

Comment on the Case No. 3253/2014-Administrative/9: Article 169 of the Constitution and the Future of Judicial Review for the Acts of Sovereignty in Kuwait

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Abstract:

The Ahmed AL-Shimmary case is one of the most important constitutional decisions ever. The Court of Cassation ruled that, where citizenship is withdrawn by the Minister of the Interior, the Minister's action may be referred to the courts by way of Judicial review. In other words, the argument that, this was a 'sovereign act' and so not for the courts was rejected. The ruling was based largely on the Rule of Law (L'état de droit) which is established in Kuwait by Article 169 of the Constitution, giving the court's jurisdiction over all administrative acts.

This judgment opens up the possibility of further development in the field of judicial review. Significant developments of this type have occurred in Western Europe in the last few decades and have already started in a number of cases in Kuwait. The later part of this article considers the possibility of future developments here, under the following headings: type of error, under review; functions excluded from the courts' jurisdiction; disclosure of official facts; remedies; and court procedure.

Key Terms:

Ahmed AL-Shimmary case, revocation of citizenship Article 169 of the Constitution; jurisdiction of the courts over administrative acts by Judicial review; sovereign acts; many types of error considered on judicial review.

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Part 1: Introduction and General Background

A major step in confirming the Rule of Law in Kuwait was taken with the Court of Cassation case of Al-Shimmary⁽¹⁾. Later, we shall discuss more generally Art 169 of the Constitution which gives the court jurisdiction over all administrative dispute and which was the central provision in Al-Shimmary. As we suggest this major decision to be capable of growth in several direction. This of course assumes that it will be followed in later cases. We need not go into the controversial question of how far the rule of Precedent is followed in Kuwait. But we can surely agree that in a new and controversial field, when faced with a similar question, most judges will be influenced, no doubt to varying degrees, by what the judges of the Court of Cassation have done in Al-Shimmary.

As with other major constitutional cases, Al-Shimmary comes with a significant political background. This background is not the subject of this article. However, to understand the significance of this case, one needs to bear in mind that citizenship is a very important status. First it brings with it a lot of consequences in the political field.⁽²⁾ Again, citizenship unlocks the door to a generous ration educational, health and welfare benefits. A second point is that, given the fairly recent history of Kuwait, there may be significant doubt as regards who is or who is not a citizen. This makes it all the more important, who should determine this doubt: the Minister of the Interior or the Courts.

In a country with a free Parliament and media, these matters have frequently been the subject of reportage and controversy⁽³⁾.

(1) No (3253) of the year, 2014, administrative/9, judgment given on April 4, 2016.

(2) 2 For example: A member of the National Assembly shall: (a) 'be a Kuwaiti by Origin'.

(3) See The Economist, November 22, 2016 <http://www.economist.com/node/21710679/>: To silence dissidents, Gulf states are revoking their citizenship Since the gulf states became independent from Britain in the latter half of the 20th century, their ruling families have sought fresh methods to keep their subjects in check. They might close a newspaper, confiscate passports or lock up the most troublesome. Now, increasingly, they are stripping dissidents, =

More recently, there has been more cheerful news⁽⁴⁾. However, the point is not how the political winds are blowing: but whether there is an entitlement to go to a Court for this important matter to be settled.

The rest of this Article is organized as follows: Part 2 Summarizes the judgment in Al-Shimmary. Then Parts 3 (Sovereignty), 4 (rule of law) and 5 (express exclusions from jurisdictions) elaborate on matters directly connected with Al-Shimmary. The longest Part 6 attempts to make a prediction of the Future Growth of Judicial review in Kuwait, under the following headings:

- (i) Type of Legal Error
- (ii) What types of function are excluded from the Court's jurisdiction?
- (iii) Disclosure of official facts
- (iv) Remedies
- (v) Court Procedure

The Conclusion follows in Part 7

Part 2: Summary of Al-Shimmary judgment

The facts , in Al-Shimmary , were that the applicant had acquired citizenship, at birth, from his father, who had citizenship from the time of Kuwait's 'Independence' (or, to be precise, when Kuwait ceased to be a British 'protected state'). Then in 2014, the applicant's citizenship was revoked by the Minister of the Interior, because his citizenship had allegedly been obtained by fraud and forgery⁽⁵⁾.

= and their families, of citizenship, leaving them stateless. Bahrain is an energetic passport-stripper... Neighboring states are following suit. Kuwait has deprived 120 of their people of their nationality in the past two years, says Nawaf Al Hendal, who runs Kuwait Watch, a local monitor'...See also : "Barghash Nationality Withdrawal" Arab Times : 20/10/2015: ' Kuwait revokes citizenship if opposition activist', World News, Reuters : Sept 20,2014

(4) 4 'Amir agrees to reinstate revoked citizenships: Kuwait Times 06/03/2017.

(5) Though note that the applicant was perceived as a political opponent of the Government.

The applicant complained to the Court of First Instance which held that it had no jurisdiction to hear the case. This ruling was upheld in the Court of Appeal, but reversed in the Court of Cassation.

The case was returned to the Court of First Instance for the facts to be established and this Court made a ruling directing the Government to restore the citizenship. It also ordered the payment of the equivalent of KWD 15,000 temporary compensation (opening the way for him later to seek a larger amount) because the Government had shut down a broadcasting station owned by Mr. Al-Shimmary, on the basis that media licenses may be owned only by citizens..

In addition, according to a newspaper ‘ The ruling will open the way for a number of opposition figures to resort to court, who were stripped of their citizenship amid a government crackdown on the opposition during a political crisis’⁽⁶⁾.

In this case, the law involved was the Nationality Law 1959, by Article 13 of which ‘ The nationality of a (naturalized) Kuwaiti national...may be revoked by Decree upon the recommendation of the Minister of the Interior in the following cases: where naturalization has been acquired by virtue of fraud or on the basis of a false declaration’. But the central question was, whether the fact that there had, or not been forgery, or fraud was to be settled by the Minister finally; or by the Courts, by way of Judicial review.

The Minister’s argument that the courts had no jurisdiction was grounded on Art.1(5) of the Jurisdiction of Administrative Disputes decree-law No. 20 of 1981. This law establishes a specialized circuit to consider administrative disputes and, significantly, states that the administrative circuit has ‘exclusive jurisdiction for... the cancellation of [cancellation] final Administrative orders...’ However, the law went on to stipulate that three subject areas

(6) Kuwait Times, October 10, 2016.

were excluded of which the one relevant here is ‘matters pertaining to nationality’.

To counter the Minister’s argument, the applicant had two alternative arguments. The first of these is Art 27, which states that ‘no deprivation or withdrawal of nationality may be revoked ...only within the limits of the Law.’ The last few words, emphasized here, were taken to draw with them, the idea that, because law is applied in the courts, the courts cannot be excluded from jurisdiction.

The Court’s second and wider basis for the judgment and also the main focus of this article was Art. 169 of the Constitution which has its equivalent in many other constitutions⁽⁷⁾. This states : ‘Law shall regulate the settlement of administrative suits by means of a special Chamber or Court, and shall prescribe its organization and the manner of assuming administrative jurisdiction including the power of both nullification and compensation in respect of administrative acts contrary to law’.

The Court of Cassation, held in the central part of its judgment, that ‘administrative measures and decisions are subject to judicial control’ (page 3). Does that statement mean all administrative measures and decisions? In particular, what is the position in regard to “matters pertaining to nationality’ The answer given by the court was that (page 3): ‘...the exception [from the court’s jurisdiction] shall be confined to decisions related to granting (or rejecting) citizenship as such matters are related to the state entity and its right to choose those who would have its nationality in the light of its absolute discretion...’.

In short: where citizenship is refused, then this refusal is not reviewable; but where citizenship is revoked by the Minister, this action is reviewable, by a court. But in each of these cases, either revocation or refusal, an ‘administrative dispute’ is involved; so

(7) For instance Ireland’s Constitution, Art 34.3 states ‘the High Court shall have full and original jurisdiction in and power to determine all questions whether of law or fact’. For commentary, see Kelly, Hogan and Whyte, *The Irish Constitution* (Lexis, Nexis, 4th ed, 2003) 753- 771 .

why is a difference drawn? There are two possible explanations and it seems that in the judgment both were relied upon.

The first is that (as noted above) Art 27 applies only where citizenship is revoked. The other explanation is based on the notion of sovereignty. We need to devote more time to sovereignty than the citizenship point, because this is a single subject. By contrast, sovereignty is potentially wider. If it were to be given a wide definition, then the effect would be to limit the fields which are subject to a Court's power of judicial review. In fact, as we shall see in the next Part, sovereignty was given a narrow definition.

Part 3: Sovereignty

Sovereignty has both an internal and external aspect. But here we are concerned only with the internal aspect. This refers to the fact that, in each state there are certain 'high political decisions' which may be placed above the law⁽⁸⁾. This idea underlies Art. 2 of the Law Regulating the judiciary, 1990, which states that 'Courts shall not have jurisdiction over the activities of sovereignty' Now sovereignty (or anything like it) is not mentioned in Art.169: the Article is worded as if it applied to all 'administrative disputes', without exception. Yet, despite this, the Court of Cassation accepted⁽⁹⁾ that the exception was good law. In summary, disputes about sovereign acts cannot be raised in courts.

(8) If it is asked whether there is a conflict between this idea and the idea of Human Rights, then this matter is discussed in Part 6.

(9) It is suggested that, although the court did not go deeply into the matter, the exemption for sovereignty may be justified on the following basis. Art. 169 uses the word 'administrative', for example referring to 'administrative measures and decisions'. And, in the definition of 'sovereignty', given in the judgment, and quoted below, there is a clear contrast between 'sovereign acts' and 'administrative authority'. This suggests that the Court intended to indicate that the field of the 'administrative authority' ends where 'sovereign acts' begin. In other words, the Court implicitly accepted the exclusion of 'sovereign acts' from its jurisdiction.

The proposition that sovereignty includes the grant of citizenship was explained by the Court in its statement (quoted in Part 2 said that a grant of citizenship is 'related to the state entity'. Connected with this is the definition just given in which the Court that 'sovereign acts [include] actions taken in its absolute discretion...to preserve the sovereignty of the state, its entity and national unity' (page4). 'These two observations plainly link up with each other to establish that sovereignty removes the grant of citizenship from the court's jurisdiction.

This leads on to the question of what is sovereignty. In response to an argument based on sovereignty, the Court noted that in the law just mentioned, the legislature did not define this key term, Consequently, the definition was a matter for the Court. The Court filled the gap with the following rather narrow definition:

‘It is established in this court that sovereign acts are decisions issued by the government as a ruling authority not as an administrative authority and issued within the framework of its political supreme authority, which may take actions in its absolute discretion to serve the security and safety of the country and to preserve the sovereignty of the state, its entity and national unity. The administrative decision was issued in its capacity as an administrative authority, within the framework of law applicable and is therefore subject to the supervision of Courts ‘ (page 4).

The natural result was to give a narrow definition of sovereignty the area which is cordoned off from a court’s review. We return in Part 6, to the wider implications, for judicial review of the idea of sovereignty .

Part 4: Rule of Law, in the context of Judicial Review

It is time to focus on Art 169. We may set the scene by mentioning the major constitutional principle which, explicitly or implicitly, find a place in many of the world’s constitutions. It is the Rule of Law⁽¹⁰⁾. Many definitions have been given of this term. At its most basic, this consists of three connected ideas:

Everyone, including the government and its servants are subject to the law and every administrative act must be legally justified.

- i) Questions of legality must be determined by independent judges.

(10) See generally, Tom Bingham, *The Rule of Law* (Penguin Books, 2010); Katrin Blasket, *The Rule of Law in China* (Springer, 2015).

10 For the independence of the Judges , see Constitution, Arts 162, 163.

iii) The law should be public and precise.

In order to make idea (ii) work in practice, there must be an entitlement to actually get to Court. The Kuwaiti constitution takes two provisions to cover this important subject. By Article 166, ‘The right of recourse to the Courts is guaranteed to all people’; not just citizens, notice this. Art 166 is a general provision which, to judge by ways in which its equivalents have been used in other jurisdictions, may mean that: Courts should be continentally located; court fees should not be too high; legal aid should be available; or should not be necessary to get some official permission before taking a legal action. The second provision, Art 169 is a bit more specialized. It reflects the fact that the State and its ministers and public authorities have always been identified as a possible danger to individual rights.

Thus Art 169 focuses on the need for access to the Courts, for persons (again this Article is not confined to citizens) who consider that they have been treated wrongly by the State and its agencies. It ensures that, however high is the public authority concerned, the individual has access to an independent court to test whether the public authority has respected the law and Constitution. This is exactly what happened in the Al-Shimmary case, as we saw in Part 3.

Part 5: Express exclusions from jurisdiction

What guidance does Al-Shimmary give regarding the attitudes of future courts in Administrative cases, in fields other than citizenship?

In Part 2, we noted that the central provision in Al-Shimmary is the Jurisdiction of Administrative Disputes Decree 1981, which establishes the administrative circuit of the courts. Art 1.5 of this law identifies three broad fields which are excluded from review, ‘... [the Courts’ jurisdiction includes all final administrative

orders] excluding orders issued in respect of matters pertaining to nationality, residence and deportation of non- Kuwaitis, licences of issuance of newspapers and magazines, and houses of worship’.

In this Part we focus on these three exclusions from jurisdiction. The first thing to be said is to recall the facts in *Al-Shimmary*. There the court held that despite the fact that Art 1.5 excludes matters ‘pertaining to nationality’ the Court did have jurisdiction to check on revocation of citizenship. This result was based on Art 169 (court has jurisdiction) and in part on Art 27 (revocation of citizenship).

But, it was not made clear in the judgment whether both had to be present, in order to reach the Court’s conclusion that revocation of citizenship is not excluded from the Court’s jurisdiction.

The other way of understanding the reasoning in the Judgment is to take it that these two (Art 169 and Art 27 on citizenship) were alternatives so that only one had to be present for a complaint to succeed. The practical result of taking the second of these two possibilities would arise in a case which centered on the words ‘matters pertaining to ...residence and deportation of non-Kuwaitis...’. What if a case arose about the deportation of an expatriate? On the one hand, there is the broad umbrella of Art 169 which stands for the proposition that, apart from sovereignty, all other administrative disputes may be brought before a Court.

On the other hand, most of the human rights provisions in the Constitution seem to be directed at the protection of citizens, not residents. This means that, although a resident could as the first condition rely upon Art.169, they would not be able to draw upon any human rights article. The question is whether expatriates, who have no equivalent of Art 27, can shelter under the umbrella of Art 169. At the moment, this seems to be unclear.

Secondly, in a liberal development, a law of 2006⁽¹¹⁾ had already been passed, removing the exclusion regarding newspaper and magazine licenses so that these are no longer placed beyond the courts' surveillance. But it remains of historic interest that even without this legislative intervention, there would have been a good argument based on Art. 169, coupled with the strong constitutional Arts. 36 and 37 (freedom of opinion and freedom of the press) for saying that the Constitution required that judicial review was not excluded.

As regards the licenses for 'house of worship', bearing in mind conditions in the Middle East, it is easy to understand a Government wanting an interpretation which removed, for instance the function of licensing churches from court surveillance. But, as against this, it is relevant here to take into account the religious practice article of the Constitution. This is Art. 33 which is a notably strong provision, whether by comparison, with the other human rights Articles in the Kuwait Constitution or with equivalent articles elsewhere. Art. 33 states: '... freedom of belief is absolute. The State protects the freedom of practicing religion in accordance with established customs, provided that it does not conflict with public policy or morals'.

Surely this provision, coupled with Art. 169 of the Constitution, quoted above as interpreted in Al-Shimmary, would make it likely that any dubious practice by the Minister of Awqaf and Islamic affairs in relation to the issue of the licence for a church would be reviewed by a Court?

Part 6: Future Growth of Judicial review

In this Part, we look beyond the three express exceptions contained in the Law on the Jurisdiction of Administrative Disputes Decree, which were examined in the last Part and ask whether Al- Shimmary may lead to an extension in other directions of

(11) Law No.3 of 2006 Regarding Publications and Publishing, Art 14.

the Court's jurisdiction. This seems quite possible. In the first place Al-Shimmary has put the Court's jurisdiction in the field of administrative disputes on a firm Constitutional foundation. Secondly, there is also the major economic fact of the fall in the price of oil. This will lead to cut-backs in the welfare state. These unexpected reversals in the social-economic position of citizens, which has been on a steady rising curve, over the past 50 years, is likely to result in law-suits, brought by some aggrieved citizens. Thus there will probably be an increase in cases coming to Court which will pose novel and difficult questions of legal doctrine and policy choice; and so give an opportunity for the development of the law. A third, general point is that the Kuwaiti judiciary is open to the challenge of making the necessary innovations. There are signs of this in the recent Kuwaiti cases summarized later in this Part.

This type of expansion of jurisdiction is a development through which the courts in many other jurisdictions have had to feel their way, starting perhaps 30-40 years ago. Based on experience in some of them, we may offer, in this Part examples of the sort of problematic areas which are likely to come before the courts in Kuwait, in the coming decade. Many of these are matters on which little guidance is provided either in Art 169 or the Administrative Disputes Decree. As result, it is the judges who will have to bear the responsibility of deciding. The possible areas of expansion which may be opened up more fully, in the coming decades, fall roughly under the following five headings.

- (i) Type of Legal Error.
- (ii) What types of function are excluded from the Court's jurisdiction?
- (iii) Disclosure of official facts.
- (iv) Remedies.
- (v) Court Procedure.

(i) **Type of Legal Error**

Apart from the subject- matter of the dispute, it is also relevant to mention the type of legal error which the applicant is claiming has been made by the public authority. To repeat the relevant part of Art. 169: ‘Law shall regulate the settlement of administrative suits... in respect of administrative acts contrary to law’. The phrase, ‘...contrary to law.’, is significant. It indicates that an organic law may be made which specifies the types of legal error of which an applicant may complain to the Court. And the organic law which has been made is made for

this purpose is Art. 4 of the Jurisdiction of Administrative Disputes, 1991 which states: that the applications which may be made must be:

‘... based on any of the following reasons,

- a- Non-competence.
- b- Existence of a defect in the form.
- c- Violation, misinterpretation or misapplication of laws and by- laws.
- d- Misuse of power’.

The types of error specified in Art. 4 are typical of those about which an individual may complain in many other jurisdictions, in both the common law and civil law world. They are accepted as striking a reasonable balance between preventing public authorities from going seriously wrong; and on the other hand, not requiring a court to interfere too deeply in the process of public administration.

However it is said that the devil is in the detail. What this means in the present context is that in Kuwait, a great deal depends on how the few, very general words in the list from Art.4, quoted above, are interpreted. Naturally, since there is no one else,

this interpretation must be made by the judges in the course of deciding actual cases.

In considering this question, we shall omit b ‘Existence of a defect in the form’ (usually called ‘fair procedures’). Since this is a subject of its own, it is best left to be studied on another occasion. Instead we shall examine the Kuwaiti cases on paragraphs ‘ a- Non- competence... and c- violation....of laws’ together, since there is a substantial overlap between them. Afterwards, we shall turn to paragraph d⁽¹²⁾.

a ‘Non- competence’ and c ‘violation....of laws’

As regards paragraph a and c, in each of these, some Public Authority has straight forwardly broken a fairly well- defined law. This law has usually been designed deliberately in order to confine the executive’s power or to require it to follow a particular procedure. In this type of case a law or decree or, in some cases even the Constitution has allegedly been broken. Accordingly, the judge has something solid on which to stand.

Most of the cases in the notable wave of judicial review decisions, in the past year or two have been of this type⁽¹³⁾. For instance, in one case the Court addressed the failure of ‘the administrative circle’ to take the measure necessary to organise Nahda District. This failure meant that the services of electricity, security education and health for the residents of Nahda were not concentrated in the District, but instead scattered among several Governorates. The Court ruled that this failure violated the decree⁽¹⁴⁾. concerning

(12) No significant legal consequence turns on which of the four paragraphs an error or fault falls into. Probably, for this reason, the Courts do not make a particular allocation into one paragraph, rather than another.

(13) The cases summarized in the next page are taken from Judge Al- Rashed, ‘The development of the Cassation Court and the role of the administrative judge in protecting the general rights and duties and human rights: an applied study of the judiciary role’ lecture given at KILAW, October 26th, 2016 . (All future references are identified as ‘ Judge Al- Rashed’.)

(14) No (93/2014) that amended the Amiri Decree No (6/1962). The Judgment is Art No. (620/2014 Administrative issued on the session of June 8, 2016).

the administrative division of Kuwait. Moreover, it ruled that it had jurisdiction to cancel, although what was involved was not a wrong action, but a wrongful inaction (or failure to act) This was a ground-breaking part of the judgment.

Another case concerned the Council of Minister's decision to increase the price of petrol, without obtaining the assent of the Supreme Council of Oil. The administrative chamber in the Court of Cassation therefore ruled that this decision violated the decree under which it purported to be made⁽¹⁵⁾.

A third example is the cases in which the selection of a candidates for appointment or promotion in the civil service has been struck down on the basis that the candidates did not have the qualifications set out in the relevant decree or regulation. Again there have been further cases arising out of the sensitive field of the 2016 National Assembly Elections. The most notable of these involved the nomination for election of a candidate, Abdul Dashti, against whom prison sentences of a total of 31 years had been imposed, in his absence (and against whom a warrant of arrest had been issued). The candidates was abroad, undergoing medical treatment.

The Court of First Instance held that the candidate was entitled to register by way of his son acting as a proxy. This decision is all the more interesting in that the Government strongly opposed this registration on the ground that the law does not expressly allow for registration by proxy. Instead the Court decided the case on the basis that the law did not expressly ban this. However this decision, against the Government, was reversed in the Court of Appeal, whose ruling was upheld in the Court of Cassation⁽¹⁶⁾.

d- Misuse of power

The other cases, fall under the broad heading of Art 4 d 'misuse

(15) No (6/1980) this is the Decree setting up the Supreme Council of Oil. This judgment is case No. (4057/ 2016) administrative issued in the session of September 28, 2016.

(16) The Kuwait Times October 28 and November 16, 2016.

of power' of the Jurisdiction of Administrative Disputes Decree. The background to this type of legal era is that the governing law or decree sets out a wide field of discretion and leaves it to the Public Authority to exercise its discretion, being guided mainly by its opinion of what is best in the public interest.

Two categories of case falling within paragraph d, may be identified here. In the first, one (or only a few) individuals is affected by the exercise of the power and is bringing the case. For instance, the refusal of a welfare benefit; removal of a licence to trade⁽¹⁷⁾ or to practice a profession; dismissal from public service; or, as in **Al-Shimmery**, withdrawal of citizenship. These cases are more straightforward for a Judge to decide in that the issues are simpler, involving such questions as competence, dishonesty or other misconduct.

In the second category, the exercise of discretion which is under attack is some governmental scheme, regulation or policy, which has (and this is the important point) widespread consequences. This include : in the field of land use planning, whether to have a ' Green Belt'⁽¹⁸⁾, increasing the number of taxi- licences to be issued for a large city.⁽¹⁹⁾ ; ' fares fair'(whether to reduce the price of transport fares below the economic level so that more people use the metro and buses)⁽²⁰⁾; the Pergau Dam case⁽²¹⁾ (whether to spend British overseas aid money to pay for a controversial dam in Asia ; or, it might be in the Kuwaiti context, how much money to allocate to the Sovereign Wealth Fund . Again sexual minorities have made claims, sometimes successfully, in respect of gay rights⁽²²⁾. The second category is more difficult than the first in that the issues involved political, social or economic judgments

(17) *Laker v Department of Trade* [1977] QB 643.

(18) *Fawcett v Buckingham* [1961] A C 636

(19) *Gorman v Minister for the Environment* [2001] 2 I R. 414

(20) *Bromley L.B.C v Greater London Council* [1983] 1 AC 789

(21) *R v Secretary of State for Foreign Affairs exp WDM* (1995) 1 WLR 386

(22) *Dudgeon v UK* [1974] EHRR 200; *Norris v Ireland* [1990] EHRR 300

which are remote for a judge's experience or expertise. In addition these stakes are higher, since more people are directly or indirectly involved.

In the second category, too, the cases often fall under the heading of 'Public Interest Litigation' and involve constitutional or international human rights instruments. These are relied on to resist laws or government policy, even if this means establishing positive socio- economic rights. Thus, in some jurisdictions courts have been prepared to order: public health measures, including anti-viral drugs⁽²³⁾; education for autistic children⁽²⁴⁾ residential accommodation, at public expense⁽²⁵⁾; And all this, despite the public authority-defendants making the argument that it was their right and duty to allocate scarce public resources , since they are responsible for public expenditure. Protection of the environment or heritage is another growing area.

For instance, the East African Court of Appeal utilized the Environmental Protocol to the East African Commission Establishment Treaty to restrain the Tanzanian Government⁽²⁶⁾ from building a highway across Serengeti Wildlife National Park.

These examples are briefly summarised here simply in order to illustrate some of the high- profile developments elsewhere, in the field of judicial review control . Is this likely to be the future in Kuwait?

Human Rights and 'Sovereignty'

In considering this difficult question the first point to notice is that, in other jurisdictions the arguments has been made , that

(23) *Sobramoney v Kwa-Zulu* 1998(1) SA 765 (CC); *Minister of Health v Treatment Action Campaign* 2002(5) SA 721 (CC)

(24) *Sinnot v Minister for Education* [2001] 2 IR 545

(25) *Government of South Africa v Groot*2001(1) SA 46(CC)

(26) *Attorney General of Tanzania V ANAW* Appeal No.3 of 2014, Judgement ,EACJA (July 29,2015): Gathi, 'Saving the Serengeti: Africa's New International Judicial Environmentalism', (2016) 16 *Chicago Journal of International Law* 386 Olaka-Onyango. ' A Bird's Eye View of Public Interest Litigation' (2015) 47 *George Washington International Law Review* 763.

the sort of issues just mentioned were simply not appropriate for a judge to consider. By to-day, as shown in some of the cases mentioned in the previous paragraph, this line of defence has ceased to be as successful as it once was. The particular label, on the basis of which this type of subject was formerly regarded, in other countries, as outside the courts' jurisdiction⁽²⁷⁾ has varied, including: 'non justiciable', 'political question', 'Separation of Powers', even the Royal Prerogative. In the context of Kuwait, it is best to use the concept of 'sovereignty' since, as noted above, this is actually mentioned, as an exclusion, in the Law regulating the Judiciary, Art 2. At this point, we need to recall the definition of sovereignty, given in **Al-Shimmary**, which was quoted in full, in Part 3 becomes important. The relevant part here is the contrast drawn between sovereignty which is stated to involve the actions 'by the government as a ruling authority [taken] in its absolute discretion...'; and, on the other side, the fact that the Court refers to 'the administrative decision issued in its capacity as an administrative authority within the framework of law ...and therefore subject to the supervision of Courts' (Page 4).

To put it simply, this seems to mean that the larger the field of discretion the more likely a Kuwaiti court is to say that this is a matter of sovereignty and therefore not for the courts. The result of this line of thought is that where only one individual is involved a court is less likely, and where a big government policy is involved, the court is more likely, to hold that the sovereignty immunity applies. In other words, that the court should not exercise its review power

However, there is another point, namely that, pointing in the opposite direction to 'sovereignty', is a newish idea and that is the idea of Human Rights. What this means is that over the past

(27) Hogan and Morgan, *Administrative in Ireland* (Round Hall, Thomson Reuters, 4th ed, 2010), Chap 15 Part F

20 plus years, the traditional categories⁽²⁸⁾ in this field- bad faith, taking irrelevant factors into account, unreasonableness- which have been used to control the scope of a discretionary power have been substantially reinforced. They have been reinforced by the notion that each person has human (or constitutional) rights, which must be respected by the state . This increases the level of control, which the courts may exercise in respect of the state's power over the individual. The source of these human rights may be in national constitution or an international treaty. And where they have constitutional status, they would invalidate even a law ; not just a discretionary power.

The basic question here is where is the balance to be fixed between the area marked sovereignty where the executive organ is free of the courts' control and on the other hand, the human rights of the individual. At one extreme, the idea of Sovereignty would mean that, so long as a public authority is operating within the framework of law, then a court may not interfere with its exercise of discretion. But, as against this, there are two points. In the first place, the idea of 'sovereignty' is not mentioned in the Constitution⁽²⁹⁾, only in the Law Regulating the Judiciary, 1990.

Secondly, the more important point is that, pushed to an extreme, this assertion in favor of sovereignty , mentioned in the previous paragraph, would give no value to the human rights, contained in the Constitution Arts. 27-49 . And surely, to judge by their wording, these are intended to make some impact. Naturally since these constitutional provisions had to be drafted to be short and general they are vague and thus different from the sort of definite rules, contained in laws or decrees, which have been relied upon, in most of the successful, judicial review cases, brought in Kuwaiti

(28) Hogan and Morgan, *Administrative in Ireland* (Round Hall, Thomson Reuters, 4th ed, 2010), chap.15, Part E

(29) Art.1 of the Constitution certainly states that: 'Kuwait is an Arab state, independent and fully sovereign....' But this meaning is to do with Independence from foreign states and not what we are talking about here.

courts and summarized earlier in this Part. they inevitably allow some space for judicial subjectivity. However most of them lay down a central theme, which provides some support for a judge, against any accusation that the judge is really substituting their own views for those of the expert public authority, to which the law had entrusted the discretion.

To illustrate what is being said here, it is convenient to take one of the strongest examples of human rights given by the Kuwaiti Constitution. This is Art.29 which state: ‘all people are equal in human dignity, and in public rights and duties before the law, without distinction as to gender, race, origin language or religion’. The way that the equality is articulated in the constitutional provision gives it an unusually definite and unqualified force,

And, despite the idea of sovereignty, Art.29 has been given the effect which might have been expected from its wording. In a line of Kuwaiti cases on gender equality, in which the applicant’s case was grounded on Art.29 the results have been solidly in favor of gender equality and of the female applicants who brought the case. One example arose out of the gender quota system for places to study in the Faculty of Medicine at Kuwait University.

This had resulted in females being excluded, when less well-qualified males were admitted. Similarly, the administrative court cancelled the Civil Service Council Decision which had granted a smaller housing allowance to female teachers than to males.⁽³⁰⁾

Considering the social background from which Kuwait is starting, it is likely that, in the future, we shall see further cases in the broad category of gender discrimination⁽³¹⁾

(30) For these two cases see the Ruling of the Administrative chamber issued in the case No. (2794/2011, in September 28,2011, supported in cassation No, (848/2012), June 18, 2014 ‘and case (No.2/ 2015) on December 9,2015.

(31) Compare, for example, *Somjee v Minister for Justice* [1981] ILRM 324, holding that it is unconstitutional for a citizenship law not to allow a foreign man married to an Irish female to acquire Irish citizenship, while a foreign woman married to an Irish male is so allowed .This remains the law of Kuwait : see Nationality Law 1959, Arts 7 and 8.

But what is more important, in this respect is that equality is not unique. There are some other solid themes , in the Constitution, for instance: free speech (Art. 36, 37 and 39), preliminary or primary education (Art 40); right to work (Art.41). It may be that over the future decades, these human rights will be brought to the courts and will be put into effect, to prevail against administrative actions or laws, although this has the effect of shrinking the field of immunity, labeled 'sovereignty'.

(ii) What types of function are excluded from the Court's jurisdiction?

The question, just considered was about the type of the error which the applicant can rely upon. A related (and overlapping) issue concerns the types of function which the public body was doing . This is another ground on which a court sometimes refuses to take jurisdiction.

This is a situation, like the previous one, in which judicial experience in other states provides a history of, at first, an unqualified refusal of jurisdiction, leading on to qualified acceptance; in extreme cases and eventually general acceptance⁽³²⁾.

In other words, we are considering areas which in other countries have been among the islands of immunity which have fallen recently to the rising tide of judicial review.

The clearest example of a ban usually comes from the Constitution. To take Kuwait, there is a prohibition on cases, in respect of the

(32) A good example of this development is the change in the UK, from refusal, by courts to consider any exercise of the (Royal) Prerogative to willingness to entertain such cases: see, for example, Harris 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 CLJ 631,

Amir⁽³³⁾ or the internal proceeding of the National Assembly⁽³⁴⁾.

This cannot be disputed since the ban is in the Constitution. It is more difficult to say what other public functions entities might fall within the scope of this exclusion from jurisdiction. This will depend on such factors as ‘tradition’: the expertise and experience of the public authority; the likely knock- on effect of a decision in other areas, about which a court can have little information and the width and confidentiality of the public authority’s sources of information; (In some jurisdictions, such policy reasons as these give rise not to a complete ban but to ‘judicial deference’, which means that judges exercise their powers of review very lightly).

In the absence of many Kuwaiti court cases to provide further guidance on this question of possible exclusion all that can be done here is to note the kind of areas in which this question may arise in the future.

First, in many countries, courts traditionally declined to exercise jurisdiction over prosecutions. In other words, they leave exclusively to the prosecuting authority, the discretion to prosecute or not to prosecute suspects⁽³⁵⁾. ‘Security’ in its many forms is also usually treated very lightly, if at all, by courts⁽³⁶⁾.

(33) Constitution, Art. 54: ‘the Amir is the Head of the State. His person has been immune and inviolable’. For example by Art.75: ‘the Amir may, by decree, ground a pardon or commute a sentence. However, general amnesty shall not be grounded except by a law ...’ Presumably the question of whether a law contains a ‘general amnesty’ **would be beyond a court’s power** of review.

(34) Art 50 states: ‘the system of government is based on the principle of separation of powers functioning in co-operation with each other in accordance with the provisions of the Constitution.

(35) By Art 167 : ‘The Public Prosecution Office shall conduct penal charges on behalf of society. It shall supervise the affairs of judicial police, the enforcement of penal laws, the pursuit of offenders and the execution of judgments. Law shall regulate this body, lay down its duties and define the conditions and guarantees for those who assume its functions...’

(36) LM v Commissioner of Police Force [2015] IESC 81 (this involved a negligence action brought by victims of a violent crime against the police because of alleged delay and incompetence which had led to the failure of the prosecution).

Another function which might, for different reasons be regarded as outside the courts' jurisdiction would be making a land use plan for Kuwait. This function is vested in the Councilors of the Municipality most of whose members are elected⁽³⁷⁾ ; and the Supreme Council of Planning and Development, in effect a committee made up of members the Government and representatives of the business community. Making a land use plan includes such major socio-economic questions as: demographics; guest mates of future prosperity levels; policy regarding foreigners. The subjective and far-ranging character of these questions, coupled with the fact that they have been vested in the hands of responsible (central and local) public representatives is significant. All this makes it unlikely that the court would take jurisdiction if an applicant were to argue that it was an unreasonable misuse of power in that the plan did (or did not) include (say): taxi- lanes; a new airport; or a light- rail system.

On the other hand, the second major function in the planning field is the granting or refusal of a Building Licence. This is an individual dispute about which a court could take some guidance from the land use plan. Accordingly, if there is a mistake of the type listed in Art. 4 of the **Administrative Dispute Decree**, quoted in section (i) there is no doubt that the developer or a neighbor could take a case.

The next example to be mentioned is the power exercised by the Public Authority for Housing Welfare⁽³⁸⁾. The work of this Public Authority is to allocate a large villa substantially at public expense to any Kuwaiti who gets married and starts a family. By now there is a very long waiting list, before the villa is actually allocated to a couple.

(37) Decree No. 33 for 2004 Regarding the Supreme Council for Planning and Development; Law No. 5 for 2005 Regarding the Kuwaiti Municipality, Art 12

(38) Set up by Law No.47 For The Year 1993 Regarding Residential Care (as amended by Law No.27 of 1995 and 113 of 2014). See especially Arts 14 - 20 of the 1993 law.

Here we may follow the same distinction drawn in regard to land use planning, between the rules which the Public Authority may make and, on the other hand, disputes in applying these rules in particular individual cases. Regarding the first of these two functions, if a case were to be brought to the Administrative Court, regarding the content of the rules, for example how many houses to build, what floor sizes or which geographic location, the Public Authority could make a strong case based on its own knowledge, experience and judgment, that a court should not involve itself. On the other hand, consider actions involving an individual case, for example: recognition of a foreign marriage and divorce for the purpose of qualifying, issues around citizenship, priority on the waiting list or succession to ownership of the villa in the event of death or divorce. In such situations, there seems no doubt that a court would exercise jurisdiction.

A different example is the Capital Market Authority and Capital Markets Courts⁽³⁹⁾. They provide a system to exercise regulatory powers over the Capital Market to regulated so as to increase transparency and market competition and to prevent systemic market risk. Regarding the legal controls in this field, it has been said in one summary⁽⁴⁰⁾, ‘the CMA Law has established what on the face of things appears to be a very effective and wide system of rule-enforcement and supervision and judicial review through specialized courts’.

The straightforward question may be asked: why the difference between the Capital Market Authority and the Planning and Public Housing situations? The first point of contrast is that,

(39) Yaseen and Jusic ‘International Standards and the Administrative Model of Capital Market Regulation in Kuwait’ Kuwait International Law School Journal Special Supplement No 1 Part 1 May 2016 page 17. This excellent article reviews the (Kuwaiti) Capital Market Authority Law, 2010, amended in 2014 and 2015, which set up the Capital Market Authority.\

(40) Yaseen and Jusic at p. 47. This quotation goes on to say that ‘ the system’s predictability and speed of functioning... requires continuous improvement’. But that is not the point here, which is that judicial review is available.

the Capital Markets legislation provides fairly definite legal standards, as opposed to far-reaching discretion, to support the court's decision. And behind this domestic law lie international standards made by the International Organization of Securities Commissions. Secondly, the subject matter of this field involves the interests of international financiers. So Kuwait's commercial reputation is at stake and judges would be keen to protect this .

Finally, there is a similar point in another area. The Central Body for Public Tenders (formerly the Central Tendering Committee)⁽⁴¹⁾ administers a system for allocating major public works contracts in which the 'general original'(that is, the principal) procedure requires a large amount of transparency⁽⁴²⁾.

However there are also widely used exceptions, which bring lower standards regarding transparency. The Central Body/ Committee has always assumed it had a very great deal of discretion regarding whether and when it allowed these exceptions provided certain conditions exist, such as: an emergency, social objectives or local sourcing of goods⁽⁴³⁾ or services.

But it is quite possible that one day a supplier of goods or services , who had failed to get a Government contract, would want to make the case that the conditions necessary to justify an exception did not exist. So far the Central Body or its predecessor has not been the subject of a judicial review, on this point. But, as with the Capital Market Authority, there are fairly definite standards to be applied, before an exception is permitted. Here too, an international backstop is provided, in this case by a link with UNCITRAL⁽⁴⁴⁾. And the subject- matter of this regulatory authority involves, directly or indirectly, major international interests.

(41) On which see Doha AlSayer, 'Pubic Procurement, KILAW LLM, 2016.

(42) Public Tenders Law No.37 for 1964, replaced by the Kuwaiti Public Tenders Law No 29 for 2016, which comes into force, in January 2017. UNCITRAL model law, 2011

(43) Methods of Public Tender, (Law No. 29 for 2016, Arts.13/18)

(44) United Nations Commission on International Trade Law.

Accordingly, there seems a good chance that this type of case would be heard by the court.

(iii) Disclosure of official facts

We have now covered what may be called the two questions of principle, in regard to judicial review cases. However in the position of a lawyer actually bringing a case to court, for there to be a reasonable chance of success (and clients will not bring a case without a reasonable chance), three significant practical questions will often arise. These are covered here and in the following two sub sections (dealing with Remedies and Court Procedure).

Where a court is dealing with an administrative dispute, in a substantial number of the cases the applicant will require the disclosure of official information in order to prove their case. But the Government may be unwilling to disclose this information, say in the field of: commercial transactions, security, foreign or international relations, contested citizenship (possibly reaching back to the chaotic period after the Iraqi invasion, when records were lost). There may be various grounds for this, for example because the information comes from: an official document, high Government meeting⁽⁴⁵⁾ or an 'informer' on the inside of some criminal or terrorist organisation. Most legal systems have rules, keeping confidential certain types of information of this type. And this is accepted as legitimate.

The question is not the rule itself, but who applies it in any particular case. To elaborate, it is acceptable that there be a rule to the effect that there is a public interest in both the fair and full

(45) In an English case on the closure of a secondary school the judge asked why the Department of Education file, which was plainly a key part of the relevant history was not being given in evidence. The lawyer for the department said: 'Files of this kind concern the formation of policy at the highest level, my Lord'. The judge said: 'on my desk by 10 tomorrow morning'. *R v Secretary of State for Education ex p Hardy* (CO/354/88; 27 July, 1988)

administration of justice, including having all relevant information before the court and, on the other hand, the confidentiality of certain government information. Depending on the circumstances, this may go either way. But our concern here is not who wins. The significant question is: in any particular case, who balances these two different heads of the public interest and so decides whether the information must be disclosed to the court and the applicant; or whether it remains confidential. In most cases, the choice on this issue is between: the concerned Minister or the judge in the case .

In regard to this question, it is significant that Art 163 states that: ‘ in administering justice, judges shall not be subject to any authority’....An equivalent provision in Ireland’s Constitution (1937) has been held to mean that it is the judge who must apply the law. The reasoning is straightforward and could be applied in Kuwait: since justice is administered by a judge, it is the judge in charge of the case who must apply the law on executive privilege, so as decide whether, in that particular case, the evidence is withheld, with the damage that may be done to justice⁽⁴⁶⁾As Walsh J remarked in the leading Irish case⁽⁴⁷⁾: ‘It may well be that it would be rare or infrequent for a court after its own examination, to arrive at a different conclusion from that expressed by the Minister, but that is a far remove from accepting without question the judgment of the Minister.’ If it is the judge who should decide, this could be done (perhaps at a preliminary hearing) at a sitting held in private (in camera)⁽⁴⁸⁾.

(46) Hogan and Morgan, *Administrative Law in Ireland* (Round Hall, Thomson Reuters, 4th ed, 2010) 1104-18.

(47) *Murphy v Dublin* [1972] I R 215,233-34

(48) See Art 165

(iv) Remedies

Even if the applicant wins against the public authority, there remains the question of what remedy a court will give. This is a wide area, about which here I can make only the following two points.

First, Art 169 states that, the Courts' role in reviewing an administrative dispute 'includes the power of both nullification and compensation'. As noted by Professor F Nathaniel Browne⁽⁴⁹⁾, this was a feature, which was not included in the Egyptian Constitution (of 1956), which was otherwise the model for the Kuwaiti Constitution. Art 5 of the **Jurisdiction of Administrative Disputes Decree** elaborates on the theme. 'The administrative circuit ...shall have exclusive jurisdiction of the applications presented for compensation for the damages resulting from [the defective administrative order] whether presented directly or indirectly.'

But 'compensation' is just one word. Its application in a particular case would require a lot of interpretation. Take a situation in which trader is unlawfully refused a renewal of his licence. As a result, the trader loses (1) profits for the year when he is without the licence; (2) profits from a major expansion based on an opportunity, which occurred only in the year when he was without the licence; and (3) because of the problems connected with re-starting a business, which had been closed for a year. Some profits in later years, are postponed even later than they would have been. So the question for the court would be whether to award damages for (1) only or also for (2) and/or (3). This type of situation could also arise in the field of private law contract, so that a general underlying question is whether the administrative law on compensation should be in line with the private law.

(49) See Brown, *The Rule of Law in the Arab World* (Cambridge Middle East Studies, CUP, 1997) 165-68

To take the second illustration of problems which may arise in the field of remedies, classically, where a court holds that a public authority has wrongfully withheld a licence or benefit, the court has not been empowered to order the grant of the licence or benefit. Art 5 of the **Administrative Disputes Decree** is fairly clear that this limitation applies in Kuwait. It states that ‘the administrative circuit shall have exclusive jurisdiction to adjudge cancellation of the administrative orders mentioned...[and for the award of compensation]’ That is all: the court is given no other powers.

In many situations, there is good sense to a limitation in that it is public authorities, not courts which have the expertise and resources to, say, award positions in civil service or set conditions for building licenses. And this remains true, even if the court has ruled that there was unfair procedure or misuse of power, by the public authority, at the first application. (But naturally, at any later, application, different personnel should hear the case ⁽⁵⁰⁾)

But, in other jurisdictions, this rule has been changed to allow the judge a discretion, in appropriate circumstances, actually to direct the public authority to grant the licence⁽⁵¹⁾.. This development has not yet been made in Kuwait. Might Art 169 be used as a lever by which it could be brought about, in appropriate circumstances? My answer is: no, because Art. 169 is in its wording limited to ‘nullification and compensation’.

(v) Court Procedure

The final set of questions concerns the processes of the Courts themselves. The **Administrative Disputes Decree**, the same organic law, already mentioned, deals with points in connection with the procedure and organisation of the Courts’ settlement of administrative suits. This law is something which is contemplated and authorized in the words of Art 169,

(50) R (Ortona) v Secretary of State for Communities [2009] JPL 1033

(51) ‘Administrative Disputes Decree’ (Ireland) Rules of Court, SI No15 of 1986, Ord 84 r.26(7)

already quoted above: 'law shall regulate the settlement of administrative suits by means on their special Chamber or Court...' Thus the Decree makes provision for such matters as: the interest or locus standi of the applicant; time limits; exhaustion of 'local remedies'; preliminary documents⁽⁵²⁾.

A point which arises in connection with this is whether if any of these provisions under the Administrative Disputes Decree were too restrictive, it could be argued successfully that they violate Art 169. Take as a hypothetical example an amendment to Art 7, which reduced the time within which the action of cancellation had to be brought from 60 days, as at present, to 20 days. On the one hand, the Government lawyers could argue that read literally, Art 169, leaves the content of the court procedural rules to the law-making authorities. In particular, nothing is said about a minimum time limit. The counter argument would focus on the purpose of Art 169. As mentioned in the earlier discussion of the Rule of Law, its purpose can be taken to be to implement especially the second element of the Rule of Law, as defined earlier in Part 4. If this principle is to be faithfully honored it will be hard to see how 20 days would be enough for the practical steps necessary to bring to court a case against the State.

Another development of court procedure has been made, this time by a court case. Because of the increasing number of cases of the same class coming before it, the Administrative Court has started to accept the Anglo-American idea of the 'Class Action', since 'the prosecutors have all one aim, derived from a general decision under which they shelter in a common legal status and without having any individual request. The law does not ban them from uniting in one legal case.'⁽⁵³⁾

(52) 'Administrative Disputes Decree' Arts. 3,7,8,9, respectively

(53)

Concluding Comment:

A wise judge has offered the following overview⁽⁵⁴⁾: ‘the Administrative Court plays an important role in the general life of Kuwait. Its role has developed quickly after it was, in its beginnings, concerned only with the conflicts mentioned in the law that regulates it, such as a staff proficiency reports or imposing punitive damages on them. But since the Administrative life has become more complex and its problems have become varied, rulings of the administrative circles have had great political and social influence’.

A major Part of the platform necessary for further development along the lines indicated by the judge is provided by the ground-breaking judgment in **Al-Shimmary**. It is true that there are many threads of a developed system of judicial review which still need to be put in place and this will take time. Possible future development have been discussed above, under the following headings:

- (i) **Type of Legal Error**
- (ii) **What types of function are excluded from the Court’s jurisdiction?**
- (iii) **Disclosure of official facts**
- (iv) **Remedies**
- (v) **Court Procedure**

None of this alters the fact that **Al-Shimmery** provides a substantial foundation for control of the executive, by the judiciary. This might, some day, be of significance not only in Kuwait but also elsewhere in the Middle East, where political

(54) Judge Al- Rashed, Page 3.

developments have taken a similar course⁽⁵⁵⁾. Also relevant is the fact that, as with other Gulf states, the Constitution of Kuwait (1962) was substantially modeled on the contemporary Constitution of Egypt (1956)⁽⁵⁶⁾. Indeed a commentator on the origin of the Kuwaiti Constitution remarks:

“Uthman [an Egyptian Lawyer who both drafted the Kuwaiti Constitution and was also on the committee that authored the fairly liberal 1956 draft constitution in Egypt], probably sought to remedy in Kuwait many of the flaws that liberal constitutionalists found in Egyptian constitutional life. He therefore not only borrowed Egyptian Language on judicial independence and the right of recourse to the court, but also included provisions barring some of the limits on liberal legality that had arisen in Egypt. For instance, in Art.169, the constitution court was specifically authorized to nullify as well as order compensation for illegal administrative act. This was an authority the [Egyptian] administrative court of the Majlis al-Dawla had claimed, only to find the Nasserist regime remove it by law. A similar attempt in Kuwait would have been a clear violation of the Kuwaiti Constitution of 1962’⁽⁵⁷⁾.

It is worth emphasizing this passage. It shows a historic commitment to the practical observance of the Rule of Law. In short, **Al-Shimmary** is well in line with this tradition and also seems to be going in the direction intended in the Kuwaiti Constitution. It has the potential to open several doors. The same is true regarding some other recent Kuwaiti cases noted here. It seems possible that in future, public administrators in Kuwait may feel that they are subject of the Chinese curse: ‘may you live interesting times’.

(55) See The Economist, November 22, 2016 <http://www.economist.com/node/21710679/>:

(56) For this pedigree, see Brown, *The Rule of Law in the Arab World* (Cambridge Middle East Studies, CUP, 1997) 165-68

(57) The Egyptian Constitution of 1971 finally adopted similar wording to that in the Kuwaiti Constitution.

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Table of Contents

Subject	Page
Abstract	35
Part 1: Introduction and General Background	36
Part 2: Summary of Al-Shimmary judgment	37
Part 3: Sovereignty	40
Part 4: Rule of Law, in the context of Judicial Review	41
Part 5: Express exclusions from jurisdiction	42
Part 6: Future Growth of Judicial review	44
(i) Type of Legal Error .	46
(ii) What types of function are excluded from the Court's jurisdiction?	54
(iii) Disclosure of official facts.	59
(iv) Remedies.	61
(v) Court Procedure.	62
Concluding Comment	64

