necessary to discuss the requirements stipulated by Kuwaiti and Iraqi law.

4.1 Direct personal interest

The law establishing the Kuwaiti Constitutional Court stipulates the fulfilment of a personal and direct interest requirement for the plaintiff in the direct original complaint, whether a natural or legal person, under Article (4 bis). The Kuwaiti Constitutional Court has ruled that every natural or legal person may file a complaint directly before the Constitutional Court if serious suspicions arise regarding the violation of the legal text of the constitution and the plaintiff has a direct personal interest in the appeal (Technical Office of the Kuwaiti Constitutional Court, 2015, p. 665-673: Kuwaiti Constitutional Court ruling in direct Appeal No. 13 of 2015 dated 16/12/2015).

The Consulting Chamber of the Kuwaiti Constitutional Court has ruled that the Appellant shall have a personal and direct interest in accordance with the explicit requirement contained in Article (4 bis) of the Kuwaiti Constitutional Court Law. Therefore, the law posits that every individual has a presumed interest in appealing legislation that contradicts the constitution. Accordingly, an appeal that aims to nullify a law merely to preserve the rights and freedoms of others is not accepted (Decision issued by the Consulting Chamber regarding direct appeal No. 2 of 2020 dated 24/2/2021: <http://www.cck.moj.gov.kw>).

The interest requirement is intended to prevent the use of constitutional complaints to express theoretical opinions without relating them to the plaintiff's personal and direct interests (Bouresli, 2016, p. 36) and to avoid waste of time and money resulting from useless pleas; the interest criterion requires that there be a practical benefit to the Appellant if the ruling is in its favor (Al-Kandari, 2020, p. 228).

The right to resort to the Constitutional Court by means of a direct complaint is granted to anyone who has an interest, whether they are citizens or foreigners, as long as the plea is considered relevant to the law in question and it is perceived that the foreigner is appealing the unconstitutionality of a law relating to the deportation of non-citizens or the regulation of their residence. Although this is practically impossible because public authorities have the right to deport foreigners for reasons related to public security (Al-Mutairi, 2019, p. 123).

A direct appeal was submitted regarding the unconstitutionality of Article (4 bis) of the law establishing the Kuwaiti Constitutional Court because it requires that the statement of the complaint shall be signed by three advocates acceptable to the Constitutional Court and that the appellant shall deposit five thousand dinars as bail, which contradicts the principle of equality and derogation from the individual's right of litigation. The Consulting Chamber of the Kuwaiti Constitutional Court decided to dismiss the appeal and obliged the Appellant to pay the court's expenses and forfeit the bail because the Appellant did not prove that the plea fulfilled the requirement of personal and direct interest (Technical office of the Kuwaiti Constitutional Court, 2015, p.707-712: Decision issued by the Consulting Chamber in direct appeal No. 1 of 2014 dated 11/5/2015).

The personal and direct interest requirement for the plaintiff regarding direct constitutional complaints has been criticized because a constitutional complaint is filed to advocate for the legality and advance the public interest, as it is a substantive complaint that challenges the constitutionality of a law (Al-Kandari, 2020, p. 232-233).

The Iraqi Constitution of 2005 granted those concerned the right to appeal directly before the Federal Supreme Court. The Statute of the Federal Supreme Court of Iraq clarified in Article (6) the terms of the interest requirement: If a Plaintiff requests a ruling on the legality of a provision in a law, legislative decision, regulation, instruction, or order, the request shall be submitted by filing a complaint that fulfills the requirements stipulated in Articles (44)-(45)-(46)-(47) of the Civil Procedure Law, and the complaint shall be filed by an advocate with absolute power. The case should also meet the following requirements:

1. Plaintiff in the subject matter of the complaint shall have a current, direct, and influential interest in the Plaintiff's legal, financial, or social status.
2. Plaintiff shall provide evidence that actual harm has been caused thereto as a result of the legislation required to be abolished.
3. The damage shall be direct and independent of its elements and could be eliminated if a ruling is issued that the legislation required to be abolished is illegal.
4. The damage shall not be theoretical, future expanded, or anonymous.
5. The Plaintiff should not have benefited from the challenged legal text.
6. The legal text challenged as unconstitutional and to be abolished shall truly be applied to the Plaintiff or is intended to be applied.

One of the criticisms of this article is that the requirement that the interest must affect the plaintiff's financial position affects his rights and obligations even though the social position is not related to law, unless it affects one's legal position. The requirement that the plaintiff must not have benefited from the law to be abolished is also criticized because a law may provide some advantages while violating the constitution, and it is in the public interest for such a law to be abolished. Accordingly, this requirement prioritizes the private interest over the public one (Atiya, 2017, 646-647).

The rulings of the Federal Supreme Court of Iraq regarding the interest requirement are in accordance with the requirements of Iraqi law. The Federal Supreme Court of Iraq ruled regarding the unconstitutionality of Article 14\ first of the third amendment Law of the Law No. 21 of 2008 on governorates that are not part of a region. It stipulated that the councils of governorates and counties shall continue to work until the results of new council elections are announced. The court ruled that the interest requirement in the direct constitutional complaint was met, which means that the constitution shall guarantee its protection because the right protected by the constitutional complaint is a right guaranteed by the constitution and recognized by law. The Court ruled that a constitutional right might be violated and that the interest was not theoretical or abstract but real because every citizen has the right to be an elector or be elected (Federal Supreme Court of Iraq website: <http://www.iraqfsc.iq/ethadai.php>: The ruling of the Federal Court No. 117\ federal\2019).

In another case, the Court ruled for dismissal of a complaint appealing Article (1) of the first amendment Law of the United Pension Law because the interest requirement of Federal Supreme Court Law No.1 of 2005 was not met. The statute stipulates that the complaint must relate to the legal, financial, and social position of the plaintiff and involve the potential for direct and independent damage rather than theoretical, future expanded, or anonymous damage (Federal Supreme Court of Iraq website: <http://www.iraqfsc.iq/ethadai.php>: The ruling of the Federal Court No. 5\ federal\2020).

4.2 Obligation to be legally represented

The legal representation obligation for direct individual access to the constitutional judiciary is meant to help the plaintiff and to raise the quality of the complaints. However, this mandatory requirement means that money must be paid to the advocate, which limits the ability of some individuals to access the constitutional judiciary because of their financial situation. Thus, financial assistance should be provided to plaintiffs (Venice Commission, 2010, p. 33).

Kuwaiti law requires that the notice of appeal be signed by three advocates acceptable to the Constitutional Court. This requirement is meant to prevent formal mistakes in actions filed before the Constitutional Court until they are examined by advocates belonging to the Lawyers Association (Al-Mutairi, 2019, p. 125).

Article 6 of the Statute of the Federal Supreme Court of Iraq requires that the statement of the constitutional complaint be submitted by an advocate under the power of attorney to ensure the seriousness and objectivity of the appeal, and the power of attorney shall be unlimited.

An appeal may not be submitted by the person in his personal capacity. It must be submitted by an advocate with absolute power; otherwise, it will be dismissed in form, and the situation cannot be rectified through the advocate's power of attorney after the complaint is filed. The requirement regarding the advocate with absolute power is imposed because advocates are more knowledgeable and aware of the proper court procedures than the plaintiffs are and in order to reduce the appeals

submitted by those who seek to disrupt the court (Hamid, 2017, p. 250). This requirement has been criticized because it is an obstacle to filing complaints. Some argue that the Court should assign an advocate to defend the plaintiff to ensure justice, as is done in felony cases (Issa, 2020, p. 509)

The Federal Supreme Court of Iraq ruled for the dismissal of a direct constitutional complaint in form because the statement of complaint was submitted by the plaintiff in his personal capacity, contrary to the Statute of the Federal Supreme Court, which stipulates in Article 20 that the complaint must be filed by an advocate with absolute power (Federal Supreme Court of Iraq website: <http://www.iraqfsc.iq/ethadai.php>: The ruling of Federal Court 115\ federal \ notice \ 2013).

4.3. Depositing financial bail

The law of the Kuwaiti Constitutional Court states in Article (4 bis) that bail of five thousand dinars shall be deposited upon registering the statement of appeal. The law requires only one bail if one appeal statement is submitted by many appellants, even if the reasons for the appeals are different. If no bail is deposited, the clerk's administration will not accept the statement of appeal. If the Constitutional Court, held in the Consulting Chamber, finds that the complaint falls outside its jurisdiction or is not acceptable in form, the bail shall be forfeited in a decision that is not subject to appeal.

Under the law, the bail continues in deposit until the appeal is accepted by the Consulting Chamber. The bail is repaid when the appeal is accepted and is forfeited when the appeal is rejected by a decision of the Consulting Chamber (Al-Hamida, 2020, p. 210). Given the seriousness of these appeals, the bail is not refund until a ruling of unconstitutionality is issued (Al-Kandari, 2020, p. 243).

This requirement is necessary to establish the seriousness of the appellant (the amount of the bail is higher than the bail amounts for other legal complaints) and to reduce the time the court spends considering these complaints and issuing rulings. The bail ensures the validity of the complaint in form and subject (Al-Mutairi, 2019, 125).

The high level of the bail amount is criticized because it violates the principle of a fair trial and limits legal protection to the wealthy elite (Bouresli, 2016, p. 39). Any such fees should be relatively low and should be reduced in accordance with the financial position of the plaintiff to prevent the abuse of the right to file direct individual complaints to the constitutional judiciary (Venice Commission, 2010, p. 34). Some have suggested reducing the amount of the bail (Al-Hamida, 2020, p. 214) or exempting some individuals from the need to pay fees for constitutional complaints, as is done for other legal complaints (Al-Mutairi, 2019, p. 126)

The first article of Iraq's Statute of the Federal Supreme Court requires that the bill be endorsed by the Court president or his authorized representative and the fee paid. It shall be recorded in the special register in accordance with the precedence of its submission and should bear the Court seal and the registration date. The plaintiff shall be given a receipt signed by the clerk in charge of receiving it, in which the number of the complaint and its registration date is indicated. Article 18 of the same Statute also indicates that the rulings of [Judicial Fees Law No. 114 of 1981](#) shall be applied to complaints, disputes, and appeals that fall within the Court's jurisdiction.

The Law stipulates in Article 10 that the fees for all complaints shall not be less than 50,000 Iraqi dinars; the Law does not specify fees for constitutional complaints. The researcher considers that it would be better to indicate the judicial fees explicitly in the Federal Supreme Court Law in a way that would make everyone aware of them.

Some argue that fees should be imposed on all complaints submitted to the Federal Court that lose or that seem designed to disrupt the court in order to affirm the seriousness of the appeal process and reduce appeals that are likely to lose (Hamid, 2017, p. 270). The researcher disagrees with this opinion and argues instead that it would be better to impose a bail in the Iraqi law that must be forfeited if it is proven that the direct constitutional complaint is not serious.

4.4 Procedures for individual access to the constitutional judiciary in Kuwaiti and Iraqi law

Article 8 of the Law of Establishing the Constitutional Court stipulates that the procedures regarding litigation before the Constitutional Court are established through a statement on regulations made by the Court and issued under a decree. These procedures are applied to matters that are not covered by the regulations of the Court of Cassation. The decree was issued

when the regulations of the Constitutional Court were issued in 1974. It was thus issued many years before the amendment of the Constitutional Court Law that allowed individuals to file direct complaints. The judicial procedures are listed in Article (4 bis) of the Kuwaiti Constitutional Court Law, which was added to the Court Law under the amended Law of 2014.

The Law requires in Article (4 bis) that the appeal be presented to the Court meeting held in the Consulting Chamber. If the Court finds that the appeal does not fall within its jurisdiction, is not acceptable in form, or is not serious, it will not accept it, and the bail will be forfeited. Its decision is definitive and not subject to appeal. The decision shall be recorded in the hearing minutes; if the Court decides otherwise, it shall set minutes of the hearing to review the appeal.

The explanatory memorandum of Law No. 109 of 2014, which amends several provisions of Law No. 14 of 1973 on the establishment of the Constitutional Court, establishes a Consulting Chamber comprised of members of the Court. It considers appeals from ordinary people to ensure that the Court is not overwhelmed with appeals.

This has been criticized because rulings of the Consulting Chamber are not subject to appeal. Some have recommended forming a committee that can ensure that the Constitutional Court is not overburdened with appeals that do not meet the formal requirements or are not serious (Al-Kandari, 2020, p. 227).

It has been argued that constitutional complaints presented to the Consulting Chamber cannot be deemed a direct complaint because the explanatory memorandum stipulates that the Consulting Chamber must consist of members of the Court; the argument is that a complaint presented to the Consulting Chamber and not directly to the Court is not a direct complaint; it can be rejected in the Consulting Chamber before being referred to the Constitutional Court (Bouresli, 2016, p. 35).

On the other hand, the Statute of the Federal Supreme Court of Iraq requires in Article 1/Third that the bill shall be endorsed by the President of the Court or his authorized representative from among the Members of the Court after the plaintiff has paid the legal fee in accordance with the amended Judicial Fees Law No.114 of 1981 and registered it in the special register of the Court in accordance with the precedence of its filing.

The researcher considers that Iraqi law has not established a Consulting Chamber or committee designed to examine direct complaints before presenting them to the Federal Supreme Court of Iraq; rather, they are presented before the Federal Supreme Court directly, which hinders the court and does not help the court to perform its work.

5. Conclusions

A few Arab constitutions have adopted direct individual access to the constitutional judiciary, most notably the Kuwaiti and Iraqi constitutions. The constitutional basis for the direct individual access should be identified in the Kuwaiti and Iraqi constitutions and the Kuwaiti and Iraqi laws should reflect them.

There is, however, an incompetency in legally regulating the direct individual access in Kuwait and Iraq. This makes this research of particular importance to regulate the direct individual access in legal terms in these two countries, which will develop the constitutional judiciary in both of them to be able to carry out its duties in overseeing the constitutionality of laws and regulations.

5.1 Results

1. Constitutions differ regarding individuals' right to direct individual access to the constitutional judiciary. Among Arab countries, those that adopted this right made sure to organize it by imposing certain requirements and clarifying the related procedures to prevent the constitutional judiciary from being overburdened with complaints.

2. Direct individual access has many advantages, the most prominent of which is that it facilitates individuals' access to the constitutional judiciary and enables them to defend their constitutionally guaranteed rights by challenging the constitutionality of laws that violate them, while avoiding the flaws of the indirect appeal method, which wastes time and hinders access to the Constitutional Court. However, direct individual access can be abused, which increases the number of complaints submitted to the constitutional court and impedes its work.

3. The Kuwaiti Constitution of 1962 guaranteed the right of concerned individuals to appeal the constitutionality of laws and regulations; however, the Kuwaiti Constitutional Court Law of 1973 did not grant individuals the right to direct

access. In its rulings, the Kuwaiti Constitutional Court tended to adopt a hard line regarding unconstitutionality cases via direct appeal; then, it followed a less strict approach until the Kuwaiti Constitutional Court Law was amended in 2014 to grant the right of natural and legal persons to direct access to the Constitutional Court. The Iraqi constitution explicitly provides the right of individual access to the Federal Supreme Court to concerned individuals, and the Federal Supreme Court Law of 2005 and the Statute of the Court accord with the constitutional text.

4. Kuwaiti and Iraqi law both set requirements for individual access to the constitutional judiciary, including the requirement for direct personal interest. However, the Statute of the Federal Supreme Court of Iraq overstates these requirements, which restrict the right of individual access to the Federal Supreme Court. The most prominent of these is the requirement that the plaintiff must not have benefited from any part of the law to be abolished.

5. Kuwaiti law requires that the notice of appeal be signed by three advocates acceptable to the Constitutional Court, while the Statute of the Federal Supreme Court of Iraq requires that the statement of complaint be submitted by an advocate with absolute power.

6. Kuwaiti law requires that bail of five thousand dinars be deposited upon submission of the notice of appeal; this is forfeited if the Consulting Chamber rules that the complaint falls outside its jurisdiction or is inadmissible. The Statute of the Federal Supreme Court of Iraq does not require bail but rather a fee, of an amount determined according to the Judicial Fees Law.

7. Kuwaiti law does not set out specific procedures for filing a direct individual constitutional complaint. It requires only that the statement of complaint is signed by three advocates acceptable to the Constitutional Court and that the appeal be presented to the Consulting Chamber after bail is posted. This is because the law establishing the Constitutional Court was amended in 2014 to allow direct appeals by natural and juridical persons without amending the Constitutional Court Regulation of 1974. However, the Statute of the Federal Supreme Court of Iraq sets out specific procedures for filing constitutional complaints because it was issued based on the Federal Supreme Court Law, which permits direct complaint for individuals. However, it has not stipulated the establishment of a committee that could examine direct complaints submitted by individuals before submitting them to the Federal Supreme Court.

5.2 Recommendations

1. Kuwaiti law should be amended to reduce the bail amount to be less than 5,000 Kuwaiti dinars to avoid impeding access to constitutional justice; the Statute of the Federal Supreme Court of Iraq should also be amended to stipulate that the bail must be refunded if the seriousness of the appeal is proven.

2. Kuwaiti law regarding the signature of three advocates on the notice of appeal should be amended to require the signature of only one advocate who meets the requirements for pleading before the Kuwaiti Constitutional Court.

3. Kuwaiti law should be amended to repeal the Consulting Chamber and establish a committee, tasked with considering direct complaints before submitting them to the Kuwaiti Constitutional Court to ensure that the formal requirements are met and the appeal is serious; Iraqi law should also be amended to establish a committee to verify the seriousness of the individual constitutional complaint and ensure that the requirements are met before submitting it to the Federal Supreme Court of Iraq.

4. The regulations of the Kuwaiti Constitutional Court should be amended to set out procedures for filing a direct constitutional complaint and make them clear, such as defining the data that must be available in constitutional complaints, methods of notification, allowing electronic means for notification, and the time given to respond to them in writing.

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