

## **Legal Restrictions on Freedom of Opinion: A Comparative Study of American and Kuwaiti Criminal Law**

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### **Abstract**

Individuals' freedom to express their opinions is one of the most important individual rights enjoyed by members of any society, and it is considered a prerequisite for democracy in all civilized countries of the world. Every authority should believe that freedom of opinion and expression is the way to establish democracy and achieve society's development and stability. However, freedom of opinion and expression must have controls and restrictions, the lack of which can lead to catastrophic consequences for individuals and society through infringement of public freedoms. Therefore, the legislators in the United States and in Kuwait were keen to put a set of legal restrictions to regulate freedom of opinion so that, if any breach of the restrictions leads to a crime, the expressed opinions are denied protection under the first amendment of the US Constitution and the Kuwaiti Constitution.

**Keywords:** Freedom of opinion, Constitution, Supreme Court, Criminal Law Punishment, Crime, Trial, Imprisonment, Fine, Accused, Lawyer, Accusation.

### **Introduction**

Freedom of expression is one of the most important and most worthy constitutional rights that a person enjoys, as it is an inevitable necessity to achieve understandings and harmony among individuals in society. This right includes expressing ideas by verbally, in writing or by any other means. The Universal Declaration of Human Rights of 1948 included this right in its Article (19). Because of the importance of this right as one of the natural and innate rights that individuals in their societies should enjoy without fear of the consequences, it is provided for in the vast majority of the constitutions of the democracies worldwide, including the Kuwaiti Constitution. As for the United States of America, because of the importance of the issue of freedoms in general and the freedom of expression in particular, the Founding Fathers of the American Constitution emphasized it through the First Amendment concerning public rights and freedoms (Kuwaiti Constitution, The First Amendment of the US Constitution).

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However, the right to have and express opinions, like other rights, is not absolute; it has restrictions and controls to ensure that the individual does not abuse or misuse the right to an opinion and expression in a way that may cause harm to others or the social order.

Accordingly, the Kuwaiti Constitution authorized the legislators to regulate this right and set the rules that show how it can be used, to ensure that the right does not conflict with others' freedom and does not cause any harm to the public interest. Thus, a set of restrictions was imposed on the freedom of opinion and expression to avoid consequences of acts of expression that may entail a crime.

In the United States, the US Supreme Court has approved over two decades a set of restrictions on the freedom of opinion and expression. A person will be denied the protection under the First Amendment of the Constitution if the person breaches any of these restrictions. As such, a crime occurs, and the perpetrator will be prosecuted. Therefore, this study aims to shed light on the debate over the legal restrictions that regulate the freedom of opinion, the violation of which results in a crime (Chemerinsky, 2018).

### **Literature Review**

The right of individuals to express their opinions freely and without fear of authority is one of the most important rights enjoyed by members of society. Consequently, many important legal studies have addressed this right, both in the Arab world and in the United States. In Arab jurisprudence, for example, such studies have been undertaken by Salman, (2011). Fikry (2007); Abdul -Malik, O., (2003). Bassiouni, K.,(1995); Al-Qassas, Y. (2014); Jamal, Y. (1970).

In American jurisprudence, many legal studies have focused on the freedom of opinion and expression, such as Bethany Dzielski, B. M. (2014). *Schenck v. United States: A Clear and Present Danger to the First Amendment. Grove City CJL Pub Pol'y*, 5, 111; Fagan Jr, J. F. (1991). *Abrams v. United States: Remembering the Authors of Both Opinions. Touro L. Rev.*, 8, 453; Meiklejohn, A. (1952). What does the First Amendment mean. *U. Chi. L. Rev.*, 20, 461; Dodd, E. M. (1942). Picketing and Free Speech: A Dissent. *Harv. L. Rev.*, 56, 513.

On the other hand, the US Supreme Court has examined the issue of freedom of opinion and expression in many cases, as it discussed freedom of political opinion in 1919 when considering the case of (*Abrams v. United States*); as for freedom of opinion that does not include expressions that incite violence, assault on property, or riots in society, the Court discussed it in 1927 when considering the case of (*Whitney v. California*); in 1973, the Court discussed

restrictions on freedom of opinion in the event that it contained obscene sexual statements when considering the case of (*Miller v. California*) and In 1969, the Court discussed restrictions on freedom of opinion in the event that it included statements that incite hatred on the basis of religion, race, or color when considering the case of (*Brandenburg v. Ohio*).

However, despite the abundance of legal studies in this regard, none of them compared the American and Kuwaiti legal systems.

### **Methodology**

This study relies on the comparative method between the legal system in the United States and the State of Kuwait regarding the procedures, controls and legal restrictions on the freedom of opinion and expression. This study aims to shed light on the legal controls and restrictions on the freedom of opinion and expression in both the United States and Kuwait. This requires dividing the study into two sections. In the first section, we discuss the legal controls and restrictions on freedom of opinion in the United States. We devote the second section to clarifying the legal controls and restrictions on freedom of opinion and expression adopted by the Kuwaiti legislators in the Criminal Law to answer the question about the similarities and differences between the legal system in the United States and the State of Kuwait regarding the procedures, controls and legal restrictions on the freedom of opinion and expression in order to reach the desired results and recommendations from this study.

### **Legal restrictions on freedom of opinion in the United States**

In the United States, the First Amendment to the Constitution does not protect freedom of opinion and expression unconditionally. Over a century, the US Supreme Court has restricted the freedom of opinion and expression in four cases, as follows:

#### **1. Restricting freedom of opinion in cases of obscene pornographic statements**

Obscene statements in American law include every obscene, dirty, or disgusting sexual expression that exceeds the accepted limits and norms of society. Unlike the rest of the restrictions regulating freedom of opinion, the obscene statements were not protected by the First Amendment of the US constitution until recently (*United States v. One Book Called Ulysses*, 1933).

However, setting an endless limit or standard of obscene pornography raised a lot of legal controversy in the US legal circles regarding when the sexual statement is deemed obscene and unacceptable and whether it is protected by the First Amendment of the US Constitution. This is due to the lack of clarity in the

US Supreme Court's rulings in this regard until 1973, when the Court intervened to put an end to this controversy by reviewing the case of (*Miller v. California*, 1973). In that decision, the Court held that the expression or the saying was not obscene pornography if the following criteria applied; firstly: a scientific value that benefits society according to the perspective of the ordinary man; secondly: if it does not violate the laws of the state regarding the severity and obscenity of pornographic words in a book, so that it describes the relationship in an accurate and outrageous manner; and, third: the availability of literary, artistic, scientific and political value of the book given its entire context and the goal of its authorship. Accordingly, the Court held that the book that Miller wrote and distributed was not protected by the First Amendment (*Watts v. United States*, 1969); (*Bridges v. California*, 1941), (*Connick v. Myers*, 1983).

## **2. Restrictions on speech that incites hate**

Despite the absolute language of the First Amendment of the US Constitution that Congress is not permitted to issue any law that limits freedom of expression, the US Supreme Court has confirmed in many cases that the First Amendment does not protect the words or phrases that include incitement to hate a segment of American society, a specific race or a specific sect. The US Supreme Court has held that freedom of expression that sometimes contradicts the rights and freedoms of individuals is not protected under the US Constitution. Freedom of opinion and expression is inconsistent with the rights and freedoms of individuals if an opinion causes harm to individuals by inciting hatred of a group, sect, or a segment of the US society because of religion, race or sex (Cal. Criminal Law §§ 11400-11402 (1953)).

The US Supreme Court adopted this restriction of freedom of opinion and expression the first time in 1927 in the case of (*Whitney v. California*, 1927). The Court ruled that the First Amendment cannot protect individuals who exploit freedom of expression to harm any segment of the US society by inciting hatred against that segment. The crime of incitement to hatred is established, even if the statements of incitement are directed at a group of individuals just because they converted to a certain political, religious or social opinion, as long as these statements lead to disturbing the peace in society or causing harm to the public interest or any member of society (Blasi, 1987).

## **3. Restrictions on speech that incites violence or fighting**

US law not only criminalizes the statements and sayings that include unfamiliar obscene pornographic utterances or phrases that include incitement to hate a group of the US society, but it also criminalizes statements and sayings that include incitement to use violence against any segment of the US society (Freedman, 1995), (Curtis, 2000).

Again, this restriction of freedom of opinion and expression, consisting in the discourse of incitement to violence or fighting, differs from the previous restriction in that incitement in this case is not only mere incitement to hatred and rejection of a segment or group of US society. This can result in harm to this segment or group, but incitement in this restriction is related to the use of fighting or violence against a segment or group of society because of its race, gender or religion (Gard, 1980).

This can lead to extreme harm to this segment or group. Hence, the punishment for this type of incitement is always the harshest. The US society calls the inciting of violence or fighting “hate crimes” ( Mannheimer, 1993).

The US Supreme Court decided to consider the statements that incite the use of violence or fighting against any component of American society as a crime very early during the First World War in 1919 ( *Schenck v. U.S.*). The Court reviewed three cases, all of which are related to opposition to the United States’s entry into the war. Members of the American Communist Party threatened publicly to use violence against members of the federal government and their families if they did not retract the decision to enter the war or if they forced Americans to enter into compulsory recruitment ( *Frohwerk v. U.S.*, 1919, *Debs v. U. S.*, 1919). The Court also decided that the first amendment does not protect the statements and phrases that incite the use of fighting against any group of American society. The Court so held in (*R.A.V. v. City of St. Paul*, 1992).

#### **4. Restrictions on freedom of opinion and expression regarding the statements of collective defamation**

The US Supreme Court recently held that statements containing the phrases of collective defamation are not protected under the Constitution. The Court considered statements that include collective defamation phrases for any group of American society to be an opinion crime. Hence, in 1952, the Court held that the First Amendment to the US Constitution does not protect such statements in the case of (*Beauharnais v. Illinois*, 1952). The Court ruled that statements that contain defamation of a specific person or several people who do not share a specific religion or race are not a crime, whatever the attributes and vilification that these words contain. Accordingly, individual defamation is protected pursuant to the First Amendment, no matter how it contains racist phrases or defamation as long as these statements and phrases are directed to a specific person or even several people who neither share a race nor a religion. The freedom of opinion protected by the First Amendment does not include collective statements that are placed by a group of society so that this group is described in a way that indicates contempt or attachment of racist or criminal descriptions of this group (Schultz, 2000).

### **Restrictions on freedom of opinion contained in the Kuwaiti Criminal Law and its amendments**

The Kuwaiti legislators' policy of criminalization and punishment is the criterion that honestly expresses the nature of the political system and its respect for the right to freedom of opinion and expression. Since the emergence of the modern State of Kuwait and the legalization of many Kuwaiti laws, the objective criminal provisions have been unified in a unified code or law when the Kuwaiti Criminal Law was issued in (1960). The Criminal Law No. 31 of (1970) added the internal and external state security crimes and the crimes of public officials, in addition to complementary criminal legislation that regulates special or specific topics such as the juvenile law, the traffic law, the anti-narcotic law, the law to combat mental effects, and the law of possession of firearms (Al-Dhafiri, 2022).

Unlike the American law, which restricted freedom of opinion in only four cases, the Kuwaiti legislature adopted and approved the legal provisions that restrict freedom of opinion, whether or not this restriction has its justifications, as the Kuwaiti courts intervened to criminalize some cases related to freedom of opinion, with the aim of restricting freedoms associated with the freedom of opinion and expression (Ghanem, 1992).

In this section, we will show the most important restrictions set by the Kuwaiti Criminal Law and the laws that complement it for freedom of opinion, as follows:

#### **1. Restrictions on freedom of opinion associated with state security:**

The restrictions on freedom of opinion associated with state security are among the most important restrictions on freedom of opinion and expression in Kuwait, the most severe in terms of penalties, and the most justified and logical. This is due to its association with the issues related to the entity and the existence of the state and its internal and external security (Appeals 20, 21, 22 of (2013), Constitutional).

The Kuwaiti legislature has restricted every opinion or expression that could harm the security of the internal state. Consequently, the Criminal Law applies the penalty of imprisonment for a period of no more than five years to all those who stab or insult publicly in a statement or by any means of expression the prince's rights and authorities ( Article 25 of Law No. 31 of (1970)).

Insulting or stabbing the prince's rights and authorities means every criticism that involves defaming prestige, hurting the feelings and reflecting lack of linguistic reverence that would weaken the authority of the prince (18/2013 State Security Restriction State Security Felonies Session 9/1/2014)

The Kuwaiti Criminal Law also punishes everyone who incites a member of the armed forces or the police to rebellion, the penalty for which is

imprisonment for a period that does not exceed five years (Article 26). A three-year imprisonment is the penalty that applies to everyone who incites or helps a member of the armed forces to escape service ( Article 27). As for incitement to overthrow the regime or government, the law applies a penalty of no more than ten years of imprisonment to everyone who is publicly inciting in a public statement or by any other means of expression to overthrow the regime or government in Kuwait. It also stipulates the same penalty for everyone who, by any means of expression, calls for embracing or converting to any doctrines calling for the demolition of basic systems in Kuwait in an illegal way ( Article 29), or just calls by any means for joining such doctrines ( Article 30)

This regards the internal security of the state. Regarding the restrictions related to the state's external security, the legislature set a legal provision restricting freedom of opinion to keep intact Kuwait's reputation and its relations with other countries. It stipulates a penalty of no less than three years to everything that would expose Kuwait to the danger of war or severing of political relations with the aim of preserving the prestige of the state and enhancing its financial confidence ( Article 4). This is intended to reduce broadcasting any false news or data. The law stipulates the penalty of temporary imprisonment, which is not less than three years, to every Kuwaiti or resident in Kuwait who intentionally broadcasts false or malicious rumors about the country's internal conditions, which would weaken financial confidence in the country, its prestige or national interests ( Article 15) The law stipulates a penalty of temporary imprisonment, which is not less than 3 years, to any person who intentionally spreads at the time of war any false news, data or rumors to cause harm to the military operations of the armed forces or stir up dismay and terror in people ( Article 29).

## **2. Restrictions on freedom of opinion with regard to freedom of belief and religions**

Freedom of belief and religions is a form of freedom of opinion. Every person has the right to embrace a religion, and the majority of constitutions stipulate the freedom of religious belief and the freedom to practice religious rituals, provided that this does not contradict the public order and morals in the state. The Universal Declaration of Human Rights stipulates this in (Articles 10, 12).

Therefore, the Kuwaiti Constitution stipulates in ( Article 35 ) that "freedom of belief is absolute, and the state protects the freedom to perform the rituals of religions according to the customs, provided that this does not prejudice public order or contradicts morals."

Accordingly, it is not possible to accept freedom of opinion and expression that scorns or despises religions or beliefs, and this entails that the legislature may intervene and restrict freedom of opinion if the purpose of the

opinion is to insult or scorn any religion or doctrine (Appeal No. 239 of (2008) Criminal Session of July 21, 2009). The law applies a penalty of one-year imprisonment and a fine of no more than one thousand Kuwaiti dinars to everyone who broadcasts opinions that include mockery, contempt, or miniaturization of religion or religious doctrine, whether this involves stabbing of beliefs, rituals or teachings (Articles 111). The law also criminalizes everyone who distorts any holy book about a doctrine of a certain religion with the intention of insulting this religion. This act is punishable by imprisonment for a period that does not exceed one year or a fine that does not exceed a thousand dinars or both (Articles 113).

### **3. Restrictions on freedom of opinion contained in the Information Technology Crime Law**

The accelerated expansion of individuals in the use of international Internet as a means of communication led to the emergence of new types of serious crimes, called cybercrimes, such as stealing information and crimes connected with morals and values established in society, in addition to crimes resulting from the misuse of social media and the Internet. This led in turn to the necessity of the legislature's intervention to enact a law that criminalizes any wrong behavior that can harm the values of society or its members (Hilali, A (2006), (Ayman, F (2007)).

The State of Kuwait sought to support international approaches to combating this type of new crime in compliance with the provisions of the Arab Convention to Combat IT crime (Arab Convention on Combating Information Technology Crimes (2010)), which takes the ease of communication as a means and under the justification of freedom of opinion and expression through formulation and approval of the Information Technology Crime Law with the aim of combating every opinion or expression would harm the constituents of society and its political, social, economic, intellectual and religious aspects due to misuse of information technology ( Law No. 63 of (2015) on Combating Information Technology Crimes).

The legislature has singled out the sixth article of the law to criminalize the statements and phrases published through the Internet or any means of information technology that the law has shown, which states: "As the case may be, every person shall receive the penalty stated in clauses 1, 2 and 3 of Article (27) of the Publications Law referred to whenever such person commits via the Internet or by any means of information technology an act as the case may be according to Articles (19), (20) and (21) of the aforementioned law." (the Press and Publications Law (2006) was amended by Law No. 4 of (2016)). The legislature referred the application of Article 19 of Law no. 3 of 2006 regarding publications to the statements and sayings that the Kuwaiti Constitution does not protect



whenever such statements or sayings are published on the Internet or by any means of information technology since “prejudicing the Allah, the Holy Qur’an or the prophets, the good companions, or the wives of the Prophet - may God’s prayers and peace be upon him and his family - or the family of the prophet by innuendo, stabbing, ridicule or defaming by any means of expression stipulated in Article 29 of Law no. 31 of 1970 to amend some provisions of the Criminal Law no. 16 of 1960.” Article 20 states that “it is not permissible to criticize the Emir of the state and no statement or saying may be attributed to him except with a special permission written by the Emiri Diwan.” (Article 21 of the Press and Publications Law).

#### **4. Restrictions on the opinion prejudicing *intuitu personae***

The Kuwaiti Criminal Law differs from the US Criminal Law in restricting the statements and phrases prejudicing *intuitu personae*. The US law does not criminalize any statements or phrases directed to individuals, no matter how grave or insulting they are, as long as they do not violate the restrictions and controls set by the US Supreme Court. In contrast, the Kuwaiti Criminal Law criminalizes all statements and phrases that are insulting and slanderous that could result in an insult or contempt for any member of society and hence affects the *intuitu personae* of individuals.

*Intuitu personae* is the status of a person in society based on the necessity to respect members of society and hence not to infringe on this status in any way, whether by saying or actually with the aim of degrading the individual, attacking their dignity or prejudicing their status in society (Appeal No. 384 of (2011), Criminal); (Al-Saeed, 2002); (Hosni, 1988); (Hassanein 1984).

Accordingly, the Kuwaiti legislature intervened to maintain *intuitu personae* of individuals in society by restricting the statements or phrases that contain insults or defamation and not to deem them part of the freedom of opinion and expression guaranteed by the Constitution. Article 209 of the Criminal Law criminalizes defamation that includes statements or phrases that attribute an incident to a person that distorts the person’s reputation (Law No. 31 of 1970 amending some provisions of Criminal Law No. 16 of (1960)).

The Kuwaiti legislature also criminalized the insult, which includes statements or phrases that attribute descriptions to a person in a way that can affect the person’s honor or position (Article 210 of the Criminal Law).

#### **5. Restrictions on freedom of opinion on the discourse of incitement to hate**

Legislatures in both Kuwait and the United States have adopted this important restriction of freedom of opinion and expression to maintain the unity of society and the cohesion of its internal front from sedition and disintegration. Therefore,

the legislature in Kuwait issued a law to maintain national unity (Decree-Law No. 19 of (2012) on the Protection of Unity). This law prohibits by all means of expression contained in Article 29 that calls for or incites hatred or contempt of any class of the society or that prejudices the national unity or incites sectarian strife or calls for the superiority of any race, group, color, origin, religious doctrine, gender, lineage, or attempts to justify or enhance any form of hatred, discrimination or incitement to that, or broadcasts, publishes or writes articles or false rumors that lead to the above. The law stipulates in Article (2) the penalty of imprisonment for a period not exceeding seven years, a fine of no less than ten thousand dinars and not more than 100,000 dinars or both of these penalties. It also stipulates the confiscation of the means, money, tools, newspapers and publications used in the commission of the crime. The punishment shall be doubled in the event of recommission or if the crime would endanger national unity or the safety of the country.

The Kuwaiti legislature did well when it adopted this restriction of freedom of opinion and expression, as Kuwait is a homeland for all who holds its nationality. There is no discrimination among them due to differences in religion, tribalism or sectarianism. All the country's sects reject all forms of racism that constitute a violation of human rights and a threat to peace and social security (Appeal Session No. 16/2/2015 Appeal No. 862 of (2014) (Criminal)).

### **Conclusion**

Through this study, we discussed freedom of opinion and expression between constitutional guarantees and legal criminalization in the United States of America and Kuwait. It seems clear that the two countries share the interest in the freedom of opinion and expression, which is one of the most important rights that individuals enjoy through giving constitutional protection to exercise this right with the aim of promoting democracy, community development and monitoring of individuals.

However, like all other individual rights, this right can be used in an arbitrary way that can be severely harmful to the security and stability of society and the general peace. As such, the legislature in Kuwait and the US Supreme Court have established a set of restrictions, the lack of commitment thereto will lead to the disappearance of constitutional protection of opinion and expression and thus the existence of the criminal responsibility of the opinion holder in preparation for their trial.

Here are the most important findings of this study:

- The Constitutions of the United States of America and Kuwait share an interest in freedom of opinion and expression and the protection thereof with many

guarantees, so that individuals enjoy this right without fear of punishment by the authorities.

- There is a close link between the right of individuals to exercise freedom of opinion and expression and the establishment of democracy, the development of society and the promotion of the control of individuals. Whenever the members of society enjoy in a decisive and disciplined manner the freedom of opinion and expression, democracy and society will flourish and so will the development of such a society.
- Freedom of opinion and expression without controls or restrictions can lead to catastrophic consequences for society by harming other freedoms of individuals, disturbing public peace and society's stability.
- The legislature in Kuwait and the US Supreme Court agreed on the necessity of putting a set of restrictions on the freedom of opinion to achieve the public interest and ensure that individuals do not use this right arbitrarily, which may lead to uncomfortable consequences with respect to the security and stability of society by harming other freedoms of individuals and disturbing public peace.
- The legislature in both Kuwait and the United States adopted most of the restrictions contained in freedom of opinion and expression, such as restrictions on incitement to hatred, incitement to fight and collective defamation of any group of society and obscene pornography.
- The US Supreme Court does not agree with the Kuwaiti legislature to restrict the expressions and insulting statements that degrade *intuitu personae*, in addition to the statements involving criticism or insults against religious doctrines and freedom of belief. Statements and phrases in these events are not deemed a crime in the United States no matter how cruel, contemptuous and offensive they are, unlike the Kuwaiti Criminal Law.

### **Recommendations**

- The Kuwaiti legislature intervene to explain the legal provision of Article 28 of the Publications and Publishing Law to remove the ambiguity of its phrases by explaining what is meant by the existing social and economic system, specifying the limits of incitement to change these two systems, in addition to determining which doctrines are prohibited from being embraced or converted.
- The competent authorities in the state should put into effect the second paragraph of the legal provision of Article 20 of Law no. 31 of 1970, amending some provisions of the Criminal Law no. 16 of 1960 by trial of everyone who attributes to His Highness the Emir any statements or sayings without a special written permission from the Emiri Diwan.

- The Kuwaiti legislature should abolish the first paragraph of Article 21 of Law No. 31 of 1970, amending some provisions of the Criminal Law No. 16 of 1960 related to criminalizing the contempt of the state constitution.
- The Kuwaiti legislature should intervene to explain some of the phrases mentioned in the legal provision of Article 21 of Law No. 31 of 1970 to remove their ambiguity by explaining what is meant by the statements that can affect the value of the national currency or what leads to confidence in the economic situation of the country or the statements which entail abuse or harm to relations between Kuwait and other Arab or friendly countries.
- The legislature should intervene to add a paragraph to Article 4 of Law No. 31 of 1970, amending some provisions of the Criminal Law No. 16 of 1960 that stipulate that “statements and opinions are not considered hostile acts.”
- It is better for the legislative regulatory methods of freedom of opinion in the Kuwaiti Constitution to vary and to delegate the ordinary legislature to regulate such important rights, so that they are not subject to infringement or restriction.

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