THE HISTORY AND DEVELOPMENT OF CONTRACT LAW IN KUWAIT

With a particular emphasis on the role and precepts of Islamic Law in its formulation and implementation

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**ABSTRACT**

In 1961, Kuwait became a fully independent country, throwing off the vestiges of its status as a British protectorate and choosing a completely fresh and different legal system. The basis chosen was not that of English Common Law but the French-inspired Egyptian model, a ready-made civil law system, conveniently available to be imported at short notice, which also reflected the Islamic traditions and sensibilities of the people. This thesis explores the underlying philosophies and origins out of which the current Kuwaiti legal system was born and then developed. It then analyses how, within this system, Kuwait’s history and evolution influenced the way contract law is codified and practiced in Kuwait today. Special emphasis is placed on the role of Islamic tradition, culture and practices. The distinction between Islamic Law and Islam as a religion is explored in relation to certain important contractual principles. This work includes both analysis of very recent, significant cases from the Court of Cassation, Kuwait’s Supreme Court, as well as direct interviews with Kuwaiti Supreme Court judges, adding a unique insight from the country’s most senior judicial figures into the legal system and workings of modern Kuwait.
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INTRODUCTION

Upon gaining independence in 1961, Kuwait established a constitutional monarchy within a parliamentary system of government and a civil code of laws based on Kuwaiti tribal customs and practices, as well as Egyptian, French and Islamic Law (Shari’a). Unlike some other Middle Eastern countries, Kuwait has maintained commercial and civil laws that, whilst guided by Islam, are not based specifically on Islamic Laws.

The aim of this thesis is to examine Kuwaiti contract law and how Islamic tradition, culture, law and practices have influenced the civil laws as they currently stand, with particular emphasis on certain contractual principles, and using primary research from Supreme Court judges. It will look at how the underlying philosophies, theories and principles of Islamic tradition have informed the development and evolution of contract law and to what extent current legal practice is still bound and shaped by those same principles.

I. Research Relevance

Since the conclusion of the Gulf War in 1991, Kuwait has become an active trading partner with Western countries.¹ Because of the unique history of Kuwait as a Middle Eastern country with a parliamentary system of government, a written constitution and laws which draw on both Western and Middle Eastern traditions, it is important to build an understanding of the history and development of these legal codes and their application to commercial contracts today. Within the framework of Islamic influence, tribal customs and colonial hegemony, the laws of Kuwait have slowly taken shape over the last century and while, in the personal sphere, the influence of Islamic practice is clearly evident, the situation with respect to the commercial domain is more complex and involved. Furthermore, there are

¹ Jill Crystal, Oil and Politics in the Gulf: Rulers and Merchants in Kuwait and Qatar (1st edition 1990, CUP, this ed 2016)
notable gaps in the research literature in this area, as the Civil Law Code has, in the main, tended to dominate. Shari’a Law has also received academic attention. However, the importance of Islam as a religion and Kuwaiti cultural tradition has generally been overlooked. This thesis, therefore, seeks to redress the balance and to examine the overlap and the effect on the law in current practice, as currently shaping Kuwait’s engagement and exchanges with its trading partners and the outside world.

As Kuwait continues to be affected by a process of cultural and societal change, the relevance of this research lies in its ability to shed light on an increasingly important aspect of the commercial domain, and whether the current code’s underlying precepts and values are suitably attuned to the demands of an ever more complex and diverse trading environment. Accordingly, any attempt to illuminate the history of its development and influences will allow for a fuller understanding and appreciation of current practice.

II. Legal Antecedents and Influence

As an Arab Emirate with a parliamentary monarchy and the oldest democratic system of government in the Arabian Peninsula, Kuwait’s legal code is derived from several legal systems. Part of that code is based on Kuwaiti legal traditions, which have their origins in the region’s tribal antecedent, customs and practices that are still very much to the fore in Kuwait today; another part is derived from the Egyptian code, and indeed the Iraqi code, which draws on French law and which, in turn, took heavily from the basic philosophy and principles underpinning Roman law. In addition, certain aspects of both the Kuwaiti Civil and Commercial Code reflect Shari’a, with other aspects reflecting Islamic religious principles, separate from Shari’a. The incorporation of these diverse elements into the Kuwaiti body of law owe much to the immediate social and cultural pressures of the day and, with

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2 Urs Martin Laeuchli, ‘Civil and common law: Contrast and synthesis in international Arbitration’ (2007) 62:3 Dispute Resolution Journal, 81
respect to Islamic influence, this is particularly evident in relation to the commercial statutes, where at different points over the last century, the law of contract has had different degrees of prescriptive Islamic elements.

Kuwait’s law is not principally based on Shari’a Law; no comprehensive source, however exists that compares and contrasts Kuwait’s legal code to the legal influences that contributed to it. Accordingly, any analysis of this area should look broadly to address the question of the impact of the legacies of Arab custom and Islamic Law on Kuwait’s codes, the impact of British law resulting from Kuwait’s status as a British protectorate for over sixty years, and how contemporary Kuwaiti contracts for example, compare and contrast with those of pre-Islamic, Islamic and Western equivalents.

III. Strands of Influence

In 1961, Kuwait gained independence and enacted its constitution. At that time, the country looked to Arab civil laws, drawing on its Egyptian neighbour’s primarily French Civil Law model, as a basis for new legislation. Roman Civil Law was therefore incorporated. However, Al-Sanhuri, the eminent legal jurist who drafted Kuwait’s new legal system, was Muslim and a passionate believer in the importance of Islamic Law. Article 2 of the Constitution of Kuwait states that Islam is the official religion of the land, and that Islamic Law or Shari’a should be a principal source for new legislation. Therefore, in some respects, Kuwaiti law became a mixture of Arab and Western legal code in order to accommodate the demands of a modern economy and reflect its heritage. These changes to the Commercial Law, which saw a move from more Shari’a-based precepts, owed much to not just Kuwait’s growing role within the sphere of global commerce, but also to an evolving debate

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3 Michael S. Casey, The History of Kuwait (Greenwood Publishing Group, Westport, USA, 2009)
concerning the role of both shareholders and stakeholders within companies and the more general notion of the corporate objective.\(^5\)

This was particularly notable with respect to international contracts and banking, which developed around its petroleum-based economy, where the idea of shareholder primacy, and entity maximisation were not to the fore and Shari'a Law was seen as inadequate to the demands of a modern commercial environment.\(^6\)

For example, Islamic Law forbids the charging or paying interest, but the Kuwaiti Commercial Code recognises the right of a creditor to interest on a commercial loan.\(^7\)\(^8\) Again, as Keay makes clear:

“Indeed, the consensus was that the weaknesses of Sharia Law with respect to the commercial environment were hampering the ‘efficient, effective and entrepreneurial management that can deliver shareholder value over the longer term’.”\(^9\)

However, the rise in recent years of the influence of Islamic factions in Kuwaiti politics has paved the way for an increase in the influence of Islamic tenets. This can be seen clearly in the latest revision of the Civil Code in 1996 with Islamic fiqh being upgraded to the second source of law, above custom. However, an important distinction has to be made between Islam as a religion and Islamic Law, of which there are many different schools.


\(^7\) A. Al-Suwandi, ‘Developments of the legal systems of the gulf Arab states’ (1993) 8:4 Arab Law Quarterly 289


IV. Research Approach and Methodology

The research for this thesis will draw on both primary and secondary sources and will employ a qualitative approach. The study will be conducted over a period of three years both in London and Kuwait and will utilise relevant documentation, with primary sources including both case reports and legislation, as well as first-hand interviews with judges from the Kuwaiti Supreme Court (the Court of Cassation). Secondary sources will cover textbooks, articles, reports, and any other materials relevant to the study; the research approach can principally be characterised as desk-based, and a mix of both theory and doctrine. The author conducted fieldwork in Kuwait, in the form of interviews with Supreme Court judges whose experience of working within the commercial domain is extensive. The interviews were semi-structured, allowing for a richer data set and facilitating a more complex and empathetic engagement with participants and so providing a measure of flexibility, which a more fixed approach would not necessarily accommodate.

From a methodological and legal standpoint, the interviews contribute an additional dimension to the research in that they allowed the researcher to discover the views, opinions and attitudes of elite practitioners of contract law and the changes which have occurred over the last 50 years. This is important as it is these very individuals who have had first-hand experience of the development of the law during this changeable period, one in which the intellectual struggle between the principles of Islam and secular law was at its keenest. It was also during this period that the demands of the global business environment were being most evidently felt and where the possible weaknesses of application of Islamic Law were coming under greater scrutiny and being more strongly debated.

This debate among practitioners is one that admits a uniquely practical and realistic element not necessarily captured or elucidated in the literature. This is relevant as the associated literature is by no means comprehensive and, if anything is
characterised by a general paucity in respect of some sources; as such, the interviews serve to complement these data.

A further point of note is that the process of drafting legislation, by necessity, involves a consideration of the views of the judiciary; any interviews therefore, provide the researcher with an opportunity to try to ascertain what influences and elements informed those views and opinions and how these contributions strived to strike a balance between the social, cultural and religious elements as well as the complexities and demands of a rapidly evolving commercial and business environment. They are exposed first-hand to how well current or developing legislation performs in the day-to-day demands of Kuwaiti contract law and what elements may not be fit for purpose or at least require revision and discussion.

Any research must have regard to the political dimension as well; interviews enabled the researcher to ascertain whether the Supreme Court judges believe that the government is aware of difficulties and issues on the ground. Additional questions in this regard touched on whether the government has struck the correct balance between the different legal systems, which constitute Kuwaiti law, in meeting the demands of not just the present environment, but those of the immediate future.

The interviews, therefore, contribute an important human dimension to the research discussion. Any research which did not have regard to the evident social cues would, of necessity, be deficient and while the cultural, religious and social aspects are undoubtedly relevant, they may not be properly captured by secondary research alone.

Interviews in this context also helped to clear up uncertainties in the secondary research and, given the nature of the study, the interview sample was very specifically targeted and data returned was rich and nuanced.

In short, the researcher believes that the interviews take proper account of the research environment, contribute to the richness of the data mix, and allow one to
draw on an oral history, which fully covers that period in the country's recent past in which the greatest change has been evident, culturally, socially, religiously, economically and, most importantly, legally.

The research will, of course, conform in all respects to the ethical policies and guidelines as set out by Leeds University and all data will be securely stored.

V. Aims and Objectives

Accordingly, the aims and objectives of the study are as follows:

- To carry out a study, the first of its kind, into the influence of Islamic traditions, culture and law both on current practice, and the evolution of, the Law of Contract in Kuwait.
- To explore the concepts, philosophies, theories and ideas from history, drawing on other legal systems where appropriate, which have helped form the current practice contract law in Kuwait.
- To better understand the development and evolution of contract law in Kuwait, leading to a more thorough understanding both of the application of current contract law in Kuwait and how it ought to be applied.
- To ascertain whether the current system functions to provide the best legal support for contract law, in context of modern needs and, if appropriate, to produce recommendations to develop and enhance the field of contract law in Kuwait and to eliminate any weaknesses identified in this study.

VI. Research Questions

- What are the historical factors that led to the development and evolution of Kuwait Civil and Commercial Codes?
• What is the impact of Kuwaiti custom, as well as Arab custom and Islamic Law on the current Kuwaiti legal system, with special focus on contract law?

• What is the impact of English law and Kuwait’s status as a British protectorate for over sixty years on Kuwait’s Civil and Commercial Codes?

• How do contemporary Kuwaiti contracts compare and contrast with those of pre-Islamic, Islamic and western contracts?

VII. Research Focus

While Kuwaiti law admits of a variety of influences and traditions, this study will focus its attention on one specific strand of influence, that of Islamic and Arabic law, tradition and culture. Kuwaiti law has drawn heavily on Egyptian legal practice, which itself is heavily indebted to French jurisprudence. This study will only consider this aspect peripherally, in order to assess the respective weight of influence between French-based civil law and Islamic principles. In like manner, there is some evidence to suggest that English Common Law doctrines carried authority during the period of the British Protectorate; again this study will address these points briefly.

Islam itself, in keeping with many other mainstream religions, admits of several schools of thought or branches; in the main, these are generally held to be five in number – any mention of Islamic Law in this study will be solely confined to the


schools within the Sunni variant, which has been dominant in the region for centuries.\textsuperscript{13}

\section*{VIII. Thesis Structure}

The thesis overall will consist of eight chapters, which in broad outline will be as follows:

\section*{VIII.i. Introduction}

This section examines the background to the thesis and the researcher’s reasons for undertaking the proposed study. It sets out the thesis’ aims and objectives and details the research questions. It provides an outline of the thesis and describes the research environment. It further examines related issues and looks at potential problems thrown up by the study; a consideration of limitations follows. The question of the originality of the research is discussed and how the current study seeks to address identifiable gaps in the literature; in light of the relative absence of similar studies, a consideration of the research’s value follows.

\section*{VIII.ii. Chapter 1}

This chapter is given over to an exploration of the broader aspects of Kuwaiti society, politics and culture and serves to place the study within an overarching framework and context.

\section*{VIII.iii. Chapter 2}

Given the numerous strands of influence that have informed the development of Kuwaiti law generally, and more specifically the spheres of commercial and contract

\textsuperscript{13} Sayyed Nasr, Islam: Religion, History, and Civilization (2\textsuperscript{nd} Edn, 1\textsuperscript{st} Edn HarperOne, 2002, Tandem Library 2003)
law, a wider consideration of general philosophy and principles, which have contributed to its evolution and form, is called for – chapter two serves to fulfil that end. It encompasses: trade and commerce prior to the implementation of contract law, Roman and medieval law and the initial use of Roman contract law; how this developed, moving into Anglo-Saxon and then early English law; preliminary civil law; the interchange between law and religion in the centuries predating the foundation of Kuwait; the rule of Hamurabi, and the concepts underpinning the Lex Mercatoria.

The second half of the chapter considers the sphere of Kuwaiti law in greater detail, examining more specific regional influences and the historical development of general and commercial law. The influence of Shari’a Law across the centuries is discussed, while the impact of French and Egyptian law is also covered. The period of the British Protectorate and later, related developments are examined, as is the prescriptive force and influence of the Majallat al Ahakam al Adliya\(^\text{14}\) with respect to personal matters and how these ran up against the complexities and demands of an ever expanding and evolving commercial environment.

**VIII.iv. Chapter 3**

Chapter three consists of a literature review, examining relevant scholarly sources with particular respect to academic debates regarding key questions and issues in the Constitution. The philosophical beliefs of Al-Sanhuri and his Islamic framework are also well documented and make very interesting reading as a backdrop to the underlying themes of the creation of a modern Kuwait. While the literature is undoubtedly rich in respect of many aspects of Islamic Law, there is an evident absence of sources dealing with more recent decades and the influences which impacted the formation of commercial law within Kuwait. The role played by the Majallat al Ahkam al Adliya and the necessary changes introduced to address its

shortcomings in respect of the commercial law are not well attested. Certain academic research on the role of the judiciary today, however, is informative and raises interesting and indeed controversial questions. The chapter will review in detail the available literature and where the current study falls within this framework.

VIII.v. Chapter 4

Chapter four serves to set the historical context of the founding of both Islamic and secular law in Kuwait providing a backdrop by which to examine the economic, commercial and therefore legal changes, that occurred leading up to and following the era of the British Protectorate. It offers an overview of pre- and initial-Islamic rule and judicial administration, along with a summary of society, family codes and penal system. The chapter explains the evolution of Shari’a and the Islamic schools of thought and how Sanhuri intended his new legal system to be guided by Shari’a, yet not stifled by it.

VIII.vi. Chapter 5

In the fifth chapter the qualitative paradigm is described and analysed, its attendant benefits and disadvantages reviewed and the reasons supporting the choice are considered. The methodology details how the thesis makes use of detailed, semi-structured interviews with relevant elite individuals and sets out the reasons for the appropriateness of the choice of sample set. Issues considered include the data collection procedure and protocol, the flexibility of the proposed format, the rationale for the questions chosen and the data analysis methods used. Relevant methodological theory is also described and then compared and contrasted with the approach taken in this work, where appropriate. Limitations of the research method are also highlighted, as well as the steps taken to minimise them.
VIII.vii. Chapter 6

Chapter six goes in depth to compile and analyse the statements given by the Supreme Court Judges interviewed as a primary resource in order to understand in greater depth the nature of contract and general law in Kuwait today and how Islam and custom, in particular, have helped shape it. It presents the data, in terms of responses to each question, in verbatim form and reported form, and presents the findings as analysed within themes that occur naturally out of the data collected, rather than under a pre-set formula. It aims to give a broader understanding of Islamic Law and custom in Kuwait and what they may have brought to the everyday working of contract law and identify areas that need improvement or change.

VIII.viii. Chapter 7

The seventh chapter discusses the differences and similarities among the various legal families; their respective impact on Kuwaiti law is outlined and examined. Consideration is given to the different approaches employed to unify these differences under Kuwaiti law as currently set out.

More than most jurisdictions, Kuwait’s history has seen it exposed to a variety of legal systems, each in its turn the product of its unique history and culture. This chapter looks at these influences and philosophies, traces the footprint and signs of that influence in the current law and details the changes, which occurred as the commercial code sought to bring together these competing philosophies and approaches.

VIII.ix. Chapter 8

Chapter eight will provides a focused analysis of two important contractual principles under Kuwaiti law – interpretation of contracts and remedies for breach of contract. This will be done primarily through the lens of the first research aim. These principles will be explored in relation to the impact of the historical sources
considered within the thesis. By exploring these two principles in depth, the aim is to evaluate the specific influence of Islamic traditions, culture and law on the evolution of contract law in Kuwait, and on the current practice, as shown by the Supreme Court.

Throughout this chapter, an important distinction is made between Islam as a religion and Islamic Law. The distinction between Islamic religious influence and Kuwaiti cultural and traditional influence is also relevant, although more challenging as the two are strongly intertwined.

Using very recent decisions from the Supreme Court of Kuwait, academic literature and the primary research conducted with the Supreme Court judges, this section aims to draw out the relevant threads of Islamic influence, as opposed to French Civil Law influence. In light of the aim, the chapter’s main findings centre on the all-embracing concept of good faith in contractual interpretation, the nature of obligation in Shari’a with reference to specific performance, the Islamic principle of balancing the harm, and recent Supreme Court developments in the scope of judicial discretion in interpretation to look beyond the actual contractual terms and consider intention, normal dealings and the overall ‘truth’ of the contract.

**VIII.x. Conclusion**

The ninth and final chapter concludes the thesis: it summarises the various aspects and elements of the study, reviews any points of note and the conclusions reached. It also considers how the results of the study fit within the overall context of the current literature and how these may contribute to that body of research; proposals for additional research and potentially fruitful areas of investigation are detailed. Recommendations, where appropriate, are also set out.
IX. Research Environment

The principal research environment will be Kuwait City and all primary and a certain percentage of secondary research will be undertaken there. As such, a number of issues arose in respect of the study, chief among these being the administrative and bureaucratic difficulties of obtaining access to judges and prosecutors. It was necessary for the researcher to obtain a list of relevant judges from the Ministry of Justice and to then seek permission from the Ministry in respect of those the researcher wished to interview. In like manner, the Ministry had to grant permission with regard to interview-access to prosecutors; while this was not unnecessarily complex, one difficulty that arose was in that the Ministry does not set out any timeframe for the granting of access.

Obtaining access to those within the commercial domain also requires a measure of engagement with the Kuwait Chamber of Commerce, nonetheless this process was far less involved than that with the Ministry of Justice and was largely dictated by the individual willingness or otherwise of executives to be interviewed.

Getting access to recent, important Supreme Court case reports was also not straightforward as they are not available to the general public. However, the Ministry of Justice approved access and these reports provided a very valuable source of material.

While these were the principal steps to be negotiated in relation to the primary research, the matter of secondary work also presented some difficulties in that there is an evident lack of materials and sources within the literature relevant to the area under investigation. This applies especially to research into historical aspects of Kuwaiti law as they can be seen as having no direct commercial benefit. In addition, some of the work undertaken in the field is not always as strong or thorough as might be desired. Translation errors have led certain scholars to fundamental misunderstandings. Furthermore, general research facilities are limited and law library material far from comprehensive, opening times are
restricted, and not all databases are accessible online. Again, while there are a number of Master's degrees written in Arabic, which touch on a variety of areas within the legal sphere, the majority of PhDs are written in French and where translated into Arabic, the quality of the translation is again often far from ideal. A further complication arises in that many commercial judgements are not within the public domain. The relatively small size of the population is also reflected in the number of researchers in the field, which pales when compared, for example, to that of the UK.

As such, research within such an environment can, at times, be challenging and there are evident gaps in the literature overall.
Chapter 1 Historical Setting of Kuwaiti Law

1.1 Introduction of Kuwait’s Legal System

This chapter will examine Kuwait’s history and general legal background and provide a broad overview, tracing its development up until the present day. An analysis of the impact of the discovery of oil on the general economy and wider society will also be presented as the development of the oil industry has transformed Kuwait, both economically and financially. The setting up and development of the legal system in Kuwait is also considered, with focus in the main upon Shari’a Law. It will also examine the reasons underlying Kuwait’s adoption of a Civil Law system; a discussion of constitutional law and governance follows. It also focuses upon the effective implementation of the Constitution of Kuwait and a discussion of various articles in the Constitution of Kuwait. The chapter examines the governance of the legal system in Kuwait and discusses the role of Emir, the role of the crown prince and the role of deputy Emir.

Following on is a discussion of the development of commercial law in Kuwait. This part details the economy of Kuwait with reference to demographics, the economy, GDP, foreign trade, the market environment, its legal structure, customs and regulations. It also throws a little light upon the investment environment. It also goes on to discuss the ways in which to carry out business in Kuwait. It throws light upon recent developments and various challenges, the role of ministry of justice, the role of various universities and judicial institutes, judicial training institutes and legal institutions and the role of law firms.

1.2 Background to Contract Law in Kuwait

1.2.1 Necessity for Development of the Legal System in Kuwait

As has been noted, the basis of the legal system of Kuwait would have originally been Shari’a (Islamic Law) with much of the customs, social behaviour and infrastructure needed for development of the legal system in Kuwait being based
upon this law (and the remainder on pre-Islamic custom). This assumes that the laws of contract and commercial law are thus the result of the development of Shari’a Law in Kuwait. However, many of these ties to Islamic Law were severed, especially with regard to Commercial and Civil law, (with Shari’a remaining for Family law), as the need for a more comprehensive suite of laws, meeting the demands of the modern commercial environment, became clear.

The Constitution of Kuwait provides that “Kuwait is an Arab State, independent and fully sovereign. Neither its sovereignty nor any part of its territory may be relinquished. The people of Kuwait are a part of the Arab Nation... Its religion is Islam and Shari’a Law (Islamic Religious Law) is main source of its legislations... Its political system is democratic... The Arabic language shall be its official language”.1

On the other hand, Kuwait’s legal system comprises an unusual mixture of English common law, French civil law, Egyptian law and Islamic legal principles.2 Article 2 of the Constitution provides that, “Islam forms a major source of law”. This article has given rise to much heated discussion (as analysed later, see Chapter 3.3.1). However, it uses the word “major” (or “principal”) and not “all” or “entire”. Nor does is say “the” major source. This means that it provides space for other sources of law. However, the laws should not go against the ethos of Shari’a Law. The Kuwaiti legal system is a very recent development from a historical point of view. Kuwait has been able to incorporate various international standards into its legal system, in addition to those arising from Egyptian Law. For example, the rules of the International Chamber of Commerce (Vienna) as amended in 1974 were adopted by Kuwait for the regulation of letters of credit. In similar fashion, Kuwait has adopted

the International Accounting Standards. These standards are formed under a special enactment, which regulates the procedures that are to be followed by the auditors and the accounting firms in state of Kuwait.³

After Kuwait attained its independence in 1961, its aim was for a very modern legal system that succinctly integrated its values and the current system is an expression of that hope. It merged its Islamic Laws, *Majallat al Ahkam al Adliya,*⁴ that were based upon the Shari’a Law with the Civil Code of France. This was a reflection of the need to accommodate an increasingly complex economic environment.

Custom plays a very interesting role in determining the legal system of a country. It can be influential either directly, as a named source, or by inference. Lawmakers do not exist in a vacuum but are a product of their time and environment. As such, the customs and traditions of their country, as learnt almost subconsciously as children, form a part of their nature and their reasoning. In this regard Kuwait is no exception. As such, the precepts of Islam are very much to the fore in the creation of new laws: according to Law Decree 38, 1980, Article 199: “*a foreign judgement may only be implemented if the verdict was issued by a competent court, if all parties involved were properly represented, if the order does not contradict any order passed in Kuwait and if it is not in violation of public order or ethics in Kuwait, which are based on Islamic principles*.⁵

### 1.3 Brief Introduction to Kuwait

Nestled high in the North-West of the Persian Gulf, the region that is now Kuwait has been home to traders and merchants throughout history. During the height of the Parthian Empire, the ancient city of Characene (Messene) was a very important port, serving trade with Mesopotamia and India; many centuries later, the area fell

³ *ibid*
⁵ Kuwaiti Civil and Commercial Procedure Code Law no. 38, 1980
under the control, in turn, of the Ottoman and British Empires. After the First World War, Kuwait became an independent sheikhdom under the British, before gaining independence in 1961. With oil reserves that are the 5th largest in the world, it is the 11th richest country in the world, per capita, with a population of some 2.8 million. However, despite having the highest Human Development Index (HDI) of all Arab countries and being designated by the World Bank as a “high income economy”, Kuwait is still home to customs and practices, which owe more to its ancient past than any modern ties it may boast of.6

In the main, internally, Kuwait’s trading practices and contract negotiations are conducted almost exclusively on the basis of trust and are informed by Islamic values of honesty, truthfulness and fairness, with most parties avoiding the complexities of formal written contracts and where negotiations are usually conducted at, what elsewhere might be regarded as, a very rapid and accelerated pace.

In many respects, this system of practice mirrors that of the Lex Mercatoria,7 8 during the medieval period in Europe and the parallel growth of English common law, in that a system grew up, based on custom and publicly accepted best practice, which largely avoided legal technicalities and where, in matters of dispute, cases were decided on the basis of ex aequo et bono – “according to what is right and good”.9 This concept is not entirely out-dated and anachronistic, as Article 38 of the

7 Walton H. Hamilton, ‘The Ancient Maxim Caveat Emptor’ (1931) 50 Yale Law Journal 133, which argues that caveat emptor never had any place in Roman law, or civil law, or lex mercatoria and was probably a mistake when implemented into the common law.
Statute of the International Court of Justice (ICJ)\(^ {10} \) shows, stating that cases may be considered on the basis of *ex aequo et bono*, if both parties are agreeable. Ultimately, such systems are characterised by a belief in the efficacy of self-regulation and by nothing so much as a desire to avoid falling under the general sway of the state. Within Kuwait, however, this informal code of practice and self-regulation is informed by an additional element, namely the customs and beliefs of Islam, which traditionally tends to be very patriarchal.\(^ {11} \) As such, the informal oral contracts between parties in Kuwait have almost invariably been between men.

Contract law in Kuwait has a distinctive lineage in that more formal contract law as it is presently conceived was only given effect in Kuwait in the very recent past. Although formal Egyptian contract and French civil law are very relevant,\(^ {12} \) \(^ {13} \) for the most part, the history of commercial exchange and agreement has been one solely dependent on oral or verbal contracts. However, the advent of codified contract law has introduced a new paradigm, which carries with it elements that rub up against a cultural ethos that, as noted, values informal face-to-face negotiations and often the swift and immediate conclusion of negotiations. In the event of later difficulties, two options present: either an informal renegotiation of terms or recourse to the civil courts. In such cases, the courts may be regarded as the very opposite of a system, which values self-regulation and an avoidance of legal technicalities and unnecessary detail.

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1.4 Tracing the Ancient History of Kuwait to the Modern Times

1.4.1 Ancient History

As long ago as the 4th Century B.C., the Macedonians colonised an island located on the coast of Kuwait, first called Ikaros but now known as Failaka.\(^{14}\) Kuwait’s more recent history is somewhat less clear and, according to Lorimer’s monumental classic reference work, is the ‘subject of various and conflicting traditions’.\(^{15}\) According to him, it ‘seems to have come into existence about the commencement of the 18th century’.\(^{16}\) Other historical sources claim it can be traced back to the year 1613 when the Bani Khalid clan of tribespeople built a fishing village in what is now Kuwait City.\(^{17}\) It is certainly accepted that in the late 17th century, Central Arabia suffered a serious period of drought and so the tribes from there (primarily the Bani Utub) migrated to what is today the region occupied by Kuwait and that, over the next hundred years or so, Kuwait’s importance grew based on its position as the trade route between India and Europe.\(^{18}\)

Indeed, when Sabah I bin Jaber was elected in approximately 1756 as the first Emir of Kuwait,\(^{19}\) he actively sought to make Kuwait a major centre of trade and commerce.\(^{20}\) Kuwait during this period started to emerge as a major trade hub between India, Africa, Mesopotamia and the Levant. Furthermore, the development

\(^{14}\) Mary Ann Tétreault, *FalaiKa Island: Unearthing the Past in Kuwait* (Middle East Institute, Jan 2013) <http://middle185.rssing.com/chan-15628190/all_p1.html> [accessed: 5th September 2014]


\(^{16}\) ibid

\(^{17}\) A letter sent by Sheikh Mubarek Al-Sabah on 5th March 1913 to the British authorities regarding the defining of Kuwait’s borders refers to Kuwait as a ‘deserted land where our grandfather settled in 1613’, see Arabic text at: <www.kuwaitmission.ch/images/5.jpg>

\(^{18}\) Lorimer, n15

\(^{19}\) Note that the current ruling family of Kuwait, al-Sabah, are descendants of Sabah I

of the pearl industry into a major part of the local economy gave Kuwait the opportunity to create one of the largest maritime fleets in the region. Other notable areas of trade included wood, spices, dates and horses.\textsuperscript{21}

1.4.2 Discovery of Oil

The drilling of oil in the area initially began in Bahrain and then towards Burgan in Kuwait in 1935, as a result of concerted series of investigations in the previous years. Although the discovery of oil, therefore, was not a ‘sudden or single event’,\textsuperscript{22} oil of any commercial exploitable quantity was finally discovered on 22\textsuperscript{nd} February 1938. This well was named as ‘Burhan No. 1’ and is in production to this day.\textsuperscript{23}

World War II, however, caused a delay in full exploration and it was not until 30\textsuperscript{th} June 1946 that the late Sheikh Ahmad Al-Jaber Al-Sabah oversaw the first oil shipment from Kuwait.\textsuperscript{24} With this Kuwait joined the other oil producing nations of the region.

1.4.3 The Oil Industry and Nationalisation

The ‘black gold’ of oil heralded a new era of major importance in the history of Kuwait. Kuwait started negotiating to exploit its natural resources in line with other Arab oil producing states.\textsuperscript{25} The signing of an agreement with British Petroleum and the Gulf oil companies saw the Kuwait government assume majority control of all operations within its borders.\textsuperscript{26}

Indeed, the discovery of the significance of its oil reserves in the 1930s and the collapse of the Ottoman Empire following the First World War, gave Kuwait an

\begin{flushleft}
\textsuperscript{21} ibid
\textsuperscript{22} Jill Crystal, Kuwait: The Transformation of an Oil State (Westview Press 1992)
\textsuperscript{23} Oskay, n20
\textsuperscript{24} ibid
\textsuperscript{25} ibid
\textsuperscript{26} Kuwait Petroleum Corporation (KPC), \textit{Kuwait Oil History} (Kuwait Petroleum Corporation, 2016), <www.kpc.com.kw/InformationCenter/Pages/Kuwait-Oil-History.aspx>, [accessed: 12th July 2016]
\end{flushleft}
This move strengthened the Kuwait government’s hand in subsequent negotiations with partners and competitors and gave it greater standing generally within the region. Indeed, the 1950s saw Kuwait transform from a ‘poor and dependent British protectorate to a wealthy, independent state’. Furthermore, the new found wealth was used by the new ruler, Sheikh Abdallah Salim, to fund a broad programme of development.

Kuwait was subsequently granted full independent status. However, this was not without exchange of notes between the then Emir of Kuwait, Abdullah Al-Salim Al-Sabah and the United Kingdom. The Reserve Bank of India had replaced the gulf Rupee by the Kuwaiti dinar. There were huge foreign investment inflows due to the discovery of large oil fields, such as that at Burgan. Kuwait was transformed economically due to the development and growth of the oil and petroleum industry and it increasingly became an important business hub within the Middle East generally, attracting growing levels of investment and interest from abroad.

Following boundary disputes with Saudi Arabia and Iraq, Kuwait gained control over its resources in 1963, and subsequently nationalised its oil and petroleum company. Given Kuwait’s close proximity to Iran and Iraq, the war between these old adversaries had a detrimental impact on the economy. In 1983, bomb explosions in Kuwait destroyed the lives of many people. Kuwait funded Iraq during its war with Iran, which lasted some eight years, and when Iraq then asked Kuwait to write

27 ibid
28 Crystal n 22
29 KPC n 26
30 ibid
31 Oskay n 20
32 ibid
down this debt after the war, Kuwait refused. However, this led to economic competition between the two countries, with Kuwait on one hand refusing to offer debt relief to Iraq and on other hand increasing its oil production by 40 per cent. Disputes over output from the Rumaila Field also exacerbated the situation.

Kuwait was invaded by Iraq in 1990. The Emir of Kuwait, Jaber Al-Sabah was replaced by Ali Hassan al-Majid under the title of new Governor of Kuwait. The later assembly of an international coalition and the routing of Iraqi forces are all well attested, as was the destruction visited on Kuwaiti oil fields by departing Iraqi forces. However, within 5 years, Kuwait’s economy had recovered.

1.5 Historical Timeline

The development of the nation that is now called Kuwait dates to the early 1700s, or even earlier, depending which historical account is used. Kuwait’s current ruling dynasty was established by Sabah who ruled from approximately 1756 to 1772. At that time, the country was, in theory, an Ottoman province but it was frequently under threat from the Wahhabi tribe. In 1897, Britain declared that Kuwait was to be a British protectorate. This lasted until June 1961 when modern Kuwait was founded as an independent emirate; Emir Abdullah al-Salem al-Sabah was thus the first ruler of Modern Kuwait. However, Iraq more or less immediately claimed sovereignty over Kuwait and, in July, the Emir asked the British to send troops. Soon after, British forces were replaced by troops from the Arab League (which included Kuwait). In October 1963, however, Iraq granted official

33 After the war ended, Kuwait declined an Iraqi request to forgive its US$65 billion debt.
34 ibid
35 About US$50 billion were spent in infrastructure reconstruction to reach pre-invasion oil output.
36 Jacqueline Ismael, *Kuwait: Social Change in Historical Perspective* (Syracuse University Press, 1982)
37 see note 17 above
recognition to nation of Kuwait.\textsuperscript{38} The following timeline succinctly covers those major events of the last century, which have shaped and moulded the nation, as it currently stands.

The following timeline describes the period from 1914-1991:

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1914</td>
<td>Kuwait became an independent state but under British protection.</td>
</tr>
<tr>
<td>1922</td>
<td>Treaty of Uqair framed relationship between Kuwait-Saudi Arabia.</td>
</tr>
<tr>
<td>1961</td>
<td>Independence was declared by Kuwait. However, it was still under Iraqi threat; but Great Britain helped Kuwait by sending troops.</td>
</tr>
<tr>
<td>23 Jan 1962</td>
<td>First elections took place in Kuwait National Assembly.</td>
</tr>
<tr>
<td>14 May 1962</td>
<td>111th membership of the UN had not been foreseen.</td>
</tr>
<tr>
<td>11 Nov 1962</td>
<td>Constitution of Kuwait was promulgated.</td>
</tr>
<tr>
<td>4 Dec 1965</td>
<td>Shaikh Sabah al-Salem becomes Emir following the death of his brother.</td>
</tr>
<tr>
<td>23 Jan 1971</td>
<td>10 seats were won in the parliamentary elections by the Nationalist Party under Ahmedal Khatib.</td>
</tr>
<tr>
<td>1976</td>
<td>The National Assembly was dissolved during the recess. Suspension of Constitutional provisions in relation to freedom of the press and re-election.</td>
</tr>
<tr>
<td>8 Feb 1978</td>
<td>There was a formation of a new government under the Prime Minister and the Heir apparent. This was after Sheikh Jabir al-Ahmad had become the new Emir.</td>
</tr>
<tr>
<td>23 Feb 1981</td>
<td>A new assembly was formed, comprised of pro-government candidates, as they had won the elections with a significant majority.</td>
</tr>
<tr>
<td>19 Jan 1982</td>
<td>A government committee was formed to promote female suffrage, and this was successful</td>
</tr>
<tr>
<td>11 July 1985</td>
<td>An anti-Subversion Bill was passed after a bomb attack in a café in Kuwait.</td>
</tr>
<tr>
<td>3 July 1986</td>
<td>Constitutional rights were suspended by a decree, a new government was formed and the National Assembly was suspended.</td>
</tr>
</tbody>
</table>

\textsuperscript{38} Ismael, n 36
dissolved. Significant change at all levels of government occurs

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>31 Aug 1986</td>
<td>The Municipal Councils were dissolved during this year, following a decree by the Emir.</td>
</tr>
<tr>
<td>July 1990</td>
<td>Iraq stymies all efforts at promoting a resolution to border disputes. President Saddam Hussein claims that Kuwait did not meet OPEC quotas. Tensions between the two countries rise.</td>
</tr>
<tr>
<td>2 Aug 1990</td>
<td>Resolution 660 is passed by the UN Security Council. Ironically Kuwait is invaded by Iraq on the same day.</td>
</tr>
<tr>
<td>28 Aug 1990</td>
<td>Kuwait is declared to be the 19th Iraqi province.</td>
</tr>
<tr>
<td>13 Oct 1990</td>
<td>Political and civil rights are restored by the exiled government of the Emir and the Crown Prince.</td>
</tr>
<tr>
<td>16 Jan to 28 Feb 1991</td>
<td>The Kuwait government of the Al-Sabah family is reinstated following 'Operation Desert Storm' and Iraq is forced to strongly adhere to UN resolutions,(^{39})</td>
</tr>
</tbody>
</table>

Table 1: Timeline of Kuwaiti history

### 1.6 Conclusion

This introductory chapter set out the relevance of the proposed research and attempted to place the study in some sort of broader general context. As a study within the general legal sphere, it looked briefly at the diverse legal antecedents and influences, which the study will both draw on and examine. A consideration of the proposed research approach and methodology followed and its aims and objectives were described and delineated. The research questions were then set out and the focus of the study explored. The broader structure of the thesis and its divisions were detailed and the research environment described. Any study as proposed should lead with some overview of the general legal environment and those elements and characteristics, which give it a unique cast. As such, the Kuwaiti legal system was introduced and its broader history reviewed. The general history of the nation was also considered and its influences and contributions to the development and evolution of the legal infrastructure analysed. From an economic standpoint,

\(^{39}\) Khedr n 2
any exploration of the country’s financial resources must have regard to Kuwait’s position as a producer of oil and gas and how this aspect of the economy has generally transformed both the cultural and social life of the nation. The chapter furnishes a suitable timeline, which goes some way towards illuminating and chronicling events within Kuwait’s oil industry and how these have, in a very short space of time, had a genuinely transformative effect on all aspects of Kuwaiti life.
Chapter 2 History and Background

2.1 Introduction

The basis of any economy or country in the 21st Century lies in its history. The presentation of history is not merely the presentation of facts - historical research serves to interpret the foundations of the present and to place it within a recognizable context. Within the context of this research that examination will largely focus on the historical antecedents of the current law of Kuwait and how those statutes give evidence of that input over not just recent decades but, indeed, centuries. In doing so, it will, of necessity, consider its evolution and development, the impact of culture, religion and society and how the framers of that law sought to reconcile all of these disparate elements.

This chapter will therefore examine Kuwaiti contract law, its history and general development, and evaluate the framework within which its current structure, form and influences are set out.

The scope of this chapter is, accordingly, general in its character and will consider the underlying philosophies and principles, which inform contract law generally and how these were given effect in the statutes enacted over the decades in Kuwait. As such the chapter will range over a number of areas, and provide a necessary foundation and setting for the analysis, which follows.

This chapter begins by examining the situation that existed before Contract Law came into existence, and the difficulties arising as a result. It then goes on to consider the factors that triggered the need for Contract Law, and in exploring the development of Contract Law defines the ways in which it contributed to society for good or ill. The chapter ends with an examination of Contract Law, as it currently stands and touches upon its development in Kuwait.
2.2 Trade and Commerce Prior to the Advent of Contract Law

The idea that prior to the codification of contract law, there were no uniform rules or regulations governing commerce or trade may seem strange; however such a situation was the norm and a source of a certain confusion commercially.

The barter system was the lifeblood of trade in pre-history, and was defined as the exchange of the goods, where the quantity and value of the goods were not properly defined.¹ Trade was complex and accountability almost nil.

Trade increased with the mining of precious metals such as silver, gold and copper. Many countries, such as Cyprus, benefitted hugely from the trade of these metals; with the name “Cyprus” meaning “emerged from copper”.²

Trade also served to link remote communities and the Greeks and Romans opened new routes for the transport of goods,³ whilst the Great Wall of China opened another route for the transport of the goods.

Bronze, another very popular metal, heavily mined in Cornwall, underpinned the boom in the local economy.⁴ While the barter system fulfilled a fundamental need, its deficiencies were all too apparent.

In later years, sea trade grew and new routes were opened, but history attests to the constant risks, which such enterprises faced.⁵

³ Michael Ivanovitch Rostovtzeff, The Social and Economic History of the Roman Empire (Biblo & Tannen Booksellers & Publishers Incorporat, 1926)
⁵ Richard L. Smith, Premodern Trade in World History (Routledge, 2008)
2.3 The Development of Contract Law

Even though trade was risky, the need for some form of contract law was increasingly apparent. The ideas that informed those laws owed much to concepts and principles that have evolved over the passage of time, and any study of contract law must consider the practicalities that informed that development.

2.3.1 Roman and Medieval Law

One of the most interesting sources of contract and commercial law comes from the later Roman period, where Roman law actually provided certain executor agreements. Its development was very informal, but of significant value at that time, although the fall of the Empire largely brought it to a halt and, as the overarching structure of the Roman world declined, its gradual weakening gave rise to small local agricultural-based economies, which were for the most part local and severely limited in extent. In like manner, the rule of law, lacking any centralised authority, declined and, within Britain, it would be some 600 years before the reign of Harold, and later the Normans, which would restore some semblance of centralised authority to the island.6 7

The development of the contract took place over an extended period of time and progress in arriving at the concepts, which we now consider fundamental to contract law, was often slow and unfocused. However, as the economies of European countries started to gradually develop, the need for more formal and enforceable arrangements became increasingly evident.8

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This development was to a large degree slow and fitful, but contract law in England gradually took on recognisable form, as the courts sought to resolve ever more complex disputes. At the same time, underlying principles informing the scope and form of the law were becoming more widely disseminated. However, in the 12th and 13th centuries this was quite informal. Rules and regulations relating to the law of contract lacked cohesion, and their impact on the wider business environment was to a large degree limited.  

So, with the passage of time, there was an increasing need for rules and regulations to be framed for the conduct of trade and commerce. Gradually, the use of coin helped in advancing the framing of those laws.

### 2.3.2 Early English Law

With the fall of Rome, and in the absence of any form of central authority, the general fragmentation of Roman Britain continued unabated for more than two centuries; however, as the resulting kingdoms came together, a legal framework began to take shape, in which laws were widely enforced and acquired a measure of standing within the wider community. The later enactment of the Magna Carta consolidated these steps and provided a backdrop to the later formation in English law of notions of contract, tort and individual rights before recognised authority.

While the law of contract underwent many revisions, fundamentally, one thing remained the same, namely that a contract is a binding legal agreement between the parties to the contract.

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2.3.3 Enforcement

The extent, to which a contract is recognised and enforced, depends upon a number of different factors and whether a legal instrument, such as the contract, was recognised. The degree of enforcement and recognition depends upon the economic needs of the community. The development of contract law tends to run in parallel with the development of commerce and trade and this relationship is evident in almost every country where any system of commerce is sufficiently developed.\(^{13}\) Additional factors also play a part in this process and the existence of other institutions and national structures is vital in ensuring the creation of a system of contract law that has real value and worth and can be properly enforced.

Enforcement is dependent on government with the necessary resources, authority and power to ensure that in the event of breach that the aggrieved party can have recourse to law in order to right any perceived wrong. A community in which there is no central government or in which the central government struggles to maintain civil order, will probably be far slower in developing any form of codified contract law than a community in which the rule of law is enforceable.\(^ {14}\) Simply put, a country with a more settled environment is more likely to have a functioning system of civil law than the one where there is civil disorder. No advanced law of contract can be anticipated in a community whose procedures lack the necessary resources to adjudicate on matters of fact. Furthermore, a system of law where remedies do not include the appraisal of damages is unlikely to prove effective.

2.3.4 Early Forms of Civil Law

As early forms of civil law were often quite basic, a clear distinction could be made between these forms and those of the modern era. Early law was often a confused mix of religious precepts, customs, tribal traditions and other practices; in this form, 

\(^{13}\) Paul R. Milgrom, Douglass C. North, Barry R. Weingast, ‘The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges and the Champagne Fairs’ (1990) 2 Economics & Politics 1

\(^{14}\) ibid
it would more often than not have lacked the features of modern civil law. However, such laws may have served their purpose, in that they may have maintained a form of order that allowed life to function.\textsuperscript{15}

From a philosophical standpoint, early law was not based on any general theory of rights, and any form of adjudication did not make reference to broader or more abstract forms of legal principle. The state was not in a position to enforce its judgments; rather it was up to the injured party to enforce the judgment themselves. In a modern system of civil law, it is the state which has a duty to enforce the judgments of its courts and both parties must respect the judgment of those courts. There were instances however, where the state would enforce the judgments of those courts, but such situations were rare. There also tended to be little or no difference between religious sanctions and the basic rule of law; in addition, the dominant political authority often heavily influenced the make-up of such laws, in other words the ruling authority could arbitrarily enact laws, undiluted by any process of consultation or engagement with other parties.\textsuperscript{16}

\textbf{2.3.5 Early Law and Religion}

As much of our information about the forms and functioning of early law is drawn from our knowledge of early Roman law and occasionally early Semitic law,\textsuperscript{17} it is likely that our understanding of early contract law originates from these two main sources. One of the principal ideas was the concept of the ‘formal promise’, which tended to be religious in character and it was heavily influenced by customs, which were largely patriarchal in nature (this point will be discussed in some detail at a later stage). This formal promise was often enforced by religious sanctions, however, as civil society evolved; this religious element became less obvious and took on a more non-religious character. As the state slowly began to enforce these


\textsuperscript{16} ibid

judgements, the influence of religion over all aspects of the formal contract started to fade. However, from state to state, the elements, which made a contract binding tended to differ considerably and there was little evident uniformity. Ideas concerning consideration and performance started to emerge and the concept of surety began to emerge.\textsuperscript{18}

2.3.6 Sanctions and Ancient Law

Although, consideration was often absent in contract negotiations, nonetheless, the early semblances of contract law as currently understood were evident in the ideas of contract performance in full, credit and terms. Similarly, the idea of payment of compensation for failure to fulfil a contract had begun to emerge. Where contracts were religious in character, penalties likewise tended to be religious in form, with excommunication considered the most extreme of possible punishments. Such penalties usually carried particular force and even kings and emperors were not immune; at a time when the state lacked the necessary authority, religious sanctions proved very effective and served to enforce performance of the contract.\textsuperscript{19}

2.3.7 Medieval Law and the Courts

However, while offenders did not fall completely outside the arm of the law, the state only had a limited ability to impose any penalty tended to be limited. Contracts between merchants were usually of a different character, and it was important that some flexibility was inbuilt: credit facilitates business activity. The courts of merchant towns and medieval consular courts are good examples of courts, which sought to enforce the terms of contracts and the development of contract law tended to run in parallel with that of trade and commerce, both effectively evolved

\textsuperscript{18} Barbara Shapiro, Probability and certainty in seventeenth-century England: A study of the relationships between natural science, religion, history, law, and literature (Princeton University Press, New Jersey, USA, 1983)

\textsuperscript{19} Theodore Frank Thomas Plucknett, \textit{A Concise History of the Common Law} (1\textsuperscript{st} edition Little Brown & Company, 1956 reproduced by permission of Plucknett, 1929, this 5\textsuperscript{th} edition, The Lawbook Exchange, Ltd., New Jersey, USA, 2010)
in tandem. Indeed, in cases of persistent refusal to keep to the terms of a contract, the courts were quite strict.\textsuperscript{20}

This relationship between the civil and religious aspects of contract law was first evident in Roman law, where the terms of early contracts were quite formal, and often, religious approval was required before they could be given effect. Early ministers or priests of the Roman church were regarded as critical to the functioning (working) of the civil law.\textsuperscript{21} This influence lasted far longer (a lot longer) than in the case of English law. The parties to the contract would promise to devote themselves to the service of the gods and penalties likewise included excommunication. Often the contractor would make an offering to the gods and call on them to witness his promise and commitment.

\section*{2.4 Civil Law in Kuwait}

\subsection*{2.4.1 Antecedents of Kuwaiti Law}

Kuwaiti law is, however, a combination of Egyptian law, English common law, French civil law and the civil code of the Ottoman empire, with clear Islamic influences evident in relation to personal affairs and family life. However, it is only in 1961 that Kuwait became a truly independent state, able to enact its own new legal system and be in control of its own financial affairs. As such, the Constitution of Kuwait was drafted, the rupee was replaced by the Kuwaiti dinar as the national currency and the discovery of vast quantities of oil in the Burgan and other fields laid the foundation for the economic growth of the country.\textsuperscript{22}

\footnotesize

\begin{itemize}
\item \textsuperscript{20} Anthony Musson, \textit{Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta} (Manchester University Press, 2001)
\item \textsuperscript{21} Brian H. Bix, \textit{Contract Law: Rules, Theory, and Context (Cambridge Introductions to Philosophy and Law)} (CUP, 2012)
\item \textsuperscript{22} Khaled Taama, \textit{The History of Law in Kuwait} (National Library of Kuwait, 2008 (Arabic Text))
\end{itemize}
As such, the evolution of contract law in Kuwait is by no means sudden, and globally there is ample evidence to suggest that contract law as currently understood evolved separately across many jurisdictions and nation states, with similarities in relation to the underlying principles and precepts apparent among all forms. The historical dimensions of this evolution will be examined in some detail in the following chapters.

2.4.2 Why Kuwait Adopted a Civil Law System

The early drafting of Kuwait’s laws was both complex and unusual in that the drafters were very wide-ranging in their formulation of the legal system of Kuwait, with the legal system, as noted, a diverse amalgam of French Civil Law, Islamic principles, Egyptian Law and English Common Law. Article 2 of the Constitution of 1962 provides that, “Islam is the religion of the State and Islamic Law is a main source of legislation”.\(^{23}\) Other sources of law include legislation, custom and the principles of the law of nature and rules of justice. This Article neatly encapsulates the notion of admixture that gives expression to the entire legal system of Kuwait, noting that while Shari’a underpins and informs the legal code, it is not to the exclusion of other codes or registers. Indeed, Article 1(2) of the Civil Code pointedly states that, “in the absence of sufficient legislative provision a matter should be resolved according Islamic jurisprudence and then custom”.\(^{24}\)

2.5 The Constitution of Kuwait and Governance

While the Constitution of Kuwait draws heavily upon Western models, it initially did not provide voting rights for women, and the creation of political parties is strictly licensed; this speaks very much to the complex mix of philosophies at play within the system. On the one hand, there is a desire to import foreign laws and to embrace


\(^{24}\) ibid
globalisation: indeed, sexual equality is enshrined in the constitution. Moreover, some protective elements under that constitution have been dissolved by the decree of the Emir.

In actual implementation, Kuwait has a combination of both parliamentary and presidential forms of government. It abides by the principles of democracy and advocates the principle of sovereignty; concurrently, it also proclaims individual freedom and equality. In theory, all of these elements are fundamentally aspirational, however in practice they are notable by their absence.

The Constitution was originally drafted by some 20 members of the constituent assembly, elected by the people; to these were added a further 11 other ministers from outside the assembly as the work became increasingly complex and demanding. The preparation and the deliberations over the articles of the Constitution of Kuwait were protracted and involved. In 1962, the Emir of Kuwait ratified the draft constitution, and the Constitution finally came into force on the 29th January 1963.

The Kuwaiti Constitution contains some 183 articles. It is divided into five sections:

- The State and System of Government
- Fundamental Constituents of Kuwaiti Society
- Public Rights and Duties
- Powers
- General and Transitional Provisions

Article 174 of the Kuwaiti Constitution states that: “The Amir or one-third of the members of the National Assembly have the right to propose a revision of the

25 Kuwaiti Constitution (in Arabic), available in English text at: <www.pm.gov.kw/kuwait-constitution.aspx>
Constitution by amending or deleting one or more of its provisions or by adding new provisions”.

This article gives an absolute right to Emir to amend the Constitution or indeed, delete any part of it. While a cursory reading would appear to favour the notion that the Emir exercises almost complete autonomy with respect to the Constitution, nonetheless, amendments or deletions require the approval of two-thirds of the members of the National Assembly or the Council. However, final approval of any amendments rests with the Emir. Accordingly, Kuwait’s legal system and its system of governance do not fully conform to European models. An amendment, once refused, cannot be reintroduced for a period of one year, starting from the date of its rejection.

Article 175 of the Constitution states clearly, “that the provisions relating to the Emiri System in Kuwait and the principles of liberty and equality, provided for in this Constitution, may not be proposed for revision except in relation to the title of the Emirate or to increase the guarantees of liberty and equality”. This article distinguishes the right given under Article 174. It also sets out the manner in which such amendments can be made.

Article 176 of the Constitution of Kuwait states that, “the powers of the Amir set forth in this Constitution may not be subject to an application for amendment during the term of his deputation”. This article again sets forth certain autonomous rights given to the Emir.

Furthermore, according to Article 181 “no provision of this Constitution may be suspended save where martial laws are in force and within the limits specified by the law; however, the meetings of the National Assembly may not be suspended nor should the immunity of its Members be violated during this period”. This Article highlights the importance of the military forces during times of emergency. The Article also provides for limits in relation to the passing of amendments, during periods when military law is enforced.

Note: Emir and Amir can be used interchangeably, both referring to an Arabian Prince
According to Article 7 of the Constitution, “Justice, Liberty, and Equality are the pillars of society’s operation and mutual help is considered to be the firmest bond between citizens”. Article 29 states that, “all persons are equal in human dignity and in public rights and duties before the law and there shall be no discrimination whatsoever on grounds of sex, race, language, or religion”. This Article served as the basis for the granting of the right to vote to women, and gave a very strong secular cast to Kuwait’s general system of government and later laws.

The principles of law are strongly established under Article 34, 32 and 162. Article 34 states that, “an accused person is presumed innocent until proved guilty in a legal trial at which the necessary guarantees for the exercise of the right of defence are secured”. Article 32 provides that, “no crime and no penalty may be established except by virtue of law, and no penalty may be imposed except for offences committed after the relevant law has come into force”. Article 162 also states that, “justice and the impartiality of judges are the foundation of the state, and a guarantee of rights and freedoms”. These Articles in the Constitution of Kuwait encapsulate the major legal principles, normally evidenced in democratic societies

The principles of equality and justice are also well framed under Articles 27, 28, 35, 36, 37, 40, 41, and 44, as such, the constitution serves as a guiding framework in the drafting of legislation

2.5.1 Governance of the Legal System in Kuwait

These contrasts are also to be seen within the wider political structure and make-up of the state, in that while Kuwait is an independent country with strong democratic values, in form, it might best be characterised as Emiri democracy, in that while the Emir should consult with the people through the Assembly, final authority is vested in him.

The National Assembly of Kuwait – some fifty members, democratically elected for a term of four years - enacts the country laws. There are three principal constitutional and administrative authorities in Kuwait: legislative, executive and judicial; the Emir sits above all these state authorities. According to the Constitution of Kuwait,
no political parties can be formed even though parliamentary blocs may be available. The system of governance in Kuwait is basically monarchical as well as Constitutional with some elements of democracy as well. The government of Kuwait derives its legitimacy from the Constitution, while the legislative branch is quite dependent upon the Emir: no rules, judgements and decrees can be passed unless approved by the Emir. The parliamentary and presidential system of governance in Kuwait enables the legislative authorities to enact the laws. However, the Emir has a one-month period within which to raise any concerns or objections to their content, following which they come into effect. In the event of objections being raised, the law must be emended.

2.5.2 Role of the Emir

Kuwait’s constitution defines the Emir as the head of the state. The Emir is officially known as “His Highness, the Amir of the State of Kuwait”. Articles 55 to 79 states that, “the Amir will assume his authority through his ministers, and his person shall be immune and inviolable. The Prime Minister and ministers shall be collectively responsible to the Emir for the general policy of the state. A law will not be issued until it is approved by the National Assembly and signed by the Amir.” As such the Emir’s power is extensive.

The Emir is responsible for the appointment of the Prime Minister, and has the power to remove him from office. He also appoints and dismisses ministers although this is done upon the recommendations of the Prime Minister. The Prime Minister does not have the right to appoint or dismiss any ministers. The Emir is also the Commander-in-chief of Kuwait’s armed forces.

Under Article 4 of the Constitution, the position of the Emir is a hereditary one. Upon the death of the Emir, only those descended from the late Mubarak al-Sabah are the rightful heirs and one of these must be selected within a period of one year.

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27 ILO n 23, Articles 55 to 79 of the Constitution of Kuwait lay down the roles and duties of Emir. They explain the powers vested in the Emir.
following the end of his predecessor’s reign. A majority vote of the National Assembly is needed in order to approve the successor. In the absence of such a majority, three other descendants of al-Sabah are put forward and the Emir must be chosen from one of these three. Stipulations include that the Emir must be of sound mind and come from Muslim parents. After the Emir has been selected, he has to take the formal and official oath under Article 60 of the Constitution of Kuwait. This is done at a special convening of the National Assembly. The oath reads, “I swear by Almighty God to respect the Constitution and the laws of the State, to defend the liberties, interests, and properties of the people, and to safeguard the independence and territorial integrity of the country.”

HH Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah is the current Emir of Kuwait, and is the fourth son of the late Sheikh Ahmad Al-Jaber Al-Sabah.

2.5.3 Role of the Crown Prince

The Crown Prince can be considered heir to the Emir. The Constitution of Kuwait states the Crown prince has to be selected within the time frame of one year from the day Emir is appointed. The designation of the Crown Prince is within the gift of the Emir. A National Assembly majority vote, at a special sitting, is also required. Upon the death of Emir, the Crown Prince automatically succeeds as the new Emir and has to take an official Oath under Article 60 of the Constitution of Kuwait, in front of the National Assembly in a special sitting. HH Sheikh Nawaf Al-Ahmad Al-Jaber Al-Sabah is the present Crown Prince of Kuwait and is the brother of HH the Emir Sheikh Sabah.

Article 61 of Kuwait states that “in the event of his absence outside the Country and the inability of the Heir Apparent to act as Deputy for him, the Amir shall appoint, by an Amiri Order, a Deputy who shall exercise his powers during his absence”. This article gives scope to the Emir to appoint a deputy, who will act on behalf of the Emir. However, the Emir can limit the scope of duties of the deputy Emir.

28 Kuwaiti Constitution 1962, Article 60
Article 62 of the Constitution of Kuwait states that Article 82 of the Constitution of Kuwait is to be followed by the Deputy Emir. Article 82 of the Constitution of Kuwait states that the deputy should, “be a Kuwaiti by origin in accordance with law; be qualified as an elector in accordance with the electoral law; be not less than thirty calendar years of age on the day of election; and be able to read and write Arabic well.” If the Deputy Emir is a minister of a member of the National Assembly, then he is forbidden from taking part in any political activities during the time he occupies the role of Deputy Emir.

According to Article 63, the Deputy Emir has to take the Oath before taking up his duties in front of the National Assembly in session. If the National Assembly is not sitting, then he is allowed to take the Oath in front of the Emir.

2.6 Development of Commercial Law in Kuwait

2.6.1 Overview of Development of Commercial Laws in Kuwait: Drawing Attention to Recent History

It is against this backdrop that the commercial law of Kuwait has evolved, although the state’s particular demographics and geography play no small part in its evolution. The impact of oil prices, however, is key. An International Monetary

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29 There is some disparity between sources on the Kuwaiti population, with Index Mundi stating it as 2.8 million with growth at 1.5% (having slowed from 2014’s 1.7% value), but in 2015 the Kuwaiti Public Authority for Civil Information estimate the population at 4.2 million. Of this 69% were immigrants; the Council for Australian-Arab Relations suggests this is common amongst counties in the Arab Gulf, with the majority of that number being primarily from South Asia followed by other Arab nations. 97% live in an urban environment, with a literacy level at 97%. 76.7% of inhabitants are Muslim. The median population age is 29 years with 25% being under the age of 14. GDP per capita was approximately $43,005, US$55,900 in 2014, with a 2013 growth rate of 2.3%. Composition of GDP in 2013 was equally split between services at 47.3% and industry at 52.4%, with industry being made up of “petroleum and petrochemicals, cement, shipbuilding and repair, water desalination, food processing and construction materials.” Kuwait’s human development index (HDI) of 0.891 rates Kuwait as the highest in the Arab world. Sources: Council for Australian-Arab Relations (CAAR), Business Guides to the Arab Gulf: The State of Kuwait, <http://dfat.gov.au/about-us/publications/Documents/business-guide-kuwait.pdf>, [accessed: 25th May 2016], Miguel Barrientos, & Claudia Soria, Kuwait
Fund Report in 2008 rated Kuwait as one of the most economically advanced countries in the world. Indeed, economic development in Kuwait had been steady and, until very recently, had been accelerating.

However, the drop in oil prices has slowed GDP growth, although this is expected to regain momentum in the next couple of years. In November 2016, the IMF wrote that “fiscal and external accounts have been adversely affected by the lower oil prices, and financing needs have emerged”. A major exporter of oil, many heavy industries within Kuwait – the fertiliser and petrochemical industries, cement companies and refineries - are heavily dependent on continuing high levels of production, with

Demographics Profile 2014, (Index Mundi, updated October 8, 2016, data sourced from CIA World Factbook, Washington D.C., USA 2015) <http://www.indexmundi.com/kuwait/demographics_profile.html>, [accessed: 2nd November 2016]

30 According to an International Monetary Fund report published in April 2008, Kuwait’s 2007 economic performance was classified as strong, “with prudent macroeconomic management supporting high growth especially in the non-oil economy”. Real growth was estimated at 4.6%. Lyxor ETF FTSE Coast Kuwait 40, Kuwait Economic Performance 1Q/2008 Update, (Lyxor ETF FTSE Coast Kuwait 40, 2008), <http://www.coast-lyxor.com/market_kuwait.aspx>, [Accessed: 25th May 2016]

31 The recent drop in oil prices led to 2016 seeing its first economic deficit. However, the Economist predicts that Kuwait will see a GDP rise from the current (2016) 1.2% up to 2.7% into 2018-20. In comparison US GDP has ranged from 2.4% down to 2.0% from 2015 to 2016, with an expected rise to 2.3% for 2017. Source: The Economist Group, ‘Kuwait’, The Economist Intelligence Unit, (The Economist Group, 2016), <http://country.eiu.com/Kuwait>, [Accessed: 31st May 2016]


33 According to OPEC estimates, Kuwait has oil reserves of approx. 101 billion barrels – roughly 10 percent of the world’s total 1493 billion barrels’ worth of crude oil reserves. In 2015, Kuwait was pumping on average 2.9 million barrels per day (mbpd), making it the 7th leading producer in the world.
the majority of these being government-owned enterprises. The contribution of private enterprise to overall economic output is relatively small when compared to European economies. Thus, fiscal and economic concerns are valid. However, the financial sector is still strong, with the IMF noting in its Nov. 2016 Report that “resilient nonoil activity and strong oversight by the Central Bank of Kuwait have kept the financial sector sound” and other economic areas forecast to recover.34

The supply of electricity, in addition to all construction and building materials, are part of a broad and diverse number of government-owned enterprises.35 Education, health services and many other major public projects are also heavily dependent on government funding and support.

<table>
<thead>
<tr>
<th>Country</th>
<th>Crude Oil Production (1000 barrels/day)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russia</td>
<td>10,221</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>9713</td>
</tr>
<tr>
<td>USA</td>
<td>8663</td>
</tr>
<tr>
<td>China</td>
<td>9712</td>
</tr>
<tr>
<td>IR Iraq</td>
<td>3117</td>
</tr>
<tr>
<td>Iran</td>
<td>3111</td>
</tr>
<tr>
<td>Kuwait</td>
<td>2867</td>
</tr>
</tbody>
</table>


34 IMF, note 32
2.7 The Legal Structure in Kuwait

A country’s legal system does not exist in splendid isolation; it is the product of a nation’s customs and social practices and mirrors to a significant extent the national psyche. In this regard, Kuwait’s legal system does not differ. The laws are a reflection of past difficulties and problems, and often incorporate not just accepted principle, but provide solutions to particular historical problems.

The presence of Shari’a Law within Kuwait’s legal system is testament to this idea and both defines and is defined by the customs and practices of the land. However, from a historical standpoint, the legal corpus is not defined by Shari’a alone: Roman Civil Law codes have contributed to the development of the commercial legal sphere in Kuwait, while the Egyptian Civil Law and the French Napoleonic codes have also played an instrumental role in shaping a range of statutes. This process of admixture has characterised Kuwaiti law from its earliest days and with respect to the theory of contract, any assessment can usefully draw on the criteria of evaluation as set out by Smith:

- “Fit - Does the theory fit that which it seeks to explain?"
- Coherence – Is it internally consistent?
- Morality - The best theory is one that shows law to be morally justified.
- Transparency - Law is transparent to the extent that the reasons given by legal actors are genuine explanations of conduct.”

Furthermore, given the heavy emphasis placed on the moral dimension with respect to reliance on Shari’a Law, Smith’s claim that “good fit and transparency, fair

coherence, and are no less morally convincing than their competitors”\(^{37}\) may be apt in answer to criticism of a move away from Shari’a towards more commercially attuned statutes. Furthermore, prior to this change, in the event of dispute or conflict, the parties only had recourse to inadequate instruments for resolution:

“Not only do the parties to the particular dispute have their conflict resolved by reference to inappropriate considerations, but their misfortune is not a stimulus to further discussion of the subject”\(^{38}\)

This gradual acceptance of the need for a reassessment of legal utility in respect of Shari’a, mirrors a point made by Campbell in relation to the question of insolvency laws, namely that there comes a point where the wider practical aspects of commercial activity and engagement with other jurisdictions require a reassessment of rules, law and operational procedures, namely “most developing countries and those in transition, have, in recent years been introducing bank insolvency laws, either on their own or as part of their general banking laws”.\(^{39}\) In addition, from a banking risk standpoint, restrictions in relation to usury did not fully take account of the evolving risks faced by banks in this new commercial environment.

“Banking is therefore a business, which constantly has to face risks and deal with them. There are many potential sources of risk, including liquidity risks, interest rate risk, market risk, foreign exchange risk, political risks”.\(^{40}\)

With regard to the architecture and structuring of the Kuwaiti judiciary and courts, the hierarchy of the court system in Kuwait follows a broadly recognizable pattern, with the Supreme Court as the court of final appeal. Below it come the Court of

\(^{37}\) ibid
\(^{38}\) Halson n 36, 170
\(^{40}\) ibid, 213
Appeal and the Court of First Instance, which have three judges each; these courts are further divided into a number of circuit courts. The matters dealt with by these courts are mainly commercial law, family law, civil law and administrative matters.41

2.8 The Provenance of Commercial Law in Kuwait

As was noted by Hassan Arab, the strength of a country is strongly correlated to the success of its legislative, executive and judicial authorities. Furthermore, as regards the judiciary in particular:

"The function of the judiciary is to promote justice and equity through the proper application of laws and regulations in order to give every man his due."42

Generally, Kuwait has demonstrated its interest in and commitment to the judiciary since the founding of the state through its setting up of courts and public prosecution departments throughout the country and facilitating the work of the judiciary in line with its goals and mission. This has reinforced Kuwait's positive image in the international community as a country with a modern system of justice that is fair and impartial regardless of gender, religion or colour.

2.9 Developments

Besides the establishment of courts and the enactment of legislation, the introduction of electronic services has facilitated many aspects of the litigation process with courts being able to dispense justice with some efficacy, to the point that swift case resolution and service quality have become the norm despite heavy caseloads. In addition, certain specialist courts and committees have been

41 Campbell n 39
established and are responsible for dealing with specific sorts of cases. These developments extend beyond the work of the courts and encompass the public prosecution service.

These developments further encompass the work of lawyers and legal consultants. There has been a growing interest in introducing better regulation of the legal profession in what Hassan Arab claims is “a serious move towards advancing the profession given the importance of this vital sector and its influential role in the judicial system”.43

2.10 History of the Law of Contract

Any consideration of contract law in its current form must have regard for its formative influences and, to a large degree, these mirror those underpinning the civil code.

In its broadest extent, the early history of the development of the Contract Law can be traced back to Mesopotamia in 2250 BC.44 A very simple and straightforward form of contract law was developed, which had two principal strands: that relating to public life and that to government. Written evidence of Contract Law is sparse and where it is to be found, is often difficult to decipher. The concept of the notary public was prevalent from 2500BC. Trade and commerce still relied heavily on the dispensing of religious favour and the goodwill and blessings of the gods were constantly solicited.45

43 ibid
44 Rus VerSteeg, Early Mesopotamian Law (Carolina Academic Press, University of Michigan, USA, 2000)
2.10.1 Rule of Hamurabi

In later centuries, the formulation of contract law was more thorough and complex and reflected the general growth in all forms of economic activity. One of the first inscriptions of contract law in any form was that ascribed to Hamurabi. These rules Hamurabi onto black stones, so that they were visible to all, and were best characterised as “an eye for an eye”.

After Hamurabi, the Ten Commandments delivered to Moses, formed the basis of the law in the Old Testament, so that religious edicts carried obligatory force within the non-religious or civil sphere.46

2.10.2 Roman Contract Law

As the primacy of such religious edicts began to decline, the state gradually became more involved in the creation and enforcement of contracts. The contract formation process involved a number of different steps and consideration or money would be ceremoniously weighed and struck against a scales to signify that a formal contract had been negotiated and a promise made. Indeed, these steps or formalities were so important that if they were absent the contract would not be considered valid.

Defaulting on a contract was also considered to be a very serious matter. Roman custom also demanded that a book of accounts be kept for each household and contract details would be entered into these journals, including all aspects of the parties’ obligations under the contract; the performance of the parties to the contract would also be noted.47 Most standard contracts were seen to contact four separate elements, which included the transfer of property, and goods.

Roman law also recognised the consensual (both agree) nature of contracts and the use of property to secure a debt or loan. The concept of partnership, agency, the provision of services and compensation all began to take shape around this time.

46 W.W. Davies, The Codes of Hammurabi and Moses (1st published 1905, Cosimo Classics Inc., 2010)

Promises, which were originally unenforceable, began to be recognised by the civil courts and later imperial legislation gave effect to this. Despite these advances, no general theory of contract was worked out, during the entire period of the development of Roman law. Nonetheless, classes of contracts were recognised and a contract generally had to fall within one of these categories if it was to be recognised. The influence and legacy of Roman law is still evident in Europe today in the construction and form of its civil law.\textsuperscript{48} The Roman categories of contract law even today are able to usefully accommodate the demands and complexities of modern life and commerce. The Romans also distinguished between contracts and simple agreements and parties to negotiations would often refer to the law to establish these differences.\textsuperscript{49}

\subsection*{2.10.3 English Contract Law}

English law underpins the legal system of many countries around the world. Approximately 30\% of the world’s population live in a country governed by an English Common Law system.\textsuperscript{50} In the United States, for instance, in terms of contract law, every state, with the exception of Louisiana, bases its law on English law.\textsuperscript{51} However, the features to be found in contract law elsewhere in civil code, religious law and mixed law countries, are also broadly present in English law, to the extent that it can be said that the concepts central to contract law appear to have evolved separately and yet in parallel in many jurisdictions and states. Contract law is necessary to ensure the correct functioning of a vital private law tool, namely a binding agreement, in all societies. As such, the similarities of the

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\textsuperscript{48} Peter Stein, \textit{Roman Law in European History} (CUP, 1999)
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\textsuperscript{50} Philip Wood, \textit{Maps of World Financial Law} (Sweet and Maxwell, 2008)
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\textsuperscript{51} Due to its French history, private law in Louisiana has civil law roots. See Agustin Parise, ‘Private Law in Louisiana: An Account of Civil Codes, Heritage and Law Reform’ in Julio Cesar Rivera, \textit{The Scope and Structure of Civil Codes} (Springer 2013) p. 234
\end{flushleft}
different legal systems are evident in almost every respect. In other words, the principles of contract law everywhere have a great many similarities.\textsuperscript{52, 53}

### 2.10.4 Anglo-Saxon Law

With respect to English law, its principles, procedures and courts owe much to the Anglo-Saxon system, which preceded it and upon which English law was largely based. The judiciary was not trained and judges in both the principal and lower courts tended to lack any formal legal education. Whereas it was often the case that plaintiffs would bring their disputes before the King, this was discouraged over time unless it could be shown that the lower courts were, for whatever reason, unable to administer justice. The administration of justice, therefore, drew for the most part, on tribal rules and traditions and often without reference to the particulars of the case at hand. There were no resources available for dealing with complex cases and no guidelines for deciding upon damages, but then most business concerns were agricultural in nature and except for merchants, trade was rare and infrequent. The economic and social conditions were not right for the evolution of contract law and the judiciary lacked the necessary abilities to develop the law as it then was. A further problem lay in the absence of any agreement among the various courts as to the form of the laws or its administration. It is clear from Anglo-Saxon law that the laws of Wessex and Mercia differed significantly and the law of one region or country was not recognised in another. As such, Anglo-Saxon law was, for the most part, tribal, based on popular customs and traditions and largely administered by an elite social class.\textsuperscript{54} The codes of practices evolved from these tribal customs and were generally named after ruling Kings. The codes, however, were not an attempt to provide a complete statement of English law and almost certainly were subordinate to local tribal customs and practices. The codes did recognise contracts

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\textsuperscript{53} Michel Rosenfeld, ‘Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory’ (1984-1985) 70 Iowa L. Rev. 769 (available on line at Heinonline.org), [accessed 6th July 2013]
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\textsuperscript{54} Frederick Pollock, ‘Anglo-Saxon Law’ (1983) 8 The English Historical Review, 30 239
\end{flushleft}
of sale and the notion of stolen property, - in other words the courts recognised stolen goods, so the concept of ownership was more clearly detailed and defined - but the codes largely existed to aid the foreclosing of sales more than anything else. Essentially, the definition of ownership allowed for the development of other related concepts and helped to advance the field of contract law generally. The concept of credit can also be identified but references to it are few.\textsuperscript{55}

There are, however, numerous incidental references to contracts in the code and surviving judgements, and defendants often had to provide some form of security if a judgement went against them. Likewise, a complainant would have to provide some form of security if they wished to prosecute a claim. Guarantees were recognised and these were enforced to the extent possible given the resources of the court; pledges of property were quite common. Contracts were generally regarded as being both real and formal in character and any pledge that was religious in form - particularly if the promisor pledged his religious belief as a Christian to the performance of the contract - was generally held to be binding. The link, therefore, between Christian beliefs and legally binding promises owes much to the early connections between tribal customs, religious practices and the courts; the later displacement of these traditional religious beliefs by Christianity saw Christian principles gradually begin to inform court practices, in other words the law was influenced by Christian principles.\textsuperscript{56} The clergy also enjoyed privileged status before the courts, and were not subject to the same sanctions as their secular (non-religious) peers. The idea of consideration, so fundamental to modern contract law, also arose at this stage and a contract was not held to be binding until money or goods had been exchanged.

\textsuperscript{55} Craig Muldrew, The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England (Early Modern History) (Palgrave Macmillan, 1998)

\textsuperscript{56} James A. Brundage, Law, Sex, and Christian Society in Medieval Europe (University of Chicago Press, 2009)
A contract was considered binding if part or all of the contractual payment was made, with such contracts then being regarded as formal contracts. Additional concepts, which form the basis of modern contract law, began to appear: the idea of fraud in relation to the sale of commodities started to take shape and the necessity for supporting evidence also became a feature of court cases. In Anglo-Saxon law, the payment of dowries took on a legal character, leading to the idea of a marriage contract. This form of marriage contract was not exclusively Anglo-Saxon and it appears in different forms in both Germanic and Frankish law. These contracts were often given physical form, where engravings of runes on ceremonial staffs or wooden sticks signified payment. Again, in Anglo-Saxon law the transaction of a sale had to show some evidence of value, in which an agreed amount was exchanged between the parties to the contract.57

The handshake was also regarded at this time as symbolising the conclusion of a contract, and owed much to the notion of a religious pledge of faith. It was held to be clear evidence of a formal agreement and was often cited in court cases, where the possibility of fraud was at issue; without it, no formal contract was said to exist.

2.11 Obligation

Within Kuwait, obligation is a substantial part of the contract and binds the parties to the contract, with each party obliged to fulfil the terms of the contract as stated. While principles and morals were not codified and did not carry obligatory force, they were a source of guidance and direction for people. As Harris, Campbell & Halson point out:

“One can contemplate economic exchange without contract, and there would appear to be widespread evidence of this in pre-capitalist economies and, less certainly and

57 Pollock n 54
perhaps not fully understood, exceptional examples of this within overall capitalist economies”\textsuperscript{58}

In contrast, the codification of these rules saw them acquire obligatory force and a system of sanctions and penalties were also enacted and enforced. Such arrangements invariably give rise to greater reliability and coherence of approach. “The law thus enables the parties to make arrangements, which are ultimately much more reliable than those which depend exclusively on sanctions within their own control.”\textsuperscript{59}

Obligation was a concomitant part of the law, and while religion was characterised by prescriptive force, the respective sanctions in the event of default or omission obviously differed.\textsuperscript{60} Obligation is essential if rules are to be respected or followed. In countries such as Kuwait, this obligatory aspect was achieved either by force or by threat.

While punishment at that point in time in ancient Kuwait could be efficacious, it was also recognised that the laws giving effect to these sanctions should at least be understood and the reasoning underpinning them appreciated. Researchers are generally in agreement that tradition is not the only source of law. The populations of Arab Gulf countries (such as Kuwait, Saudi Arabia, Qatar, Bahrain, Oman and United Arab Emirates), were made up of Badu (travellers) and Hathar (settled people). While the Badu populated the inland regions, the Hathar mostly lived in coastal towns. Until the end of the eighteenth century, disputes were settled in accordance with desert customs, which were informed by the tenets of Islam.\textsuperscript{61} Each

\textsuperscript{58} Donald Harris, David Campbell & Roger Halson, Remedies in Contract and Tort (1\textsuperscript{st} edition, CUP 2002, 2\textsuperscript{nd} edition 2005) p.6
\textsuperscript{59} ibid, 7
\textsuperscript{61} Maria O’Shea & Michael Spilling, Kuwait (Marshall Cavendish, 2009)
tribe had its own dirham (territory) and its own sheikh (chieftain). The sheikh’s role was that of guide and protector. His role was twofold, that of political chief and supreme judge in matters of tribal disputes. These disputes ranged from simple matters relating to dowry payments to the more complex and involved including cases relating to homicide and adultery. In the absence of legislation, the sheikh served as the sole authority and judge in all matters. The sheikh would arbitrate in matters of blood feuds, which could involve the killing of a tribal member by someone from another tribe. Tribal members could look to the sheikh for protection until a successful resolution to a dispute was achieved. Often desert rules and traditions were strictly enforced, as were the prescribed codes of behaviour and conduct, which governed all aspects of daily life. However, notions of forgiveness and reconciliation were largely absent.  

2.12 Legal Institutions in Kuwait and Their Responsibilities

2.12.1 The Role of the Ministry of Justice

This Ministry has complete oversight of the courts and prosecution departments across the federation in terms of recruiting judges and organising the work of the courts and prosecution departments. In addition to recruiting, the Ministry regulates and licenses lawyers, experts and interpreters. A number of the Ministry of Justice’s principal responsibilities are set out in the examples below:

- Propose and implement amendments to the rules of procedure for civil and criminal litigation as would serve the interests of justice and the public good, taking into account international best practices that do not conflict with the public order and are consistent with the rules of justice and equity.

- Operate a more practical online service where online services are used, not only to register cases and file applications, but to create an online forum for hearing witnesses within statutory guidelines that are first codified then implemented.

ibid
over a transitional period in which case documents can be filed online to help ease the paper load of the court and prosecution system.

- Hire judges who possess a high degree of legal acumen especially with regard to commercial transactions, given Kuwait’s position as a business hub located at the crossroads of east and west. In addition to attracting experts in procedural law, specialists in diverse fields such as e-commerce, banking, real estate, maritime law and insurance law not to mention legal education are also required.

- Likewise, with regard to public prosecution, there is an evident need to educate a new generation of public prosecutors to deal with the exceptional nature of some modern crimes. Criminal law is now a different discipline in terms of both methodology and subject matter. Today, an innovative approach is necessary in respect of the investigation of new forms of crime, which are on the rise e.g. cyber-crime, corruption, fraud and deception in commercial transactions, human trafficking and terrorism.

- In terms of lawyers, experts and interpreters, the role of the ministry should extend beyond the granting and renewing of licenses to administering practical and theoretical assessment tests for individuals who wish to become licensed professionals. Ten years ago there was a shortage of lawyers and the government had to steer law graduates towards the profession in order to fill the void. With that trend reversed, the ministry can now focus on quality rather than quantity. The immediate focus, moving forward, should be to implement a minimum number of professional development courses and professional conferences which lawyers need to attend each year in order to renew their licenses with the aim of enhancing their personal and professional skills in keeping pace with developments in the larger legal environment and the economy, thus improving general levels of competence and professionalism within the broader legal arena.
2.12.2 The Role of Universities and Judicial Institutes

University law schools in the Kuwait have gradually begun to establish more specific programmes, which look to develop both the theoretical and practical knowledge of their student.

By giving students the option of specialising in different aspects of the law instead of requiring them to study general law, this allows for earlier specialisation and ties in with developments in many other professions, including medicine and engineering.

For a number of reasons, law students should be proficient in both the Arabic and English languages, as in the case of English, it has become the language of commerce and business globally. In all cases, the student will need English especially if he wishes to pursue postgraduate studies in the future. Many modern laws relating to emerging transactions originate in foreign jurisdictions.

2.12.3 The Role of Judicial Training Institutes and Legal Institutions

Training institutes play an instrumental and important role in the qualification, education and training of members of the judiciary through a continuous series of courses, conferences and seminars. However, training institutes will need to play a more positive role through partnering with international bodies and organisations in the hosting of annual conferences on various legal issues of concern in order that members of the judiciary can keep abreast of the latest international developments and practices in business transactions, commercial and civil litigation, and criminal law.

Training institutes should be given comprehensive powers to create training courses and programs (continuing education) for members of the judiciary, including judges, public prosecutors, lawyers and even legal consultants. These courses, in the case of judges, would be made compulsory for those who wished to secure promotion and for the renewal of licences (for lawyers and legal consultants).
2.12.4 The Role of Law Firms

Multinational law firms have an important role to play within the Kuwaiti judicial system, which, apart from providing services to their clients, can significantly contribute to the effectiveness and performance of the judiciary in the following ways:

- Facilitating the professional development of new lawyers and consultants with theoretical and practical training with a view to educating interns and furnishing them with the core values and basic principles of the profession.
- Partnering and cooperating with judicial training institutes by sending lawyers and consultants to attend their conferences and seminars and selecting experienced in-house lawyers and consultants to participate as speakers and lecturers in such conferences and seminars.
- Partnering and cooperating with judicial training institutes by hosting in-house qualification and training workshops for lawyers, which acquaint them with methods and procedures for effectively managing law firms across their administrative, financial, marketing and other functions.
- Partnering and cooperating with universities through the development of joint programs for visiting lecturers enabling them to speak at faculties of law on the practical aspects of enforcing various procedural and special laws in order to give students a solid understanding of how such laws might apply in practice.
- Arranging for lawyers and legal consultants to attend courses and international seminars and conferences abroad and encouraging their participation as speakers and delegates. In addition to the obvious marketing benefits for the law firm, there is also an educational benefit for participants, who are kept abreast of the latest global developments in their field.

In conclusion, this overview of the contribution various parties can make to the development of the judiciary underscores the on-going efforts to improve its broader functioning. Many challenges lie ahead if the industry is to realise these
objectives. Concerted efforts are needed in order to advance the Kuwaiti legal community as a world-class centre of professional excellence.

2.13 Conclusion

Kuwaiti law is underpinned by a venerable legal ancestry, whose principles draw on Roman law and later, on the English common law system and a multiplicity of influences from both European and Arabic law, in particular that of the French and Egyptian legal systems. This chapter accordingly reviewed these precursors with a particular emphasis on aspects of Roman, Anglo-Saxon and English contract law and how these have subsequently informed Kuwait’s contract law. An examination of the general history of the Kuwaiti legal system followed in addition to consideration of the concept of Obligation within Kuwaiti law and related instruments. The chapter then provided an overview of the civil law system and the background to the creation and drafting of the Constitution; an exploration of pertinent aspects of the Constitution followed including aspects of its subsequent implementation. The relationship between the Constitution and government was then analysed and the cultural and social aspects of Kuwaiti society as reflected in the drafting of the Constitution explored. The unique role of the Emir within both the political and legal spheres was considered as was how these elements are accommodated within both the Constitution and the broader legal domain. This background served to set the framework for a review of Kuwait’s commercial law, its provenance, recent history, subsequent development and evolution. In concluding, the chapter also sought to place the various legal institutions of the nation in context, and to describe in some detail their general functioning and roles within the broader apparatus of the state. In particular, it examined the role of the Ministry of Justice, the universities’ legal departments and the various judicial training institutions. Finally, it looked at the role of law firms within this overall structure and how each could lend its strengths to develop the legal system. Concerted efforts are needed in order to advance the Kuwaiti legal community as a world-class centre of professional excellence.
Chapter 3 Literature Review

3.1 Introduction

This chapter will study, analyse and present a summary of the scholarly literature currently available covering the development of commercial Kuwaiti Law, focusing on the historical background, thus giving the context for the judges’ interviews. As such, it analyses scholars’ arguments regarding the controversial question regarding the role of Islamic Law in the Kuwaiti legal system, both from a theoretical view and the ramifications it has on Kuwaiti political situation. This is a necessary question in its own right and as a backdrop to understanding the position of the new Kuwaiti Constitution and the Supreme Court judges’ legal background. This chapter then widens out to encompass the literature regarding all sources of law before reviewing what Kuwait was trying to achieve from an ideological point of view in the forming of a new independent country. A review of academic analysis of the Civil and Commercial Code is covered in the final section.

3.2 Historical Background

The historical context and background to the Kuwaiti legal system has produced a wealth of literature. The transformation of Kuwait from a ‘coastal-commercial centre’ to a ‘state-like chiefdom’ revolved around the forming of a heterogeneous tribal-merchant state that brought together tribal groups and other groups of wanderers and migrants, who began to feel a loyalty towards their new ‘tribe,’ a new community bound together by social obligations. According to Yanai, the subsequent move in the nineteenth century towards a more socially stratified

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1 Shaul Yanai, *The Political Transformation of Gulf Tribal States* (Sussex Academy Press, UK, 2014) 16
society created new social norms and a real or imagined lineage,\(^3\) which was necessary as part of the development of a more sophisticated system, allowing and accepting the British influence for political and economic reasons. The legal system therefore went hand in hand with these goals, rather than as a religious or jurisprudential aim in its own right. The aim of this literature review is to focus on some of the more controversial aspects to the modern setting of Kuwaiti law.

### 3.3 The Role of Shari’a Law

One of the crucial aspects underlying this research is the role of Shari’a Law in Kuwaiti law, both traditionally and in today’s political environment. It is an important framework for the understanding of Kuwaiti law and has engendered much scholarly debate, as well as being of increasing importance in terms of political practice and global opinion. The Supreme Court judges’ interviews on the question are particularly interesting. Existing literature regarding the status of Islamic religious law in the modern Kuwaiti legal system is however, somewhat conflicting.

Harvard’s Ahmed Aly Khedr emphasises the role of Shari’a Law as the guiding principle underlying all legislation, listing it as the first and most important fact when describing the Kuwaiti legal system.\(^4\) However, Husain M. Albaharna PhD (Cantab) writes that the post-1962 “national courts … apply the Western-inspired laws, promulgated for Kuwait during the last few years. Concerning Shari’a Law, its application has been confined to matters of family and personal status.”\(^5\)

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\(^3\) Yanai n 1, 17


\(^5\) Husain M. Albaharna, PhD (Cantab), The Legal Status of the Arabian Gulf States: A Study of their Treaty Relations and their International Problems (Manchester University Press, UK, 1968) 21
The Great Constitutional Debate - Definite or Indefinite Article?

This difference of opinion noted above is partly because the very essence of Islam as a constitutional source of law is controversial. Indeed, the constitutional interpretation depends largely upon a question of emphasis. As mentioned previously, Article 2 of the Constitution says (in Arabic) that Kuwait is an Arab country and that Shari’a Law ‘is main source’ of the country’s law. This is a literal translation of the Arabic text. However, it does not read well in English – one would normally expect an article before the term ‘main source’. This, though, is the key point of contention. Should it be ‘a’ or ‘the’? An indefinite article or a definite one? The translation of the constitutional clause as to Shari’a Law being ‘the’ or ‘a’ main source is extremely important and changes the whole meaning: the main source makes it superior to other forms as the primary source, whereas a main source ranks it pari passu with other sources, as one of several principal sources. Much political, religious and social discussion has been spent on the presence or absence of one small word. In terms of semantics, if there is no article specified, one could argue that, by default, it must be ‘a’ because it is more general and therefore more appropriate in a case where it is unclear, as implying ‘the’ is too specific and runs a greater risk of being contrary to the original meaning. However, this is not universally accepted.

Aly Khedr does not commit himself, using the linguistically neutral and literal approach, saying simply ‘Shari’a is main source ...’. Clark Lombardi, however, deals eloquently with this linguistic issue in his recent article in the American International Law Review. The Kuwaiti Constitution states that “al-sharia al-islamiyya masdar raisi l’il tashri”. Lombardi translates this as Shari’a Law being ‘a chief source of legislation’. He writes that because the new Constitution already stated that Islam was the official religion of Kuwait, a “constitutional choice both to

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6 Khedr n 4
establish Islam and to make Islam the chief source of legislation [author’s emphasis] might be read in combination to suggest a justiciable requirement that all Kuwaiti law respects Islamic principles”. As such, the choice not to refer to Shari’a Law as ‘the’ main source of Kuwaiti law, he claims, was deliberate. Whether this reasoning is accepted, or just that the default position must be ‘a’ if it not specifically stated otherwise, it should be noted that the generally accepted translation by western nations is that of it being ‘a’ main source. Needless to say, many Kuwaiti politicians and religious leaders think otherwise, as noted later.

### 3.3.2 Comparison to Syria

As a question of contextual interpretation, it is interesting to compare this to the wording in the 1950 Syrian Constitution, which was the first in modern times to include a reference to Islam as a source of law. Indeed, it should be noted firstly that in earlier 20th century constitutional documents, Arab states did not have (or very rarely had) any reference to Islam as a source of law. Nathan Brown in his 2002 book argues that the reason was basically two-fold: that constitutions during that period were not intended to be strict ‘constitutionalist’ documents as we would see them today; and, secondly, it was a question of expediency, as many of the Arab rulers of the time did not wish to bind themselves by Islamic Law, but wanted to retain the freedom and flexibility to rule basically as they saw fit.

### 3.3.3 Fiqh as Opposed to Shari’a

The 1950 Constitution of Syria clearly states that fiqh is “the” main source of legislation. However, the use of ‘fiqh’ as opposed to ‘Shari’a’ is significant. (Some scholars have translated the clause broadly to say that it is ‘Islamic Law’ that is the

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8 ibid, 747
9 For example, see the International Religious Freedom Report for 2011, United States Department of State, (Bureau of Democracy, Human Rights and Labour 2011)
11 Al-Dustra Al-Suri, Syrian Constitution of Sept. 5, 1950
main source of legislation\textsuperscript{12} but the Arabic states \textit{fiqh} as the chief source and the distinction is important). \textit{Fiqh} refers to core, fundamental rules of scripture, as studied by the \textit{fuqaha}, the traditional established class of religious scholars. It is the theoretical basis or philosophical foundation for Shari‘a Law and one of the branches of religious knowledge, rather than cleric law. It was widely understood as a given that the new laws of Syria would be compatible with the fundamental rules of scripture, as recognised by the \textit{fuqaha}, and also that the new laws would not damage what leading scholars considered to be the overriding given aims and interests of a Muslim society. Given the historical context, the clause was certainly not read, at the time, to mean that Islamic religious law was the one and only principal source of Syrian legislation.

Indeed, the main reason for the inclusion of \textit{fiqh} as the main source of legislation, it is argued, was simply to mollify the stricter Muslims, led by the Muslim Brotherhood, who were angry that a clause to establish Islam as the official religion of Syria had, in fact, been rejected (after widespread, and sometime violent, objections by the religious minorities).\textsuperscript{13} Thus, according to Majid Khadduri, the initial aim of the Constitution was the exact opposite of imposing religious law: Islam was expressly excluded as the main religion of the country, and the \textit{fiqh} clause was just a ‘sweetener’. Furthermore, Khadduri goes on to add that there was no recognition at the time that this clause would ever have any real significance.\textsuperscript{14} It was seen simply as a standard description of the legal system. He cites the fact that, given the forceful and violent opposition by the religious minorities to the proposal to make Islam the official religion of the country, and the fact that – on the contrary - there was no objection to the inclusion of \textit{fiqh} as being the chief source of legislation, this logically affirms the fact that the clause was not considered to be of

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\textsuperscript{12} Fauzi M. Najjar, ‘Islam and Modern Democracy’ (1958) 20 Rev. of Pol 164 169
\textsuperscript{13} Majid Khadduri,‘Constitutional Development in Syria: With Emphasis on the Constitution of 1950’ (1951) 5 Middle E.J. 137, 151
\textsuperscript{14} ibid
\end{flushleft}
any importance or have any practical effect.\textsuperscript{15} Otherwise, he concludes, the religious minorities would have protested equally as vehemently over the \textit{fiqh} clause. Therefore, even though it says ‘the’ main source of law, it was not drawn up with any understanding that this would be taken as a serious constitutional clause giving Islamic Law any extra importance. Indeed, despite listing \textit{fiqh} as ‘the’ main source of law in its 1950 Constitution, the 1958 ‘new’ version (as part of a joint Syria-Egypt union as the United Arab Republic) deliberately downgraded \textit{fiqh} from ‘the’ to ‘a’ chief source without any major (or even minor) upheaval. Interestingly, this was reaffirmed even in the 2012 version under Assad.

In fact, the distinction between ‘the’ and ‘a’ has only really become a main debating block in recent times and especially between western and Muslim different interpretations. Deeks & Burton point out that it was in the drawing up on the new Iraqi constitution that the arguments became really heated, with strict Shia Muslims insisting on Islam being ‘the’ chief source and the US and the Kurds being equally adamant that it must state ‘a’ chief source or else the country would have a valid excuse to insist on being a strictly Islamic state and able to exclude all secular rights and interests.\textsuperscript{16}

\subsection*{3.3.4 Forms of Shari’a}

Definitions, however, are not easy or clear-cut, even leaving aside \textit{fiqh} and focusing purely on Shari’a. According to Al-Daihani, there are four main sources that judges can use as reference for Shari’a Law.\textsuperscript{17} Al-Ayoub lists these as the Quran, the Sunna, the Consensus of Muslim Jurists, and the Decision by Analogy or Reasoning.\textsuperscript{18} There are also additional sources that can be used, including, in particular, the Al-\textit{Istihsan}

\begin{thebibliography}{99}
\bibitem{Daihani} ibid, 152
\bibitem{Al-Daihani} Sultan M.M. Al-Daihani, \textit{Information Behaviour of Kuwaiti Legal Professionals} (Loughborough University UK, 2003)
\bibitem{Al-Ayoub} A. Al-Ayoub, \textit{The Legal System of Kuwait}, in K.R. Redden (ed. Modern Legal System Cyclopedia, Buffalo, NY, William S. Hein 1990) p180-189
\end{thebibliography}
and the *Al-Istislah*, which are highly complex and comprise theoretical rules allowing deviation from previous decisions where needed under some other rule or due to public interest and where the Quran and the Sunna do not directly cover the situation.\(^{19}\) *Urf*, or custom, is another source of Shari’a Law (as distinct from custom as a source of Kuwaiti law).\(^{20}\)

Given the wide sources of Shari’a Law and the importance of context, it is obvious that there is scope for a wide variety of interpretations. Al-Sanhuri’s understanding of Shari’a Law was a modern and enlightened view, not a strict following of the clerics’ views. In fact, according to Lombardi, when Kuwait used the term ‘Shari’a’, instead of *fiqh*, it was deliberate and aimed to show that the legislation would derive not from the analysis of the traditional elders and scholars but from the “universal principles of Shari’a that modern scholars like Sanhuri induced from the *fiqh*”.\(^{21}\) This has a different scope and was a deliberate choice by Sanhuri, in keeping with his own beliefs and principles.

### 3.4 Sanhuri and the Philosophical Framework

Sanhuri’s importance in providing a philosophical framework and way to unite the different tenets cannot be overstated. Huneidi refers to Al-Sanhuri as the “Jeremy Bentham of Egypt”.\(^{22}\) He was greatly influenced by Rashid Rida, a great Islamic scholar in the early part of the 20\(^{th}\) century. Rida argued that law should both respect the fundamental principles of the religious scriptures and be for the greater good of society. Enayat notes how Rida managed to use a ‘dynamic’ and very modern interpretation of Shari’a Law in order to both respect tradition and respond

\(^{19}\) ibid


\(^{21}\) Lombardi n 7, 748

to the challenges of modern society, with the aim of serving the general public interest.\textsuperscript{23}

Al-Sanhuri went even further. He saw social justice as a key part of the application of laws, directly compatible with the application of very broad Islamic principles which were, in his opinion, very similar to those of the Western world (see Shalakany where he notes that Sanhuri’s aims in updating Egyptian law were to respect Shari’a Law and promote social justice\textsuperscript{24} and, furthermore, that this is consistent with most European models).\textsuperscript{25} His work, \textit{al-Wasit}, or The Middle Way, is a “modern Arab legal classic”,\textsuperscript{26} read and studied by all Arab jurists and lawyers. The very significant role of western thinking, as imported into modern Arab constitutions by Sanhuri, is noted by Enid Hill when she points out that, when drafting the new Civil Code for Egypt (1949), Sanhuri used “comparisons of more than 20 modern codes, the jurisprudence of the Egyptian courts, and the Islamic Shari’a”.\textsuperscript{27} And, indeed, it has to be remembered that the Egyptian system itself was already very largely secular and French-based. The legal court system called the Mixed Courts (or al-Mahakim al-Mukhtalita), which was set up in 1875, was based completely on French Law: this is probably not surprising as the code was drawn up by Maitre Manoury, a Frenchman, and the courts’ judges were practically 100% European. It is only in pre-emption land rights, for instance, that we see any recognition of Islamic Law.\textsuperscript{28} Indeed, it was Sanhuri’s professor from Lyons, Hamid Enayat, \textit{Modern Islamic Political Thought} (1\textsuperscript{st} edition: University of Texas Press, Austin, USA, 1982, this edition I.B. Tauris, 2005) 69-81

\textsuperscript{23} Hamid Enayat, \textit{Modern Islamic Political Thought} (1\textsuperscript{st} edition: University of Texas Press, Austin, USA, 1982, this edition I.B. Tauris, 2005) 69-81
\textsuperscript{24} Amr Shalakany, \textit{Between Identity and Redistribution: Sanhuri, Genealogy, and the Will toIslamise}, Cairo University Law School, Islamic Law & Society, (Brill Academic Publishers, Koninklijke Brill, NV, Leiden, 2001)
\textsuperscript{25} ibid 228
\textsuperscript{26} Ian Edge, ‘Comparative Commercial Law of Egypt and the Arabian Gulf’ (1985) 34:1 \textit{Cleveland State Law Review}, 139
\textsuperscript{27} Enid Hill, ‘Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971’, (1988) 3 \textit{Arab Law Quarterly} 33
\textsuperscript{28} \textit{Les Codes Mixtes d’Egypte}, Articles 93-101, (prcedes du Reglement d’Organisation Judiciaire, Ibrahimieh: Librairie judiciaire Au bon livre, 1932)
Eduoard Lambert, another Frenchman, who was invited to participate in the early stages of the 1949 drafting. The debt to the French way of thinking is clear.

Thus, this new Modern Egyptian code, which subsequently greatly influenced the inception of the Kuwaiti legal system, was, overall, viewed as a great success and celebrated as such, “as a successful attempt to harmonise Islamic with European law”. Sanhuri himself put it eloquently and diplomatically when he said: “we adopted from the Shari’a all that we could adopt, having regard to sound principles of modern legislation”.

This, indeed, seems to give a clear (although polite and respectful) ceiling to the amount of influence Shari’a Law was intended to have i.e. so much and no more. Professor Anderson surmises that the totality of Shari’a-based law in the final version of the new civil code was only about 5-10%.

Given its excellent reception, it is therefore not surprising that so many of the other Arab states followed suit and adopted very similar codes, all inspired by Sanhuri’s vision of how a successful Arab state constitution should be formed. Hill points out that Kuwait, Libya, Syria and Iraq drew up very similar codes to the Egyptian one and that all these codes were then used as models by Qatar, the UAE, Jordan and Bahrain for their own programmes of legal reform.

Similarly, as implied above by Albaharna, the fact that Kuwaiti law specifically cites Shari’a Law as the governing law for inheritance and family law, under Article 18 and Family Law 1984 respectively, implies that Shari’a is, therefore, not the

29 Lombardi n 7, 742
30 Ministry of Justice (Egypt), Al-Qanun al-madani, Majmu’at al-a’mal al-tahdiriyya (Travaux Preparatories of the Civil Code), 7 vols., Cairo, 1949, i, 85
31 J.N.D. Anderson, ‘The Shari’a and the Civil Law (The Debt Owed by the New Civil Codes of Egypt and Syria to the Sharia)’ (1954) 30 Islamic Quarterly, 29
32 Hill n 27, 39-40
33 Albaharna n 5
34 Constitution of the State of Kuwait 1962, Article 18, “Inheritance is a right governed by Islamic Sharia”
governing law for all other areas of the law. Linguistically, stating the positive in a closed list confirms the negative as regards an open list.

The decision, therefore, in light of - or even despite - having named Islam as the official religion, to step back and not name Shari’a Law as ‘the’ official main source of the new Kuwaiti laws was a deliberate choice by Sanhuri and the other legal constitutionalists, as was the choice of Shari’a principles, rather than those of fiqh.

3.5 Modern Political Ramifications

Unfortunately, the issue of Shari’a as ‘the’ or ‘a’ chief source of law has consumed a lot of time and attention in Kuwaiti politics recently. The usefulness of this is highly debatable. Political point-scoring is behind much of it and claims of religious superiority are used as justification. Al-Rumaihi writes that:

“Instead of tackling Kuwait’s real problems, the parliamentarians have devoted a great deal of energy to the issue of women wearing the veil and to changing an article of the constitution to make the Shari’a (the sacred law of Islam) not just a principal source of legislation but the only source of legislation. A good number of people feel that these are marginal issues and that the groups promoting these issues are seeking ideological gains at the expense of Kuwait’s welfare.”36

3.6 Constitutional Explanatory Notes

It also must not be forgotten that the Kuwaiti Constitution was published along with guidelines that were to serve as notes of explanation, for the courts’ use (the ‘explanatory memorandum’)37. The explanatory note to Article 2 specifically says that lawmakers and Parliament do not have to draft or adopt Kuwaiti laws

35 Kuwait Family Law No 15/1984
36 Mohammed Al Rumaihi ‘Kuwait: Oasis of Liberalism?’ [1994] 1 Middle East Quarterly, 131
according to strict *fiqh* rules; this would seem to imply that they could go so far as to be inconsistent with *fiqh*. However, it is not clear in relation to Shari’a Laws. Saba Habachy writes that the explanatory notes were descriptive, rather than prescriptive.\(^3^\) He says that when the draft constitution was presented to the Emir, along with the explanations, it included a letter explaining that the aim was to reflect the ‘factual’ situation in Kuwait as regards democracy and the legal system. As such, Kuwait’s commitment to, and acceptance of, the role of Islamic Law was simply a reference to the state of affairs as stood: it did not indicate an order to the government going forward. As shown with the example in Syria, *fiqh* principles are understood to be a fundamental basis for law and society; this is not stating anything new or controversial. Nor is it telling judges how to interpret government statues or the law. Again, if one looks at the Kuwaiti Constitution, for instance, Article 9 declares that the family is the cornerstone of society and “is founded on religion, morality, and patriotism”. Religion, morals and love of one’s country and society are therefore all accorded equal importance, intertwined, as part of the accepted traditions of an established civilisation: religion is not set aside and accorded a greater value.

### 3.7 Judicial Decision Making in Contentious Cases

Given that statutes incorporate, almost by definition, basic universal Islamic principles, there still remains the question of how the judiciary should judge cases where legislation as laid down by Parliament does not give an answer. No new system will cover all the necessary possible cases; there will always be gaps. From a practical point of view, the way to cover these gaps is prescriptive and shows an intention to direct and guide in a way that simply naming Islamic principles as ‘a’ or indeed ‘the’ main source of law does not. Sanhuri knew that, however comprehensive his constitutional codes were, there would be always be certain

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gaps. His Egyptian code laid down that, in this case, Egyptian judges should look first to custom, then Shari’a Law, then natural law principles and finally rules of equity.\textsuperscript{39} This contrasts with those of Syria and Iraq, which require the judges to look first to Islamic Law and then to custom. However, on a practical level this makes no difference.\textsuperscript{40} To Sanhuri, Egyptian custom was basically that of fiqh; the traditions and customary practices of the country were completely intertwined with Islamic principles, as interpreted by scholars of that country over the ages. Thus, the clause in the Kuwaiti Constitution, which is essentially the same as that of Egypt, had a note in the explanatory memorandum\textsuperscript{41} which, as Ballantyne notes, says that custom being, by definition, compatible with Shari’a Law was taken as “already being the correct view of Kuwaiti law, even on the present wording of the Constitution”.\textsuperscript{42}

It is not clear, however, what authority the courts have if, despite the above, there is a gap in the law, and custom is not consistent with Shari’a Law. With regards to criminal law, the situation is easy. Article 32 of the Kuwaiti Constitution states:

“\textit{No crime and no penalty shall be established except by virtue of law, and no penalty may be imposed except for offences committed after the relevant law has come into force}”\textsuperscript{43}

This corroborates Article 1 of the Criminal Law No. 16/1960 whereby it is written that:

“\textit{No act will be criminalized, nor punished, unless it is stated by law}”\textsuperscript{44}

\textsuperscript{39} Herbert J. Liebesny (translator), \textit{Egyptian Civil Code, Article 1}, in \textit{The Law of the Near and Middle East: Readings, Cases and Materials} (State University of New York Press, Albany, USA, 1975) 95
\textsuperscript{40} Hill n 27, 189
\textsuperscript{41} Al-Aayoubn n 18 (Explanatory Memorandum)
\textsuperscript{42} William M. Ballantyne, \textit{Essays and Addresses on Arab Laws} (1\textsuperscript{st} edition 2000, Curzon Press, Richmond, UK 2011) 62
\textsuperscript{43} Kuwaiti Constitution, Article 32
\textsuperscript{44} Criminal Law No. 16/1960, Article 1
The law of the land in a civil code country are the acts of Parliament and in criminal law, therefore, the only source of law are the specific statutes, as passed by Parliament. If no act exists, judges cannot create a crime, no matter what other source they use.

More importantly, if government were to pass direct laws that contradicted Shari’a Law, leading scholars do not believe that Article 2 gives the courts the power to preside over cases brought to challenge the Parliament’s supposed obligation to comply with Shari’a Law. Al-Moqatei states that if Islamic Law became ‘the’ principle source and all laws had to comply specifically with Islamic Law, this would render null and void various statutes and create ‘constitutional controversy’.45

Thus, there is a duty to consider Shari’a Law, but the judges have a certain discretion (it is only ‘a’ chief source of Kuwaiti law, after all).

This is reflected in practice. The 1992 case in the Constitutional Court was brought to argue that allowing the charging of interest in Kuwait could not be legal in Kuwait as it flouts Shari’a Law.46 Kuwait was indeed the only country in the Gulf that had legislated specifically to allow the charging of interest. The commercial code had originally set the rate at 7% but, in 1977, the Central Bank raised it to 10%. However, in the 1992 constitutional challenge, it was held that as Shari’a is only ‘a’ principal source of Kuwait’s law, the lawmakers were entitled to pass laws, such as the allowing of interest, even though it went against Islamic Law as traditionally understood. As such, Ballantyne says the government can thereby ‘evade’ Shari’a Law.47

However, Lombardi claims that this is not the correct, or the only, interpretation of the decision. He says that, although traditionalists believe that charging interest violates Islamic Law, another body of opinion believes that ‘there are no clear

46 Case No. 8/1992/Constitutional Court, 5
47 Ballantyne n 42, 3
scriptural principles that categorically preclude it’.\textsuperscript{48} It is therefore possible that the court did not consider the action to be clearly against Shari’a Law and so the court had not ‘evaded’ Shari’a Law at all.

\section*{3.8 Sources of Law}

The written constitution in Kuwait is supreme. All other law, whether Shari’a or custom or any other, has to conform to it. And the only court with the power to judge whether other laws are indeed in conformity is the Supreme Constitutional Court (see Article 1 of the Law Establishing the Constitutional Court 14/1973).\textsuperscript{49}

Another problem in the deciding on the application of law to plug the ‘gaps’ is that of the role of judicial precedent in Arab countries. In short, as with France and other civil code countries, judicial precedent is not a significant source of law. Indeed, ‘codes are an anathema to judicial precedent’, says Edge.\textsuperscript{50} A vicious cycle is created by the lack of reporting. As precedent is not an official source, there is no need to report cases. But as cases are not reported, it is extremely difficult to decide cases to help resolve current cases. The net effect is that there is very little organised and structured reporting of law cases in the Middle East. Those that exist are often brief and – worse – inaccessible. Shari’a Law itself, of course, does not recognise judicial precedent as a source of its religious jurisprudence.

\subsection*{3.8.1 English Common Law}

The influence of English common law is also of academic interest. As, indeed, is that of French civil law and other sources. Common law is used in this thesis from a comparative law point of view to differentiate a system which uses precedent (as well as statute) as a source of law from a civil law or codified system where judges

\textsuperscript{48} Lombardi n 7, 749, footnote 50
\textsuperscript{49} Article 1, Law Establishing the Constitutional Court 14/1973: “The established constitutional court will be the sole body competent to interpret the constitutional texts, decide in cases in relation to the constitutionality of laws …”
\textsuperscript{50} Edge n 26, 140
have no power to act if there are no codified law that grant authority. Garner defines common law as:

"The body of law based on the English legal system, as distinct from a civil-law system; the general Anglo-American system of legal concepts, together with the techniques of applying them, that form the basis of the law in jurisdictions where the system applies." 51

From a historical basis, it is clear that the advent of the 1962 Constitution effectively put an end to the formal role of English law in the Kuwaiti legal system. However, its influence is broadly accepted in today’s modern law, although the extent is difficult to quantify. Kuwait’s own set of Immigration guidelines, for instance, says that Kuwaiti law ‘reflects elements’ of the English common law system. 52 The United Nations refers to the legal system as being an “amalgam” of English common law, French civil law, Egyptian law and Islamic legal principles. 53 However, others note that English common law no longer has any relevance to Kuwaiti law. 54

Myra Williamson writes that it is interesting that Kuwait is one of the few countries that chose not to adopt the legal system of its colonial power or protectorate power. 55 Given Sanhuri’s experience in drawing up the French-based Egyptian code, it was maybe not surprising that, when asked shortly afterwards, to draw up one for Kuwait, he simply decided to do what was effectively just a duplicate version.

54 for instance, William Ballantyne (Prof.), *Arab Commercial Laws*, (Lecture at McNair Chambers, Oct. 2013)
Williamson writes that the choice served as a “quick fix at the time” but that it was not a wise choice in terms of the bigger picture.\textsuperscript{56} Casey also notes how ‘quick’ the adoption of the new Constitution was.\textsuperscript{57} Indeed, within just one year of Britain proclaiming that it would repeal British Jurisdiction, on the condition that a new system was in place, a new legal system was indeed suddenly ‘created’ and Kuwait had an ‘entirely new and foreign system’.\textsuperscript{58} Hijazi writes that:

“This wholesale and hasty introduction of a new legal system with unfamiliar and rather complicated principles led, naturally, to a species of indigestion...”.\textsuperscript{59}

3.8.2 Economic Effects

Although some see this as a ‘daring choice’,\textsuperscript{60} the haste of this decision may have been unfortunate. Common law countries are consistently shown to perform better economically and financially than civil code countries, and French civil code countries usually perform the worst.\textsuperscript{61} Back in 1997, a Harvard study of 49 countries concluded that “our results show that civil law, and particularly French civil law countries, have both the weakest investor protections and the least developed capital markets, especially as compared to common law countries”.\textsuperscript{62} Recent World Bank data seem to confirm this, ranking Kuwait as bottom of the six member states of GCC (the other five not having French-based legal systems) in terms of ease for small- and medium-sized firms to do business.\textsuperscript{63} Thus, despite the undisputed wealth of Kuwait, according to Williamson the country is “hampered by an inefficient political and legislative environment which is slow to respond to

\begin{itemize}
\item \textsuperscript{56} ibid
\item \textsuperscript{57} Michael Casey, \textit{The History of Kuwait} (Greenwood Press 2009), 68
\item \textsuperscript{58} Williamson n 55, 36
\item \textsuperscript{59} A. Hijazi, ‘Kuwait: development from a semi-tribal semi-colonial society to democracy and sovereignty’, (1964) 13 \textit{American Journal of Comparative Law}, 4, 432
\item \textsuperscript{60} Huneidi n 22, 216
\item \textsuperscript{61} Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleifer and Robert W. Vishny, ‘Legal Determinants of External Finance’, (1997) 52 \textit{The Journal of Finance}, 3
\item \textsuperscript{62} ibid, 1149
\item \textsuperscript{63} World Bank/International Bank for Reconstruction and Development, \textit{Doing Business 2013- Smarter Regulations for Small and Medium Sized Businesses}, (10\textsuperscript{th} edition 2013), 59
\end{itemize}
"business needs and difficult to navigate". The blame for this, she claims, is the genetic legacy of a French civil code system.

3.8.3 The Legacy of the British Legal System in Practice

However, no system that has been in place for so long can be suddenly removed without leaving any trace. The Anglo-Kuwaiti treaty of 1899, which foresaw the Protectorate and the establishment of a British Jurisdiction system to run in parallel with the National Jurisdiction, covered a very important era of global commercial affairs. Looking for lasting influences of British law in Kuwait today, Williamson claims that although precedent is not technically a part of civil law, lawyers have admitted to her, anecdotally, that they try to find similar cases to back up their arguments, just as common law practitioners would do. Of course, however, one needs to know whether lawyers in other civil code countries also do so before one can conclude that this is due to lasting influences of English law traditions. The legal education system certainly seems more similar to the French system than the British one, although certain American forms and titles are adopted (lawyers, for instance, make a career choice to become judges, attending ‘judge school’, as per the French system, rather than the British or American one where judges do not need specific training).

A more important jurisprudential question is whether the British legal system has left a trace on Kuwaiti law in terms of legal realism. Is a judge supposed to be simply a neutral decoder of the formal set of rules or is it his/her job to use their knowledge, experience and subsequent wisdom to ‘apply’ the law, as they see fit? If Kuwait could be shown to be the latter, then this would show a more indirect lasting effect of British legal traditions, not as specifically written down, but as part of the accepted traditions and mores of legal thinking in the country. This is outside the scope of this research but Williamson suggests, in her role of Law Professor in Kuwait, that law students are far more naturally inclined toward the former view, of

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64 Williamson n 55
65 ibid
the law being black and white, and that judges should be completely neutral and devoid of all personal views, as there is always a 'right' answer and all 'good' judges should reach the same conclusion about the same case. This is contrary to the view of a lawyer trained under the English common law. It is also contrary to the view of Sanhuri himself who did not adhere to the idea of a judge being simply a strict judicial scholar who applies a code. As shown in his diaries (see Chapter 7), Sanhuri believed that a judge must not be “frozen” in time by the code but a person who reflects society as it is today and can be flexible to bring his own experience to bear of administering justice.

Liebesny notes that Britain left its mark in the Gulf with a “sizeable legacy of statutes” but is not surprised that Kuwait moved over to a practically completely Egyptian-based system so easily, despite the long years of British protectorate-ship. Unlike in India and Pakistan, for instance, British jurisdiction in Kuwait never extended to all local citizens, only those who were subject to British extraterritorial jurisdiction. At the time of independence, British Jurisdiction only applied to roughly 30,000 people: on the contrary, National Jurisdiction covered approximately 250,00, namely all citizens of Kuwait, other Arab countries, and Iran. These two systems were poles apart. Hijazi writes that the National Jurisdiction was, in theory, based on Ottoman-style Al-Majallah but, in practice, was no more than “the conscience of the official dispensing justice”, with no written laws, formally identified procedures or even identified courts. The British Jurisdiction, however, followed English legal principles and English procedures, effectively meaning there were two completely different systems running side by side. Thus, the British system was not ingrained, certainly not for the majority, and

66 ibid
69 Williamson n 55
70 Hijazi n 59, 428-9
not the local people. Furthermore, there were practically no local trained lawyers and no English law school system in place, so no manner whereby to promulgate the British system, thus ruling out the possibility of an enduring legacy.\footnote{Liebesny n 68, 111}

### 3.9 Kuwait’s Ideological Aims as a New Country

The role of Shari’a Law, and indeed English common law and French civil law and all other sources, however, should be taken in the context of what Kuwait – as a newly independent country - was trying to achieve at the time. A new country is concerned with far more than the specific role of its legal sources: it is trying to create a framework for a successful, just and peaceful new society. The Kuwaiti constitution is inspiring in this regard. It clearly states that Kuwaiti citizens are all equal “in human dignity and in public rights and duties before the law”.\footnote{Kuwaiti Constitution, Article 29, [Equality, Human Dignity, Personal Liberty], (1) “All people are equal in human dignity and in public rights and duties before the law, without distinction to race, origin, language, or religion.”} They are also presumed innocent\footnote{Kuwaiti Constitution, Article 34, [Presumption of Innocence, Right to Trial], “An accused person is presumed innocent until proved guilty in a legal trial”.} and entitled to freedom of religious belief and freedom of expression\footnote{Kuwaiti Constitution, Articles 35 and 36} (as “freedom of belief is absolute”).\footnote{ibid, Article 35} Article 7 of the Constitution reflects a triumvirate of fundamental ideals, similar to that of the French:

*“Justice, liberty and equality are the pillars of society; co-operation and mutual assistance are the strongest bonds between citizens”*\footnote{ibid, Article 7}

Interestingly, in France’s tripartite motto of *liberté, égalité and fraternité*, she has liberty and equality but, instead of justice, uses ‘fraternity’. Kuwait covers fraternity, by its emphasis on the bonds between citizens, but specifically cites ‘justice’ as an essential ingredient in its own right. Some, however, include justice in the French
group of ideals, not in terms of the original slogan from the revolution, but as one of the fundamental truths on which democracy is based and included, therefore, by inference, in the French trio. In the Institut Européen de l'Université de Genève publication, edited by Olga Inkova, Philippe Roger argues that justice was understood to be included in the French slogan, that the actual inclusion of it was simply ‘de trop’, a fourth word which was dropped as otherwise it meant that the power of the other three would be diminished.

The Constitution is thus a very moral document, based on fundamental ideals and values. It effectively endorses individual human rights within a benevolent and caring state. These rights and principles are presented as self-evident norms and truths. The constitutional recognition in Article 29 of equal individual human dignity, regardless of creed or colour, is a moving testament to the underlying aims of the Constitution.

The role of the state as ‘guardian’ is also critical. Under Article 8:

“The State safeguards the pillars of Society and ensures security, tranquillity, and equal opportunities for citizens.”

Thus, these fundamental human ideals are not specified or justified as religious rights: rather, they are universal principles that the modern state of Kuwait wished to embrace. Indeed, the Emir’s very personal and uplifting preamble to the Constitution sets the tone, using phrases such as ‘the dignity of the individual’, ‘political freedom’, ‘social justice’, ‘equality’, and ‘consultative law’. This is obviously seen as coherent with Arab and Islamic principles as the Emir speaks of his country’s future as upholding “the traditions inherent in the Arab nation by

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77 Olga Inkova (Editor), Justice, Liberté, Egalité, Fraternité: Sur quelques valeurs fondamentales de la démocratie européenne, (Institut Européen de l'Université de Genève, 2006)
78 ibid, chapter by Philippe Roger, ‘La Révolution Française et la Justice ou la Seconde Exile d'Astreé’, 13, 15
79 Kuwaiti Constitution, Article 8
enhancing the dignity of the individual, safeguarding public interest, and applying consultative rule yet maintaining the unity and stability of the Country”.\textsuperscript{80} Indeed, and interestingly, Arab nationalism is seen as completely compatible with world peace. The Emir approves the new constitution as “having faith in the role of this Country in furthering Arab nationalism and the promotion of world peace and human civilization”.\textsuperscript{81}

The concept of the State as a benevolent guardian is furthered by its specific constitutional function to care for the young, and ensure their physical, spiritual and moral well-being,\textsuperscript{82} to protect the country’s senior citizens,\textsuperscript{83} ensure the provision of education,\textsuperscript{84} the science and arts,\textsuperscript{85} public health care,\textsuperscript{86} and so forth. The role of religion in itself is not written as a primary concern. Indeed, the only article which imposes on the state a constitutional duty with a religious context (as opposed to a descriptive statement, such as that the religion of the State is Islam\textsuperscript{87}) is that of Article 12 [Arab Heritage] which states that “the State safeguards the heritage of Islam and of the Arabs and contributes to the furtherance of human civilization.”\textsuperscript{88}

This again, however, is referring more to general ideals, and the importance of a country’s traditions and heritage, rather than specific religious rules.

As such, “few monarchies, especially in the Arab world, have ever had such liberal democratic ideals enshrined in their basic political documents”.\textsuperscript{89}

\textsuperscript{80} Kuwaiti Constitution, Preamble
\textsuperscript{81} ibid
\textsuperscript{82} ibid, Article 10
\textsuperscript{83} ibid, Article 11
\textsuperscript{84} ibid, Article 13
\textsuperscript{85} ibid, Article 14
\textsuperscript{86} ibid, Article 15
\textsuperscript{87} ibid, Article 2
\textsuperscript{88} ibid, Article 12
\textsuperscript{89} Casey n 57
3.10 Separation of Powers

Furthermore, as previously noted, Articles 50 and 163 of the Constitution purport to ensure the independence of the judiciary and the separation of powers when they say that “the system of government is based on the principle of the separation of powers, functioning in cooperation with each other”;\(^90\) that “none of these powers may relinquish all or part of its competence in this Constitution”;\(^91\) that “in administering justice judges shall not be subject to any authority”\(^92\) and that “no interference whatsoever shall be allowed with the conduct of justice”.\(^93\) Articles 51, 52 and 53 specify very clearly where the legislative, executive and judicial powers are vested. The importance for the judiciary to be impartial is also recognised, not as a wish or an ideal, but as the fundamental root of all law. Article 162 [Impartiality of Judges] states that:

“The honor of the Judiciary and the integrity and impartiality of judges are the bases of rule and a guarantee of rights and liberties.”

Thus, honour and integrity are written into the constitution as intrinsic moral values, not as religious rules.

In light of the above, in his article in the Middle East Quarterly, Al Rumaihi writes “Kuwait is one of the very few states in the Middle East with a written constitution, separation of powers, rights of free speech, fair elections, and a parliament with a genuinely popular mandate”.\(^94\)

Although this sounds very powerful, many would argue that it did not represent any material change. Historically, Kuwait ‘invited’ the Emir to govern the country, in a collegiate manner, based on fundamental principles of rights, as agreed by tradition

\(^90\) Kuwaiti Constitution, Article 50
\(^91\) ibid
\(^92\) ibid, Article 163
\(^93\) ibid
\(^94\) Rumaihi n 36
the consultative process. According to eminent constitutional scholars, there was effectively a political and social contract, agreed between the people of the country and its ruler. The elected assemblies in 1921 and 1938 were two 20th century examples; the 1962 constitution was simply a third such contract.95

3.11 Commercial and Contract Law

It should be noted that the Constitution naturally does not cover contract or commercial law as such. A constitution sets the legal framework of the whole country; it seeks to provide over-arching ideals and principles: the actual day-to-day uses of contract law in commercial settings are outside of its ambit. However, without the legal framework, and its setting down of the overall philosophy, business codes of practice would be very difficult.

As such, alongside the Constitution, the Civil and Commercial code was developed in 1960, and enacted as Law 2 of 1961, of which the second book was effectively providing the contract law provisions as found in the Egyptian Civil Code. This is a full ten years before other states in the Gulf and, given how comprehensive and all-encompassing the codes are, it is not surprising that Ballantyne concludes that it is thanks to them that it is, in his view, remarkably easy for both Kuwaiti nationals and foreigners to do business.96 The fact that the commercial system is secular and independent of Shari’a Law means that it is more dependable and decisions can be trusted, without fear of religious interference, he says.97 It should be pointed out, though, that Ballantyne’s view predates that shown by the World Bank/IBRD data noted above (see note 53). The endorsement of the charging of interest in 1992, as previously mentioned, clearly helped the commercial sector, both domestic and

95 see, in particular, ‘Uthman ‘Abd al-Malik al-Salih and Adil al-Tabataba’i’
97 ibid, 64
foreign, although “the ceilings on interest have caused problems for the finance industry”.98

The legal position is interesting, however. The 1961 Commercial Law and Al-Majalla in Kuwait were replaced by the Kuwaiti Civil and Commercial Codes of 1980. These new codes were drawn up by a commission that was headed up by three eminent Egyptian judicial scholars. It is Section 305 of the Civil Code99 that prohibits interest on money that is loaned or interest on late payments of money owed. The contracts are not void but the interest clause is severable. This would seem clear. However, Law n. 68 of the 1980 Commercial Code qualifies this (or contradicts it) by saying that interest on commercial loans is not banned providing that the interest rate is not excessive. Ian Edge in The Cleveland State Law Review notes that “the explanatory memorandum says that riba is concerned with excessive interest and exploitation of weakness.”100 The distinction here is that any non-commercial loans, e.g. ones between family members, must be protected because if any interest is charged it is, by its nature, exploitative of the weaker family member. Hence, it is forbidden. The Commercial Code, on the other hand, recognises that interest is a standard part of a commercial loan but outlaws excessive interest as a very high rate of interest will only be agreed to if one party is in a weak position and hence in danger of exploitation.

It should also be noted that, in the Commercial Code, Al-Sanhuri deliberately chose to implement a system of Law of Obligations based on the Iraqi model rather than that of Egypt. This is because he saw it as being more in keeping with the Kuwaiti local set-up.101 Equally, the Syrian code was used for agency and securities law. It therefore shows a concerted effort to provide a system that was not only effective

98 Z. J. Hafeez, Islamic Commercial Law and Economic Development (Heliographica, California, 2005) 34
99 Civil Code of Kuwait, Law no. 67, 1980, Section 305
100 Edge n 26, 137
101 Huneidi n 22, 216
but, on a practical basis, picked the best parts, as applicable to the existing Kuwaiti society and practice.

The importance of trying to restrain the impact of Islamic Law on commercial practices is noted by several scholars. The Qur’an says that rigid application of religious law has been detrimental to economic development and business in many respects. The waaf system, for instance, prevents the pooling of capital; restrictions on commercial partnerships limit businesses longevity, thus also preventing capital accumulation; and legal personality is not fully recognised. Although most countries have now reformed the traditional Islamic Law that does not allow or recognise corporations as distinct legal entities, it has seriously impeded corporate development with the vast majority of Middle East private sector still being run by family-owned sole businesses. Azzam also notes that the Islamic legal system fails to protect creditors or prevent unfair trading practices. In short, “the laws in Islamic countries thus erect major hurdles for private economic development”.

It is worth noting that Egypt, at the same time, tried to reform its own Civil Code, looking for inspiration to the Kuwaiti Civil Codes, both new and old, (as well as many other sources). The aim, as above, was to govern financial dealings by Shari’a. These proposals, however, were shelved.

### 3.12 Economic Effects

Hafeez notes that it is thanks to this secure commercial code that there has been such a positive effect on the Kuwaiti economy, and that any problems are not due to

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103 ibid, 2


105 Hafeez n 98, 3

106 Al-Mashru Al-Qanun Al-madani (Majilis Al-Sha’ab 1982)
the nature of the commercial code in itself but result “from the content of specific laws, like the ownership law”. The commercial code, in this case, goes hand in hand with oil income. Thanks to oil revenues, Kuwait has helped establish a diversified thriving economy, using those rather volatile revenues to invest in local, domestic and international businesses and industry sectors. This had the effect of converting oil income, which is both volatile and finite, into far more stable and reliable ongoing varied wealth sources, thus providing help toward the long-term growth of the country. Although reservations about the business environment in Kuwait were noted above (especially as regards investor protection, capital markets etc.), the economy is certainly in a healthy shape: Kuwait’s Sovereign Wealth Fund currently stands at $296 billion, and the Reserve Fund for Future Generations, which receives 10% of the annual oil and gas revenues, was estimated at the time of the 1990-1991 Gulf War to be approximately US$100 billion, with the investment returns being roughly the same as the annual income from oil and gas.

In the interests of providing a balanced view, it should also be noted that there are other scholars who disagree with the argument that Middle Eastern economic development has been hindered by and is not possible within a strictly religious framework. Federspiel argues that by persuading Islamic leaders of the benefits of development, they can be agents of growth, with emphasis on civic culture. Nasr focuses more on the fact that the government can use Islam to help growth because it allows for greater access to the civic population and hence more social control.

107 Hafeez n 98
and stability. Also, the very fundamentals of Islam, if followed correctly, can be a serious engine of growth. The Islamic ban on waste, corruption, and inefficiency is a strong force for promoting good.

3.13 The Role of the Judiciary in Modern Kuwait

It has to be noted that there is no specific literature review possible as a comparative base for the research done in this paper on the judges’ interviews. There is, to the best of the author’s knowledge, no other body of first-hand interviews from senior Kuwaiti judges. Furthermore, there is very little in the way of any interviews or reporting of personal opinions; the very marked reluctance to give public statements is, indeed, an issue. One leading scholar, Nathan Brown, writes that the problem behind this is that the independence of the judiciary is, in practice, not guaranteed. Despite the seeming constitutional guarantees (see above), the fact is that the irremovability of judges is not guaranteed, unlike in many other Middle Eastern countries. Article 163 of the Constitution only says that the law must simply “state the guarantees and provisions relating to judges and the conditions of their irremovability.” Although you could argue that this presupposes an irremovability, it is equally obvious that conditions could, in theory, be imposed so as to make it so onerous that effectively it was non-existent. Certainly, it has been called ‘excessively weak’ and in need of amendment, as well as being pointed out that, on a practical basis, any irremovability only applies to senior judges anyway.

Sources:
113 Hafeez n 98, 4
114 Nathan Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf, (CUP 2007)
115 Kuwaiti Constitution, Article 163
116 Brown n 114, 160
The implication, therefore, is that judges are not completely safe in their role as independent judiciary and, therefore, not immune to political pressure and as such, are reluctant to talk openly, or even at all, because of fear of saying something wrong.

The significant number of foreign judges working in Kuwait adds to this problem as, if cheaper and more compliant options are easily available, judges will naturally be more likely to toe the political line rather than risk not having their contracts renewed. Kuwait, also, did not adopt a full Majlis al-Dawla system. As such, there is not a complete involvement of the judiciary in the drafting of new legislation. Their influence, and power, therefore, is somewhat limited which may mean that they are protected insofar as pressure is seldom brought to bear on people who have little power or, more likely, that they are in weaker position, less able to stand up to the executive and so somewhat vulnerable.

3.13.1 Judicial Reluctance

It has to be said that, in the public domain at least, there have been hardly any charges of undue influence being put on Kuwaiti judges; however, as Brown says, the result is that they “are more likely to avoid politically sensitive issues than to impose government will”.\(^{118}\) This is seen on a practical basis by their reluctance to assert themselves and become involved in constitutional challenges, despite having the authority to do so. In 1993 and 1994, for instance, two important constitutional cases, including one concerning freedom of the press, were thrown out, not on lack of merit, but on technical bases, namely that there was either a procedural flaw with how the case was brought or that the parliamentary action in question was outside their scope.\(^{119}\)

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\(^{118}\) Brown n 114, 160


Similarly, law forbids the courts to hear cases regarding acts of sovereignty. This was incorporated into Egyptian law from the French model, and is a well-established legal concept in western law, seen in public international law, as well as national law (the Queen of England cannot be tried in an English court). However, the term ‘acts of sovereignty’ is not specifically defined: it is, in general, a vague term that can be interpreted strictly or very widely, and easily covers practically all foreign policy or security issues.

In Egypt, however, President Nasser extended it to cover a broad range on internal administrative decisions. Using similar reasoning, and despite being one of the few other Gulf countries to establish, finally and after a lot of dissent and objections from the ruling family, an administrative court, the Kuwaiti judiciary has since been criticised for interpreting this clause far too broadly and effectively giving themselves a justification for leaving all internal matters to the executive and for the judiciary not to get involved in any possibly contentious political matters. Indeed, the law itself has been challenged as being unconstitutional because it restricts one’s rights to the courts but, again, the courts refused to address the issue as the administrative court decided that the issue was not sufficiently important to be worth sending to the Constitutional Court for it to be heard and judges upon. This contrasts with the ‘bolder’ approach taken more recently by the Egyptian courts, whereby the Egyptian Constitutional Court has veered away from using ‘acts of sovereignty’ to the more American term of ‘political questions’, thereby taking away the carte blanche idea of acts of the executive being automatically outside the courts’ scope and making it more subject to the courts’ discretion.
very hard to come by. Brown is emphatic when he writes that, even in favourable circumstances, the Kuwaiti judiciary refuses to be a “force for liberal legality”, that although their framework gives them the basic tools and authority to do so, they show little or no inclination to “pursue such a mission” and, in sum, “the Kuwaiti judiciary has never pursued a liberal legal vision of any sort”.

3.14 Forces for Change

Some people see signs of change or, perhaps it would be more accurate to say, ‘forces for change’. In his research paper, undertaken as part of LSE’s Kuwaiti Development Programme, Greg Power notes that although the Arab Spring uprisings certainly showed the public’s feelings, en masse, about their respective governments, the storming of Parliament in Kuwait in late 2011, by disillusioned and discontent normal people as well as wider political activists, “had less to do with issues seizing the region than with public and media outrage at a very local issue of alleged corruption, and the buying of MPs’ votes by the government”. Of course, it must be remembered that even modern Kuwait has a history of heavy-handed government – the ruling al-Sabah family has twice in recent decades dissolved parliament, completely unconstitutionally. Various articles were suspended, including the very article that prohibited the Emir from dissolving parliament. Since 2006, however, parliament has tried to wield its power more, and government has resisted, with the net effect of four elections in six years. Levels of public trust are therefore not high. Furthermore, although ‘advocates of liberal

\[\text{Sources:}\]

122 Brown n 114, 179
123 Greg Power, ‘The difficult development of parliamentary politics in the Gulf; Parliaments and the process of managed reform in Kuwait, Bahrain and Oman’, [London School of Economics, Kuwaiti Programme on Development, Governance and Globalisation in the Gulf States, October 2012, No. 25], 5
124 in 1976 and 1986
125 It is only authorised under the Constitution in cases of military necessity.
legality’ are very strong in Kuwait, notes Brown, and continue to be so, ‘their strength lies outside the judiciary’.\textsuperscript{126}

Again, this would seem to have some bearing on the senior judicial members’ reluctance to talk openly and publicly on their views, and on other literature being forthcoming on that topic.

3.15 Conclusion

In conclusion, the literature gives a detailed understanding of the historic development of the Kuwaiti legal system and places it firmly in a modern context. The drafting and acceptance of a new Constitution, and Civil and Commercial Code, was fundamental in paving the way for a new, modern country, throwing off the vestiges of her old protector and choosing a completely fresh and different legal system, one which reflected the French-based Egyptian model which was conveniently available to be imported as a ready-made system and the Islamic traditions and sensibilities of the people. The wisdom of the choice, as seen above, is debatable. The role of Islamic Law as a source of law, however, has become a hotly contested topic in recent years and there is a conflict between the importance in Kuwait of the ideas of Islam as a cultural and historical tradition that is integral to the country and that of strict Shari’a Laws. The Constitution, moreover, is a wide, moral document, setting the tone for the whole of the legal system, both as a reflection of social understanding at the time and the aims and goals going forward. It is an amalgamation of all the good and useful aspects that could practically be found, from a wide variety of influences, without a desire to adhere strictly to any one single source. And it is this that has laid out the framework for the Civil and Commercial Codes that allow business and consumers to operate in a modern environment. Lastly, and unfortunately, the position of the judiciary tends to lead towards a reluctance for judges to take a stand and have a voice that is heard: the

\textsuperscript{126} Brown n 114, 158
fact that judges in the Kuwaiti Court are appointed by a council which, itself, is made up of senior judges and “other officials who owe their positions to ministerial appointments”\textsuperscript{127} means that their independence from political pressure is not a given and it is not the judicial arm that wields the hand of change.

\textsuperscript{127} Al- Malik Al Salih n 117, 151
Chapter 4 Kuwait’s Commercial Law from the Perspective of Islamic Law

4.1 Introduction

Previous chapters provide an overview of the background to and development of Islamic commercial law and describe how Islamic prescripts had some influence as the basis for Kuwaiti commercial law. In doing so, it examines the historical background, including the pre-Islamic era, the emergence of Islam, Islamic practice, its scope, general principles and processes. The chapter explores the transition from pre-Islamic to Islamic practice, the respective differences in practice and application, particularly with regard to both the criminal and moral codes and how Islamic influence evolved and spread following its emergence in the 8th century. As a matter of course, it covers the growing influence and spread of Islam, the impact of Islam during these periods on both the social and political spheres, and the centrality of its role during the later Ottoman Empire leading up to the establishment of the British Protectorate. The influence and application of English common law during the Protectorate will also be discussed, as will the extent and influence of its mandate, the process of assimilation, recognition of and sensitivity to local customs and practices in the administration of justice.

Also covered will be a review of the demise of the British Protectorate, how the precepts and principles of Islamic Law impacted the development and structure of commercial law and arguably how its prescriptive strengths, in respect of the personal sphere, did not translate to the commercial domain.

The chapter examines how amendments to the law have taken account of the changing economic environment from the 1930s onwards and how the influence of Islam waxed and waned during these more recent decades in respect of the political, social and legal spheres.
4.2 The Pre-Islamic Structure of Arab Society and Transition to Islam

Early Pre-Islamic society across the Arabian Peninsula was characterised by a rough distinction between rural and municipal life, where in the case of the former, agriculture was the principal mainstay of life, and trade that of the cities.

4.2.1 Cultural and Ethnic Differences

Across the Arab peninsula, cultural and ethnic differences proliferated. Chief among these were the distinctive differences in lifestyle practised by the Bedouin and their more urban countrymen. Indeed, Bedouin customs predominated for centuries before the advent of Islam and were mostly tribal in nature, with a distinct hierarchical structure in evidence.¹ Throughout this period, the Arabian Peninsula was convulsed by periodic wars, invasions and inter-tribal rivalries. Religiously, each tribe worshipped an array of diverse deities and polytheism was the norm, with most worship being nature-based – sun and moon worship were not uncommon.

Linguistically, the word "Islam" is derived from "salam", which means peacefulness.² Essentially, the word usefully captures what was regarded as the distinction between the pre-Islamic and Islamic eras, with the former being characterized as "Al-Jahiliyya", an Arabic word that signifies foolishness, furiousness and haughtiness.³

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4.2.2 Islamic Teaching and Precepts

The Islamic religion has two main bases: faith and *Shari’a* (Islamic Law). The faith and principles of Islam are regarded as having been passed to the Prophet by God and these were then enshrined in the *Qur’an* which is regarded as the primary source for all Muslims in relation to the teachings of their faith. Shari’a, in contrast, is concerned with the practical aspects of everyday life and sets out those rules, which regulate the relationship between God and man, the conduct of man in his engagement with his fellow human beings and the relationship between man and the natural world around him. Islam quickly came to replace those systems, deities and codes, which had predated it and its influence with respect to both legal and moral codes was overarching. The scholar Muhammed Ibn Idrīs Ash Shafī’l, in his compilation of Shari’a, the 8th Century *Risala*, described four sources of law. These being the two described above:

- **Sunna**: the behaviours and sayings of the Prophet Mohammed and
- **Quran**: the word of God as told to the Prophet Mohammed,

plus

- **Ijmā**: consensus of the Muslim community and
- **Qiyā**: human reasoning

The latter two show that even as far back as the 8th Century there were scholars that believed the laws were open to interpretation and may require further debate to enable their application in a just and reasoned manner suitable to the situation.

Prior to the advent of Islam, two principal legal systems prevailed, that of the Bedouin tribes and that which held sway in the urban communities across the peninsula.

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4 ibid
4.2.3 Systems of Governance

The political system of the nomadic Bedouins was tribal in organisation with each tribe governed by a Sheikh or Head. The tribe’s headship was not hereditary, but rather each was selected by the Sheikhs from those who were deemed to have certain qualities conducive to good leadership, including but not limited to: bravery, generosity, patience, helpfulness and far-sightedness.\(^7\)

The tribe’s Head enjoyed certain rights and privileges, but equally shouldered certain responsibilities. Among these rights was an entitlement to a quarter share of all goods captured during a raid of a rival tribe (\textit{mirba’}) and to first choice from those goods (\textit{safaya}); responsibilities included defending and protecting the tribe, representing it before other tribes and passing judgement, but generally in consultation with the tribe’s Sheikhs.\(^8\)

4.2.4 Sovereign Rule

In addition to nomadic Bedouin societies, the cities were home to other Arab societies and kingdoms such as those of the Maen, Sheba, Qutban and Himyar. Ruled by a king, power was hereditary, passing to the eldest son. Moreover, in the regions separating the boundaries of the Roman and Persian Empires, there were Arab kingdoms such as “Al-Munathera” on the boundaries of Persia, ruled by absolute monarchs.\(^9\)

There were some cities across the Arabian Peninsula that were ruled by tribal heads; examples include Mecca, ruled by Quaresh; Al-Taef ruled by Thaqeef and Yathrib ruled by Al-Aws & Al-Khazraj. In contrast to those more absolute sovereign kingdoms, the system of rule in Islam was based primarily on the principle of consultation, and systems of governance developed accordingly. This conduct of affairs was based on the precepts of the Qur’an itself - \textit{“and their affairs were and

\(^7\) Elizabeth Losleben, \textit{The Bedouin of the Middle East}, (First Peoples Series, Level 4-8, Lerner Publications, Minneapolis, USA, 2003)
\(^8\) ibid
still are being conducted by mutual consultation among themselves”.

4.2.5 The Caliphate

This system following the Prophet’s death was replaced by that of the Caliphate, with a Caliph or steward, following the path of the Prophet, who worked to protect Islam and enforce its rulings.

The Caliph was appointed through consultation, although Islam did not set out any specific method for the selection of the Caliph, allowing local customs and practices to dictate approaches and methods.

The First Caliph, Abu Bakr Al-Siddeeque, was unanimously elected, while the Second, Omar Bin Al-Khattab, was chosen through a process of consultation. This process of consultation gradually gave way to a hereditary system that owed much to Byzantine and Persian influence, and this persisted under the Abbasid until it was changed to a system in which the Caliph chose his successor.

4.2.6 Delegation of Authority and Care of the Faithful

Following the Mongolian invasion of 656.A.D the Caliphate capital moved, from Baghdad to Cairo during the time of Al-Zhaer Bibers, and then, later to Spain. During this period the administration of the Caliph evolved, with the Caliphate divided up into small administrative regions, controlled by a local governor (wali), who was also charged with the care of the Muslim faithful. These regions later grew in size during the early 7th century, under Caliph Omar Bin Al-Khattab, where control took on a more religious character, although still remaining answerable to a central government. This changed during the time of the Umayyads, where a more

\[\text{ibid}\]

\[\text{ibid}\]

\[\text{ibid}\]

\[\text{Patricia Crone & Martin Hinds, God’s Caliph: Religious Authority in the First Centuries of Islam, (University of Cambridge Oriental Publications, 2003)}\]

\[\text{ibid}\]

\[\text{Note the spelling of Abbasid and Abbasid are interchangeable.}\]
decentralised system conferred greater powers on local governors; in contrast, under the Abbasis, a more centralised authority saw control revert to the Caliphate system, with local governors and princes becoming employees of the Caliph. As the Islamic conquests progressed, the administration of the Caliphate became more complex and extensive; a particular feature of this period was the creation of divans or departments, which oversaw the administration of the army, tax collection and more fundamental aspects of governments, including the creation of a postal or message service that sought to connect all quarters of the Caliphate.

4.3 Judicial Administration

4.3.1 The Pre-Islamic Era

Before the advent of Islam, two systems for regulating disputes existed, a customary judgement system and an arbitration system. Throughout the Arab kingdoms, judicial power resided in the King assisted by a judicial council; this later took on a more religious character following the advent of Islam, and punishment was seen as having both divine and retributive elements.

4.3.2 Judicial Systems in the Principal Cities

The Arab cities were the centre of economic, commercial and industrial activity, of which Mecca was the principal centre, whose commercial links extended to the majority of Arab cities. In Mecca itself, government positions were distributed among the lords of Bani Quraysh (the family of the Prophet), who normally convened in Dar Al-Nadwa to exchange opinions and to mediate in disputes through

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15 ibid, 123-156
16 ibid, 187-190, 194-5
17 Robert Hoyland, Arabia and the Arabs: From the Bronze Age to the Coming of Islam, (Routledge, 2001), 113-139
a process of arbitration.\textsuperscript{19} \textsuperscript{20}

4.3.3 Judicial System of the Bedouins

The settling of inter-tribe disputes within Bedouin society fell to the individual parties in the absence of any recognised central authority and enforcement was ultimately an exercise in power by one party or the other.

4.3.4 The Qur’an and Judicial Administration

The character of Islamic judicial procedures was more complex and judgements carried greater weight and authority, as they were seen as being vested by the authority of the Qur’an, prophetic tradition (Sunna) and the consensus of Muslim scholars. In the conduct of personal affairs, the Qur’an was regarded as a source of revelatory authority and Muslims and litigants were content to adhere to its precepts and prescriptions.\textsuperscript{21}

However, with the expansion of the Arab state, around the turn of the 7th century CE, Omar Bin Al-Khattab appointed judges in each territory to adjudicate disputes, and in the absence of guidance from the Qur’an, these were able to make individual determinations.

4.3.5 The Qur’an as a Repository of Prescriptive Authority

Under the Umayyads, 661–750 CE, the Qur’an was still regarded as a repository of prescriptive authority,\textsuperscript{22} although Coulson describes their outlook at the end of their era as pragmatic. There was a common feeling of unrest by the end of the Ummayyad reign; citizens felt that the rulers had lost their way Islamically and there was also a growing unrest amongst non-Arab converts who complained of

\textsuperscript{19} Ira M. Lapidus, A History of Islamic Societies (1\textsuperscript{st} edition CUP 1988, 3\textsuperscript{rd} edition 2014) p.46-66
\textsuperscript{20} Eric R. Wolf, 'The Social Organization of Mecca and the Origins of Islam', (1951) 7 Southwestern Journal of Anthropology, 4 329
\textsuperscript{21} McAuliffe, n 2
\textsuperscript{22} Encyclopædia Britannica Online, "Abbasid Dynasty", Encyclopædia Britannica, (Encyclopædia Britannica Online, Encyclopædia Britannica Inc., 2016) <www.britannica.com/topic/Abbasid-dynasty>, [Accessed 5\textsuperscript{th} January 2016]
racial inequality and exploitation. This led to the other-throw of the Ummayyads by the Abbasis and a return to religious fundamentals and Islamic principles. The Abbasis, 750 to 1258 CE, took a much more idealistic religious approach to the law, although Coulson suggests that early Abbasian scholars achieved a balance between the Abbasis’ idealism and the Ummayyad’s pragmatism.23

4.3.5.1 The Schools of Islam

During this time of development and the rapid spread of Islam, there was of course much debate and discussion by scholars over Shari’a. The Qur’an was The Qur’an, of its content people were sure, it had been delivered directly from God to his final prophet, Mohammed. The hadith on the other hand, the traditions and sayings of the Prophet Mohammed, required more analysis. The Qur’an informs its followers that not only must the Qur’an itself be followed but The Prophet also. The Prophet Mohammed died in 632 CE, leaving those close to him to pass on the reports of his teachings and actions, the hadith. However, as time passed and Islam spread geographically, it was harder to be sure of what was truly hadith. Strict rules were put in place that potential hadith had to pass or conform to, and as time moved on, the collection of hadiths grew.24 As some wished to ensure the passing of what they believed to be true sayings or deeds of the prophet into the anthology that would be followed by all, they would associate it with the name of one of the Caliph close to or following Mohammed, whether this was a known fact that the Caliph had reported it or not.25 The hadiths led to prescribed obligatory behaviours, sunna, or ‘beaten path’. Originally this ‘beaten path’ insinuated tribal customs, or very early common


25 ibid, 41
Islamic practice, but later came to be related to Islamic jurisprudence stemming from the *hadith and Shari’a*.26

Geographical differences in the collections occurred, which led to the subsequent emergence during the Abbasis period of the Four Schools of Law (Madhhabs) in jurisprudence (*Fiqh*) within Sunni Islam; a judge had to settle disputes according to one of these Schools.27 In Iraq, judgement was made according to the Hanafi School, evolving between 699-767 CE; in Egypt according to the Shafi’i School, developed around 820 CE; in Sham (Syria) and Morocco according to the Maliki School, developed around 795 CE. The final school was Hanbaliyya, developed around 855 CE and the most conservative; it evolved in Baghdad and is the school followed today in Saudi Arabia. In cases where the litigant was not of the same School as the judge, the case was referred to another judge of the litigant’s School.28

Exceptions for settling disputes and protecting rights did exist, known principally as *Grievance Judgments* and *Hisba Judgments*.

### 4.3.6 Grievances Judgment

This type of judgment had as its objective the protection of aggrieved parties and the restoration of rights, and it differed from ordinary judgements in that it was not subject to certain fixed or established rules. In such instances, an individual petitioned the Caliph or any Prince, and the latter considered his grievance and delivered a judgement based on his authority and standing, without necessarily having recourse to the prescriptions of the Qur’an.29 30

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26 Coulson n 23, 39
27 Hisham Ramadan (Editor), *Understanding Islamic Law: From Classical to Contemporary*, (Lanham Maryland: Rowman Altamira, 2006), 18
30 Abbas Al Aboudi, *Law History*, (Oman Press, 1998), 21
4.3.7 **Hisba Judgement**

This judgement was based on the principle of enjoining good deeds and the interdiction of bad ones as this was deemed a collective obligation for all Muslims.\(^{31}\) *Hisba*, or *hisbah*, is the act of volunteering to interpose in the life of another if it is believed he or she are not adhering to, or following the rules of Allah and the Qur’an. Whilst essentially the motive is good, it is worth noting that there is some contention over how this is done and surrounding the Abbasis’ true intention of their creation of the role of Al Hisba, a state-employed volunteer to enforce Islamic practice. It is considered by some that this did not fit in with the Islamic and Qur’anic principles of freedom and justice, the Abbasis’ Al Hisba were about maintaining control.\(^{32}\)

4.4 **Criminal and Penal Systems in the Pre-Islamic Era**

Before Islam, a rudimentary penal system did exist, although again, its principal features differed among the various municipalities and these, in turn, were of a different character to those of Bedouins societies.

4.4.1 **Criminal and Penal Systems in the Kingdoms**

Some inscriptions have been found in recent decades listing crimes and requisite punishments, and these would appear to indicate that the power to enforce these laws and sanctions rested with the King, or those provincial governors authorised by him to act on his behalf.\(^{33}\) Stipulated crimes included: intentional killing, highway robbery, disobedience to the King, where the punishment for each was death, although the payment of blood money -*diyya*- in the case of murder was regarded as

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\(^{31}\) Al Turmani n 28


suitable atonement. The King could also forgive those who had rebelled against him once they repented and offered sacrifices and gifts in his honour to local deities – highway robbers, however, were afforded no such leniency and were executed as a matter of course.

4.4.2 Penal System of the Nomadic and Settled Bedouins

The basis of punishment was personal vengeance and familial consolidation, so it was similar to that of other primitive societies. It was marked by severity, cruelty and revenge and varied according to people’s lineage, the esteem in which they were held and their social position. Those crimes, which feature most regularly throughout the pre-Islamic era, were murder, assault, adultery and robbery.

Killing
Murder was one of the most common crimes in both nomadic and settled Bedouin societies, with revenge seen as obligatory in all instances, with the exception, as mentioned, of the payment of diyya to the wronged family.

Assault
If this did not result in death, revenge or compensation via blood money was regarded as acceptable.

Adultery
The notion of consent and the application of force in the case of rape in the past have differed from more modern accepted definitions. Both the adulterous wife and her partner could be put to death by the sword.

Theft by deceit or fraud
In such cases, the culprit was required not just to return the amount, but also to pay reparations amounting to double the sum in question.

Robbery
Within Bedouin societies, a distinction was made between theft and the acquisition of booty; the latter being deemed acceptable in all cases.

The habitual criminal
In such cases, the individual was generally ostracised from society and no further help or support was afforded them.35

4.4.3 Criminal and Penal Systems under Islam
Under Islam, the penal code underwent a dramatic shift in both character and execution, with many crimes subject to religiously stipulated sanction, as set forth in the Qur’an and Sunna.36

4.4.4 Crimes with Religiously Stipulated Punishments
Theft
Shari’a dictated the severing of the right hand, with similar punishments applicable for any form of highway robbery or theft with violence.

Adultery
Adultery saw the woman confined to her house and the object of universal shame and derision. In later years, these punishments became more severe and the death penalty was often invoked.

Slander
A slanderer could be beaten and all future testimony rejected until he recanted

Consumption of Alcohol
In sharp contrast to the Pre-Islamic Era, under Islam the drinking of wine or alcohol was gradually made unlawful and offenders could be beaten.37

Qasas (Revenge) Crimes

35 ibid
36 Sarayrah, n 33
Also called by religious scholars, felonies, in order to distinguish them from crimes with religiously stipulated punishments. These were generally of two kinds: crimes leading to a loss of life and those where loss of life did not occur. Punishment for these felonies was the qasas (revenge), where the culprit was subjected to a punishment commensurate with the harm inflicted on the victim.\(^\text{38}\)

**Ta’zeer Censure Crimes**
Shari’a set no fixed punishments for such crimes, but rather gave the ruler, or the judge acting on his behalf, the freedom to decide on an appropriate punishment deemed adequate for censuring, disciplining and deterring the criminal from committing such actions again. These punishments were called *ta’zeer* or censure.\(^\text{39}\)

### 4.5 Social Structures Within Society and Civil Arrangements

#### 4.5.1 Social Classes in the Pre-Islamic Era and Under Islam

**Free people**
Within Bedouin societies, all free people were regarded as equal in standing before the law; class distinctions were not the norm. However, in the cities, society was more class-oriented, with free people generally falling into three principal categories: the ruling, wealthy or under-classes.

**Slaves**
Slavery was common in Arab societies before Islam and the trading of slaves and enslavement for failure to pay debts were the norm. Following the advent of Islam, although slavery was not prohibited, it was severely restricted, with enslavement normally a consequence only of war. Manumission was encouraged and a number of

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\(^{38}\) ibid


\(^{40}\) Khalid Al Hendeyani, *The History of Law and Social Systems* (Kuwait University Press, 2009)
avenues were prescribed. Often a clause of the agreement of freedom was that the freed would convert to Islam, joining the new Arab tribe where all were brothers and would therefore become warriors to join in the fight against the non-Muslims.

*Ahl Al-Thimma (Free non-Muslims under Muslim reign)*

These were people of conquered countries bound by agreements with Muslims under which they secured themselves and their possessions in return for a sum of money paid to Muslims called *jizya* (tribute).

### 4.5.2 Prescriptive Codes With Respect to Family Life

From earliest times, Islamic Law has always been particularly prescriptive with respect to personal morality and family matters, a situation that has persisted to the present day. As this thesis will examine the influence of Islam on commercial law in Kuwait and how commercial codes were emended in light of the inadequacy of Islamic Law in respect of commercial affairs, a brief survey of the prescriptive extent of that early framework will serve to place that code in context, and to highlight the degree of continuity, which persisted through the centuries.

The family was of paramount importance in pre-Islamic society, and following the emergence of Islam the importance of the family unit remained unchanged, nonetheless, a number of changes did occur.

**The System of Marriage**

In the pre-Islamic era many types of marriage persisted, however under Islam, many of these were deemed impermissible.

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42 Coulson, n 6
43 Pipes, n 41
Marriages prohibited by Islam

Dhaizan (Detested) Marriage
The elder son, after the death of his father inherits his money and wife, so he is free to either marry her or marry her off to his younger brother or any of his relatives if he has no sons. The woman was not consulted in such matters.\(^45\)

Istibdhaa Marriage
Here, a sterile husband requests another man to have sexual intercourse with his wife in order that she might conceive. The wife remains apart from her husband until she gives birth.\(^46\)

Mukhadana and Mudhamada Marriage
In such instances, there is essentially a sexual relationship between a man and a woman and any child born of that relationship or sexual union is regarded as the man’s. The woman, in such cases, may have more than one sexual partner, and in the case of offspring, it is she who makes the decision as to parentage from among her partners.\(^47\)

Musafaha (Adulterous Marriage)
The woman would have several partners in addition to that of her husband.\(^48\)

Shaghar Marriage
In such instances, the husband marries his daughter or sister off to another man in return for the other man's marrying his daughter or sister off to him with no dowry.\(^49\)

Badal (Exchange) Marriage
The husband relinquishes his wife to another man in return for the other’s relinquishing his wife to him; no dowry is involved.\(^50\)

\(^{45}\) Mahmoud Salam Zanati, Al Qatel Wajazaeh (Riyadh Press, 1991)
\(^{46}\) Jawad Ali, Al Mofasal Fe Tarekh Al Arab Qabel Al Islam (The Details of Arab History before Islam), (Dar Al Alm Press, Beirut, 1380)
\(^{47}\) Keddie n 44
\(^{48}\) Zanati n 45
\(^{49}\) ibid
Marriage resulting from Conquest
In the pre-Islamic era, traditionally, the property of defeated tribes in battle passed to the victors; this included the women and children. In many instances, this was seen to serve as a form of ritual humiliation.

Mut’a (Pleasure or Temporary) Marriage
A temporary marriage for a pre-defined fixed term. In the pre-Islamic era, this measure was a response to the expatriation of men from their homelands.

Consanguinity
In the pre-Islamic era, marriages of consanguinity were prohibited and this stipulation carried over into the Islamic era.51

Other points or terms of note regarding marriage

Lawful Marriage
Marriage made through engagement, contract and dowry and necessitating competence. Adopted by Islam with some modifications made to its provisions regarding its conditions and purposes.

Competence
In the pre-Islamic era, marriage necessitated competence between the two spouses, but the criteria later differed under Islam. In the pre-Islamic era, competence meant equality in social rank.52 The criteria for competence under Islam included an acceptable degree of religiousness and good moral character; race and lineage were also regarded as of importance.53

50 ibid
51 ibid
52 Keddie n 44
53 ibid
Engagement and Consummation

Islam adopted the tradition of engagement, where the principal provision was that the woman was free to commit to marriage. Again, under Islam, a daughter was regarded as the property of her father and he made all decisions as to marriage.\textsuperscript{54}

Dowry

The amount paid by the husband to a wife. Traditionally, it could take several forms and could include cattle, camels or even slaves.\textsuperscript{55}

Adoption of Children

In the pre-Islamic era, the adoption of children of unknown birth or lineage was regarded as acceptable, although not under the Islamic code.

Inheritance System

In the pre-Islamic era, rights of inheritance were governed by custom and practice with respect to lineage, adoption and general laws of succession.\textsuperscript{56}

Will System

In the pre-Islamic era, no restrictions or code of practice existed with regard to how a man might dispose of his property on his death, however, under Islam, two thirds of an estate had to pass to the man’s heirs.\textsuperscript{57}

Dissolution of Marriage

Divorce

In the pre-Islamic era, a man could divorce his wife merely by stating that he wished to do so; this practice was later adopted under the Islamic code.

\textsuperscript{54} Barbara Freyer Stowasser, ‘Women and Citizenship in the Qu’ran’ in Amira El Azhary Sonbol. (ed), Women, the Family, and Divorce Laws in Islamic History (Syracuse University Press 1996) p.23
\textsuperscript{55} ibid
\textsuperscript{56} Suad Joseph, ‘Family, Body, Sexuality and Health’: Encyclopedia of Women and Islamic Cultures: Volume 3, (Boston, Brill, 2005) p.54
\textsuperscript{57} Hiroyuki Yanagihashi, A History of the Early Islamic Law of Property: Reconstructing the legal development, 7th-9th centuries, (Leiden; Boston: Brill, 2004)
Khul’
In this case, the spouses agree on a specific amount of money that the wife pays to her husband in return for his agreeing to the dissolution of the marriage.\(^{58}\)

Ilaa’ (Swearing)
This refers to the scenario in which the husband leaves his wife for a period of time without having sexual contact with her.\(^{59}\)

4.6 Arabic System of Ownership

Ownership System in the Pre-Islamic Era
Traditionally, ownership of land or territory was within the gift of the king, and this was often used to cement relationships with tribal heads; within the cities, ownership of land was not tribally or collectively based, and if an individual cultivated land, it was commonly regarded as his.\(^{60}\)

Ownership System in Islam
Under Islam all ownership was regarded as provisional in that ultimately Allah is regarded as possessing all that exists. Temporal ownership was subject to the rights of the group being observed and it was not possible to dispose of property if this would adversely affect the interests of the wider group.\(^{61}\)

Contractual Forms in the Pre-Islamic Era
Contracts were regarded as agreements freely entered into and were generally absent of formal procedures; it was only later, under the Islamic code that rules with respect to proof, the drafting of contracts and witnesses were instigated.
During this pre-Islamic period, a number of sales contracts existed:

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\(^{58}\) Stowasser n 54, 23  
\(^{59}\) ibid  
\(^{60}\) Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Themes in Islamic Law), (CUP 2005)  
\(^{61}\) Yanagihashi n 57
**Mulamasa (Touching) Sale**
When one touched an item of clothing without examining it or when he wore it, the person became liable to pay its value.

**Munabatha (Exchanging) Sale**
Also called the throwing sale; it occurred when one seller threw a commodity to the other, who, in turn, threw another commodity to him and each of them said: "This for this".

**Hasat (Stoning) Sale**
This occurred when a buyer threw a stone at a group or collection of items for sale - cattle, pots, clothes etc. – whatever the stone hit was regarded as sold

**Najash (Pretentious) Sale**
Here, the owner of the commodity arranged with another man to bid on a proposed commodity, although not actually interested in buying it

**Ijarah (hiring & leasing)**
These contracts were based on mutual benefit or the exchanging of the usufruct of a property.\(^62\)

**Loan contracts**
In the pre-Islamic era, loans were commonly in the form of a sale, as a man would sell a commodity to the buyer, provided that the latter repaid in double its value within a fixed term. So loans at that time were connected to *riba* or usury.\(^63\) Islam later approved interest-free loans and prohibited usurious ones.

**Company contracts**
Companies existed in the pre-Islamic era, especially in the more commercial cities, as joint enterprises were common and each member of a venture would later

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\(^63\) Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Contemporary Issues in Islam), (AltaMira Press, 2006) p.97
benefit from the success of an enterprise commensurate with their level of investment in the joint venture.64

4.7 Early Islamic Period to the Founding of Kuwait

4.7.1 Islam From the 10th to 12th Centuries

Whist there was some evident overlap with custom and practice during the Prophet’s lifetime, following his death the spread of Islam was exceptionally rapid: within a century, the Islamic empire extended across the globe, from Spain as its furthermost point in the West, right to the East and the Indus River.65 The Islamic empires, such as the Ummayyads, Abbasids, Seljuks, Mughals, Safavids and Ottomans, dominated most of the then known world.66

During these early centuries, Islam enjoyed a golden age of learning and advancement, in which mathematics, astronomy, physics, poetry and philosophy all flourished. Commonly held to have run from c.750 CE – c.1258 CE, it was particularly pronounced under the Abbasids,67 where huge strides were made in fields of scientific endeavour, including agriculture and commerce. Under the Abbasids, the administration of the Islamic empire, centred on the modern city of Baghdad, became more ordered and professional and the resulting period of growth and general prosperity resulted in advances in all branches of the sciences. Increased levels of cultural and scientific exchange heralded a new era of cooperation among thinkers, as Christian and Greek thought were translated into Arabic under both the Ummayyads and Abbasids.68 Building on the work of Euclid

64 ibid
68 ibid
and Ptolemy, Arab mathematicians laid the groundwork for modern algebra, while the new science of optics emerged under Ibn Al-Haytham; in like manner, significant advances were made in astronomy and medicine. However, these were not confined to the sciences alone, with the arts and philosophy also blossoming during this period. In this regard, Greek thinking was particularly instrumental, and Aristotelianism and Neoplatonism were incorporated into Arabic philosophy under Avicenna and others; in literature, the Book of One Thousand and One Nights, from the 10th century, was but one of many original and novel texts. In the field of technology, engineers were able to employed hydro- and wind power and geared mills were common; the transmission of knowledge in relation to papermaking and gunpowder from China also accelerated advances.

While this blossoming of intellectual endeavour owed much to the cohesion and stability of the Abbasis Empire, as this began to fracture and its influence wane and dissipate, so this remarkable period of intellectual achievement gradually came to an end. The upheaval of the later Mongols invasions of the 13th century brought it to a close, as Baghdad fell to Hulagu Khan in 1258.

4.7.2 Islam During the Ottoman Empire Period

Following the fall of Baghdad and the Abbasi Empire, Islam once more became

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69 George Saliba, Islamic Science and the Making of the European Renaissance (Transformations: Studies in the History of Science and Technology, Massachusetts Institute of Technology, USA, 2007), 131-171
70 Stephen Menn, 'Avicenna’s metaphysics’ in Peter Adamson (Ed.), Interpreting Avicenna: Critical Essays (1st edition, CUP 2013), 266-269
71 Dimitri Gutas, Greek Thought, Arabic Culture: The Graeco-Arabic Translation Movement in Baghdad and Early ’Abbāsid Society (2nd-4th/8th-10th Centuries), (Routledge, New York, 1998)
72 Richard Hovannisian and Georges Sabagh, The Thousand and One Nights in Arabic Literature and Society (Levi Della Vida Symposia), (CUP 1997) 6-14
central to all aspects of political and daily life under the Ottomans. Founded by the Oghuz Turks in 1299, the fall of Constantinople was the start of a period of growth that reached its peak under the reign of Suleiman the Magnificent in the 16th century. During a period of almost continuous conquest, Ottoman rule extended from Hungary in the north, eastwards to Syria – and what is now modern Kuwait - and Algeria on the west coast of the African continent; it was not until the Battle of Lepanto in 1529, that the march of Suleiman’s armies was checked.

As with the Abbasis before him, Suleiman introduced a range of legislative measures, dealing with taxation, education and criminal law, which consolidated earlier gains, and saw the Empire run by professional administrators. Under the millet system, the large communities of Jews, Christians and Catholics were able to practice their respective faiths freely and a system of religious pluralism ensured relative peace and harmony throughout the empire. Despite this, the Caliph was seen as the spiritual and political leader of all Muslims throughout the empire and laws were in conformance with Islamic teaching.

While the empire enjoyed a period of sustained growth in the century following the death of Suleiman, a number of factors conspired to limit growth from the 17th century onwards. A moribund middle class, competing pressure from the Dutch and British empires and religious-inspired suppression of the new technology of printing all served to stifle intellectual endeavour and much-needed change. Corruption, general oppression, high taxes and a poor balance of trade also contributed to economic stagnation, so that by 1922, the Ottoman Empire had

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75 Andre Clot, *Suleiman the Magnificent* (New Amsterdam Books, New York, USA, 2011)
76 ibid
77 ibid, 199-227
78 Crone & Hinds n 11
become but a pale shadow of its former self.\textsuperscript{81}

\subsection*{4.7.3 Foundation of Kuwait}

In many cases, it is often relatively straightforward to pinpoint the exact date on which a country, or empire was founded or a particular reign began, even when the date in question may stretch back to antiquity, e.g. the foundation of Rome (750 BCE). However, the exact date for the foundation of Kuwait has always been contested and a period approaching the end of the 17\textsuperscript{th} century has generally been advanced and accepted as most satisfactory given the available evidence.\textsuperscript{82} Political control of Kuwait commenced with the election of Sabah I, a member of the Al-Sabah tribal family, to the role of Emir in 1756; this period of political rule by the Al-Sabah family extended unbroken for almost 150 years to 1899, and the creation of the British Protectorate. During this period, the precepts of Shari’a Law taken in conjunction with traditional customs and practices served as the sole and principal source of law for the region.

Kuwait’s interaction with the outside world covering the period up to the end of the 19\textsuperscript{th} century was dominated by three principal players: the British, the Ottomans and the Saudis, although in comparison to the first two of these, the level and extent of Saudi influence and engagement could largely be described as minimal.\textsuperscript{83}

Kuwait’s first real and substantial contact with the British, however, occurred in 1792 when the British East India Company, following increasing tensions with the Ottomans, moved agency operations from Basrah to Kuwait.\textsuperscript{84} The influence of the Ottomans was more extensive and Kuwait was effectively an administrative unit of the Ottoman Empire under the control of the Governor of Basra, although the extent

\begin{flushright}
\textsuperscript{81} ibid, 447-555 \\
\textsuperscript{82} David H. Finnie, Shifting Lines in the Sand: Kuwait’s Elusive Frontier with Iraq (Harvard University Press, 1992), 1-12 \\
\textsuperscript{83} Michael. S. Casey, The History of Kuwait (Greenwood Publishing, 2007) 29-47 \\
\end{flushright}
and degree of that control is much disputed.\footnote{E. L. Rogan, Frontiers of the State in the late Ottoman Empire: Transjordan: 1850-1921 Vol. 12 (CUP 2002)}

\section*{4.8 Ushering in the Period of Kuwait as a British Protectorate}

\subsection*{4.8.1 The 1899 Agreement}

Fundamental change was ushered in in the late 1890s during the rule of Sheikh Mubarak. While the strength of his relationship with the Ottomans waxed and waned, he enjoyed far closer relations with the British, to the extent that when both Russia and Germany sought to pull Kuwait within their sphere of influence, it was to the British that he turned for support and assistance. This culminated in the 1899 Agreement, which effectively acted as a precursor to Kuwait’s later becoming a British Protectorate in 1914. This initial Agreement bound the Emir to consult with and seek the consent of the British in respect of all matters pertaining to foreign policy and to ensure that no other sovereign power could lease or control any part of Kuwait without the express permission of the British government.\footnote{Andrew B. Loewenstein, "The veiled protectorate of Kuwait": liberalized imperialism and British efforts to influence Kuwaiti domestic policy during the reign of Sheikh Ahmad al-Jaber, 1938–50', (2000) 36:2 Middle Eastern Studies p.103} At that time it was recognised that the Agreement would effectively serve as a prelude to a later more extensive engagement culminating in Kuwait becoming a Protectorate; the British, in turn, committed to subsiding the Emir to the tune of some 1,000 pounds sterling per annum.\footnote{Casey n 83, 29-47}

\subsection*{4.8.2 British Protectorate of 1914}

Fifteen years later, in November of 1914, Kuwait became a British Protectorate, a decision that must be viewed in the context of Britain’s role in the First World War, where long-standing antipathy to the Ottoman Empire had come to a head. It was proposed that Kuwait attack and occupy the strategically useful sites of Bubiyan, Umm Qasar and Safyan and that in the event of reprisals they could rely on British
Protection. Mubarak, however, died within one year of the signing of the Treaty and was followed in quick succession by his eldest son Jaber and then a year later Salem. On the succession of Sheik Salem, the tone and tenor of the relationship with the UK changed, as Salem was far more sympathetic to the Ottoman cause. However, the Protectorate remained in place for another 45 years and only ended with the Declaration of Independence on June 19th 1961. During the intervening years, Kuwait experienced a number of changes, some a reflection of and a response to wider geo-political concerns, others, the result of internal pressures and demand for greater political involvement.

4.8.3 Political Landscape During the Protectorate

As to the second of these, two principal political events marked the period: the creation of the First Advisory Council in 1921, and some seventeen years later in 1938, the foundation of the First Legislative Council. The purpose of the former was to facilitate the orderly selection of a candidate from among members of the Al-Sabah family for the position of Emir and to ensure that some measure of consultation and debate from outside the immediate circle of the ruling family would inform that decision. The formation of the Legislative Council was the culmination of initial growing demands for greater participation in and input into local affairs. Composed of 14 elected members, the Council's remit was broad and covered legislation relating to budgetary matters, justice, education, health and public works.

A number of factors impinged on the political landscape of Kuwait during the period in the run up to the end of the Protectorate and were, to a large degree, instrumental in bringing it to a close: the Gulf region itself had become increasingly internationalised; the growing importance of Kuwaiti oil began to make itself felt; Arab nationalisation and the influence of President Nasser were becoming more prominent, and the decline of British imperial power in the decade and a half after

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88 Finnie n 82, 40-70
the end of the World War II was more pronounced. The Arab-Israeli conflict and the rise in Cold War-related problems and tensions all contributed to an atmosphere in which the ending of the Protectorate became more likely. A further factor was the sense that Kuwait itself was becoming far more autonomous and less willing to consult on matters of international concern; the Al-Sabah family had moved the country gradually away from a less dependent role and in aligning itself with various international organisations, the asymmetry in power was gradually eroded.89

This shift in the balance of power may also have been aided by a move on the part of the British to prioritise economic rather than security concerns – the loss of Iraq as an ally following the revolution in 1958 may have precipitated that change in emphasis. Economically, Gulf oil was becoming the driving force behind Western and, in particular, British economic growth and securing it at a price, which continued to facilitate that growth, was of paramount importance. While military bases in the region ensured security of supply, security concerns were subordinated to those of economic policy.

An additional factor of note was the creation of OPEC (the Organization of Petroleum Exporting Countries) in 1960, in which Kuwait was a significant player. This also gave more concrete focus to the rapidly emerging role of Kuwait as a regional power and as a player on the international stage, particularly in the context of its position within the bloc of oil-producing Gulf States. Applications for membership of both the Arab League and the United Nations gave further evidence of a drive for autonomy and international engagement. However, Kuwait could not completely discard the protection of the British, and essentially had to accommodate the need for greater internal autonomy with the realities of external security. Despite Kuwait’s looking to the British as a source of security in relation to

external affairs, the decline in British power was marked, and essentially, Britain, in turn, took careful account of the United States’ position when determining Gulf policy.

Nonetheless, in the shifting of British focus from the Eastern Mediterranean to the Gulf region, Kuwait was seen as essential to British foreign policy designs, not least as a result of the 1958 revolution in Iraq. Britain’s reliance on Kuwaiti oil and the significant presence of British oil companies in the country all served to also make Kuwait vital to British economic interests.

4.8.4 Islam During the Time of the British Protectorate

While the area covered by modern Kuwait came under the control of the Al-Sabah family in approximately 1758, a measure of autonomy still prevailed with respect to the Ottoman Empire. This delicate balance persisted until the late 19th century, at which point concerns over the intentions of Turkey saw Sheikh Mubarak turn to the British for protection from the immediate prospect of direct Turkish rule. In exchange for control of Kuwait’s foreign affairs, the British provided naval protection to Kuwait. In the period prior to the protectorate, Kuwait’s economy was particularly dependent on decisions emanating from Basrah, home to the Ottoman governors. Despite this, the growth in trade with both the US and Britain sustained the Kuwaiti economy, with the trade in pearls accounting for one third of all employment in the country, and almost half of all Kuwaitis were at one point dependent on profits from the trade. The growth in the cultured pearl market in the early part of the 20th century devastated the Kuwaiti economy and it was not

92 ibid
until the sinking of the first oil well jointly by the Americans and British in 1936 that the economy began to flourish again.93

However, the subsequent growth in economic output following the discovery of oil and Kuwait’s increased relations with the non-Arab world served to highlight the limitations of the Shari’a code, particularly in relation to matters of commercial practice. As noted by Anderson and Coulson,94 the chief impediment to the adoption of a code based on Shari’a Law is its inherent inflexibility in the face of political, social and economic change. While secular laws can be refashioned and changed as the political or economic climate evolves, no such amendments or remoulding is possible with Shari’a, representing as it does, an absolute or essential truth. As Ballantyne argues,95 modern Islamic states constantly strive to reconcile religious obligations with the vagaries and complexities of the commercial code.

Indeed, he argues that they are faced with three possible options: to enact legislation, which stands at odds with the principles and precepts of Shari’a; to pass Shari’a compliant laws, but essentially ignore its prescripts; or to occupy a middle ground that strives as far as is practical to adhere to the edicts of Shari’a, while still remaining sensitive and attuned to the demands of commerce.96

In looking to Al-Sanhuri to draft new commercial legislation in the early 1960s, Kuwait was acutely mindful of the need to arrive at some form of accommodation with this critical dilemma. Some hold that the constitutional references to Shari’a evident throughout the legal code of the Gulf States are but “pious

95 ibid, 142
96 ibid, 142-3
acknowledgements of an undoubted religious allegiance”, that are essentially circumnavigated by the courts in their interpretations of that code. However, it could be argued that the drive behind Al-Sanhuri’s remit speaks to something different: a willingness to create a body of legislation that readily acknowledges the realities of the external commercial environment and domain, and attempts to incorporate that legal corpus as far as possible within a loose, but overarching Islamic framework.

At a basic level, the conceptual fundamentals of the common law notion of the contract are present in Shari’a: a contract has binding force and its stipulations must be adhered to; however, it is performed under Divine sanction and is seen as being of Divine origin. As Al-Sanhuri notes, there is freedom of contract within the express limits of public policy, but the principles of Shari’a serve to narrow the extent of that freedom considerably. Kuwait’s approach in adopting Al-Sanhuri’s code saw it essentially reach an accommodation with Shari’a in that the commercial code and that of Shari’a operated to an extent in tandem, where Shari’a was a principal source of legislation, rather than being the principal source. As such, subsidiary bodies of law, which did not derive their legislative force from Islam were not seen as in opposition to it, but rather having specific force within a narrow and clearly defined remit. This is evident in the 1992 pronouncement of the Kuwaiti Constitutional Court where it was noted that while Shari’a directs and guides the legislator in adopting an Islamic cast of mind, he is not exclusively bound by such edicts, where there is a gap or absence of provision in the Islamic *fiqh* with respect to a particular area or concern. As such, the legislator is only compelled to adopt or be guided by Islamic principles to the extent that it is practical or possible given the matter before him. As Islamic Shari’a is held by the constitution to be but one of many other legislative sources, the legislator can essentially look to a source,

which best fits the task or requirements at hand.\textsuperscript{98}

4.9 Legal Dimensions During the Time of the British Protectorate

One area of concern during the Protectorate was the application of law, where English legal principles might be seen as running counter to local customs, practices and statutes. The presence and operation of Shari‘a courts, which adhered to Islamic Law, set and were a reflection of, local customs, practices and more, whereas English common law principles embodied a philosophy and outlook that was essentially alien in their character and precepts.

4.9.1 Reception of English Common Law

The administration of justice in Kuwait during the period of the Protectorate was not typical, as the cases of both the Sudan and India serve to amply demonstrate. In both of these jurisdictions, the acceptance of "justice, equity and good conscience" as the basis for law served to introduce universal principles, broadly similar to those of Equity in England and Wales, to cover gaps in English case law and statutes.

In the Sudan, local custom was recognised as a source of civil law, but in practice, its application was infrequent and its role gradually declined, as British judges administering the law in Sudan had little, if any knowledge of local customs and practices and an even poorer grasp of Sudanese culture and society. The application of English law without reference to local and cultural practices tended to be the norm;\textsuperscript{99} furthermore, French and Egyptian law were also often set aside in favour of English common law.


In the case of Egyptian law, it could be argued that this process of setting aside bordered on antipathy - “the consideration or application of local custom, Egyptian law or any law other than English law was the exception rather than the rule”.\textsuperscript{100} There was also the largely unarticulated imperialistic view that other systems did not, from a philosophical standpoint, embody the notions of justice.\textsuperscript{101} While in other colonies, a ‘reception date’ for the incorporation or accession of English law was the norm via express legal provision, in the case of Sudan, a process of gradual assimilation occurred, as British judges transplanted their Sudanese counterparts. This ad hoc approach, however, was to see English law subject to local conditions and in the absence of an express Sudanese legal provision, English law would apply. There was also a professed element of pragmatism with respect to the adoption of English rather than Egyptian law, as it was felt that a lack of familiarity with the Egyptian code on the part of British judges could give rise to basic errors, which would ill-serve all involved.\textsuperscript{102} Abdelrahman writes that:

“The law as administered by British judges is more likely to be a just law if it is administered in accordance with a system with which they are familiar rather than in accordance with a system such as Egyptian law”.\textsuperscript{103}

As in India, the over-arching notion of “justice, equity and good conscience” was also employed to reverse earlier judgements delivered according to the Egyptian code and underpinned the application of the appeals process. Nonetheless, the concept of “justice, equity and good conscience” was not regarded as inherent to the English legal code; indeed, its basis is Roman canonical code and was understood, especially by humanist lawyers in the 16\textsuperscript{th} and 17\textsuperscript{th} centuries, to serve to fill the gap when case

\textsuperscript{100} ibid, 52
\textsuperscript{101} Vijay K. Bhatia, Christopher N. Candlin, Jan Engberg (ed.) \textit{Legal Discourse across Cultures and Systems} (Hong Kong University Press, 2008)
\textsuperscript{103} ibid, 59
law and statute failed, allowing one to apply instead universal and fundamental rules of justice. Although the English courts of Equity were originally based on these broad principles, they soon became bound by their own set of laws and precedents. One judge noted the problem, stating that he was charged with acting according to the principles of “justice, equity and good conscience”, but only in so far as this was “not repugnant to my [author’s emphasis] ideas of ‘justice, equity and good conscience’”. Judgements were, in effect, “subject to such qualifications as local circumstances may render necessary”.

While there was some disagreement as to the relative merits of applying the Egyptian code and the question of partiality with respect to English common law, the gradual process of incorporation and application of English law rather than one of immediate accession served to throw into relief the issues and complexities involved and how these were viewed by those charged with the day-to-day administration of justice. In Sudan, a further complicating factor was the idea that while English common law was ‘convenient’ and readily ‘accessible’, it was not necessarily binding on the Sudanese courts, and could be used merely as guidance. In addition, the decisions of Sudanese courts prior to the creation of the protectorate could be regarded as a parallel source of law with that of Sudanese statutes, effectively giving rise to a system of stare decisis or precedent. Again, while certain English statutes had ready applicability, others were found wanting when confronted by the intricacies and force of local custom and practice, particularly with respect to employment law.

Overall, though legal evolution was sustained by English law and in the absence of any reliable form of legal reporting, which might facilitate the creation of a proper system of Sudanese precedent, English law effectively filled the legal breach.

104 ibid
105 ibid, 56
106 ibid, 67
107 Chibli Mallat, Introduction to Middle Eastern Law (OUP 2007), Abdelrahman n 99, 67-68
During the time of the Protectorate in Kuwait, however, the issues, which had so readily presented themselves in both the Sudan and India, were largely absent. English law, contrary to the situation in in the Sudan, was not adopted into the legal code, nor were the philosophical ideas which underpinned Equity seen as having any ready applicability to the Kuwaiti code or the administration of justice. With respect to commercial laws, there was still a heavy reliance on local customs and practices and a general reluctance particularly at local level to engage with the court system. While familiarity with English common law principles was not unusual within the judiciary, heavy reliance on the existing code tended to be the norm. Despite this, there was a noted and growing recognition throughout the period of the Protectorate that commercial laws would need to be amended, but it was not until its end and the appointment of Al-Sanhuri that any overarching effort was made to address the issues, which Kuwait’s emerging economic role necessitated.

4.10 Further Political Changes

Throughout the Protectorate, a number of changes occurred both with respect to the administration of justice and in relation to political matters. 1921, in particular, proved to be a year of notable change. When Sheikh Salim Al-Sabah died, there was a push for wider participation in government and the decision-making process; a number of reforms emerged as a result. Perhaps the most important was an agreement that regulated and fixed the process of royal succession; the Emir was to be nominated and chosen exclusively from a panel of three Al-Sabah family members. If there was agreement as to that choice, the name was forwarded to the British government for formal ratification. This individual was also appointed to head the Shura (Advisory) Council, which was composed of members both of the

108 Khaled Taama, The History of Law in Kuwait (National Library of Kuwait, 2008 (Arabic Text)), p.16
royal family and prominent families throughout the kingdom. The council was, however, short-lived. The other principal outcomes were the adoption of Shari’a Law for Kuwaiti citizens and Muslims, although this did not have statutory force, and the appointment of a governor.\textsuperscript{109}

The need for a formal system of judicial administration saw the establishment of a courts system in 1932, whose first head was Sheikh Abdullah Al-Sabah. Sheikh Al-Sabah also represented the royal family as president of a new governing council, which additionally comprised of twelve members chosen from families across Kuwait. A number of statutes dealing with health, religion and education were enacted throughout the course of the next decade.\textsuperscript{110}

However, it was the earlier Lausanne Agreement of 1923, which proved to be most transformative: a mandate system was created, which required the assent of the British government, and this was given effect over subsequent years (1926 - 1959) through the enactment of additional legislation. The British government effectively acquired the right to enact legislation, whose legal force was applicable only to British citizens, foreigners and non-Muslims within Kuwait, with Kuwaitis per se falling under the remit of Shari’a Law.\textsuperscript{111}

The administration of justice with respect to Kuwaitis was divided along religious lines, where rules respecting the distinction between Shia and Sunni branches of Islam were enforced. In 1938, a second Shura Council was established following pressure for some form of participatory government, this was composed of 14 members, and these were chosen from an initial 320 nominees; the Council was later instrumental in drafting the Law of Succession, which regulated the appointment of the Sheikh. 1938 was also the year in which specific courts were

\textsuperscript{109} ibid, 17
\textsuperscript{110} Nathan J. Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf, (CUP 2007, 149
\textsuperscript{111} Taama n 108, 19
established to deal with family, criminal and commercial law, an innovation that was in many respects ahead of its time.\textsuperscript{112}

A number of councils were also created, whose function was to facilitate the needs of particular sectors; chief among these was a business council, a construction council and a shipping council, as well as an ad hoc body, which addressed the needs of other sectors as they arose.\textsuperscript{113}

\textbf{4.11 Islamic Law Moving Forward}

Currently in Kuwaiti Law Shari’a is used to pass judgements on family law, whilst Commercial (in particular) and Contract law (to some extent) has a more secular basis. Of course, the Constitution, under Article 2, states that Islam is the official religion of Kuwait and does form a basis of the law. However, it seems clear that Sanhuri’s aim was to create a more modern Shari’a, a law based on Islamic principles, following the teachings of the Qur’an and The Prophet as guidance, but interpreted (as the original Shari’a was, and has continued to be) by scholars to provide a practical legal system, applicable in a modern world and modern society.

This work will explore in more depth, the contention that exists within Kuwait, between those who would solidify the influence of traditional Shari’a within the law, and those who view Shari’a, as Al-Sanhuri did, as a system that should develop as its people, their community, their understanding and their international interactions develop.

An important point to expand regarding the application of strict Shari’a is that discussed by Ballantyne in his collection of works, \textit{Essays and Addresses on Arab Laws}.\textsuperscript{114} In today’s world it is going to be continuously difficult to apply Shari’a in a

\begin{flushleft}
\textsuperscript{112} ibid, 20
\textsuperscript{113} ibid, 21
\textsuperscript{114} William M. Ballantyne, \textit{Essays and Addresses on Arab Laws} (1\textsuperscript{st} edition 2000, Curzon Press, Richmond, UK), 2011, 85
\end{flushleft}
pure and unadulterated form, simply because the world is rapidly changing. These changes are not necessarily in terms of morals and principles, which is where a lot of concern seems to lie with some fundamental Islamic groups. Although of course there have been, and are continuing to be, fundamental changes in global attitudes, particularly as regards human rights and equality and where international business is practiced it will be expected for all participating countries to conform to these rights and equalities. Shari’a Law as it is currently interpreted in some of the less liberal countries does not always currently comply with these growing international laws. Regardless of whether or not traditional Shari’a can work with human rights, there have been huge and rapid transformations in the world of commerce that Shari’a, as compiled by its 7th-9th century scholars, does not always have the capacity to deal with.

Ballantyne references the Aramco Arbitration, Saudi Arabia v. Arabian American Oil Company.\(^{115}\) Whilst it was agreed that the governing law of the Concession Law should be the Hanbali School of Shari’a Law, as practiced in Saudi Arabia, it was found to not be independently sufficient to construct the concession. Additionally, gaps were filled using world case law and “world-wide custom and practice in the oil business and industry”, alongside jurisprudence. Jurisprudence historians, Sir Norman Anderson and Professor Noel Coulson state,

“a system of law which attained its formal perfection centuries before the demands of modern technology, finance and marketing were dreamed of...”\(^{116}\)

and later

“a phenomenon of the modern world for which there is no adequate precedent in the experience of the past... (and where) in the majority of cases (the foreign corporation concerned) be entirely non-Muslim in its national and cultural origin, for it is of the

\(^{115}\) Aramco Arbitration, Saudi Arabia v. Arabian American Oil Company (1963) 27 I.L.R. 117
\(^{116}\) Ballantyne, n 114
nature of the Shari’a that it should be regarded as addressed, in its technicalities, to Muslims alone.”

This does not mean that Shari’a cannot work in a modern society, just perhaps that the changes in our modern world have been too rapid for modern day Islamic scholars to keep pace with in interpreting how Shari’a should be applied to these situations. However, it does seem sensible that these situations be addressed in the courts by those experienced in the law, and particularly international law, in a logical, practical and fair manner. Scholars could then examine these cases at their leisure to help them explore these issues from a point of view of Islamic principles, the Qur’an and the hadith. This is essentially the procedure practised in Kuwait currently. As laws are passed, the council will examine them and highlight any that they feel contravene the Islamic principles and moral texture Kuwait, as a country, follows.

4.12 Conclusion

In many respects, the development and evolution of a legal code may be readily viewed through a pre- and post-Islamic lens. Prior to the birth of the Prophet Mohammed, a distinction could often be drawn between the principal features of the codes and regulations as applied to both rural and urban communities, with the former having the Bedouin code as particularly prominent and widespread. One notable feature was the heavy and predominate concentration on transgressions against the individual; murder, assault and robbery all feature consistently in those codes which survive. In addition, a growing circumscription of personal and moral codes was evident, and rules with respect to marriage and family are seen to attain a growing weight with the passage of time.

The period following the advent of Islam to the present could, if taken as a whole, be said to be one in which the influence and presence of Islam within legal codes are

117 ibid
almost always in evidence. Although there is a waxing and waning of the extent of that influence across the centuries, Islamic precepts and moral decrees gradually become more pronounced and acquire greater legal force with the passage of time - to the extent that it eventually suffuses the legal code across the Arab peninsula, its prescriptive force is readily acknowledged.

The growth and spread of the Ottoman Empire largely consolidated this process leading to a more widespread and consistent enforcement of Islamic principles and ideas, and a uniformity of application that was hitherto absent. The meshing of public and private practice and the consolidation of these within the legal code reinforced Islam’s claim to a unique position and role within the administration of the law and this persisted following the fall of the Ottoman Empire and the advent of the British Protectorate in Kuwait.
Chapter 5 Methodology

5.1 Introduction

This chapter will review and discuss the research approach and methodology that was chosen, its design and aims. It will also present the method and tools that were used for the data analysis. An important part is also to consider the limitations of the study and any potential problems or concerns.

This thesis relies on a combination of primary and secondary data. For the original data, this research used personal, in-depth, face-to-face interviews with seven separate judges from the Supreme Court of Kuwait (Court of Cassation). Each interview lasted approximately 90 minutes. As Seidman says, the purpose of in-depth research interviews is not to ‘test hypotheses’, nor to ‘evaluate’ in the normal academic sense of the word, but:

“At the root of in-depth interviewing is an interest in understanding the lived experience of other people and the meaning they make of that experience.”

5.2 Primary Research

5.2.1 Interviewee Selection

The judges were selected based on experience and seniority, as the aim was to get the views of the now very senior people who were instrumental in the early 1960s in the actual formation of the independent Kuwait and its new legal system. The majority of the men were colleagues of Al Sanhuri, the original author and founder of Kuwaiti modern law, and they were also part of the main Committee that was responsible for establishing and implementing the new system. Thus, they have a

unique first-hand historical perspective of the past 50 years, going from pre-independence as a protectorate state, through the drafting and implementation of the new Constitution and right up to the current day, where the effects of the new legal system can be seen and analysed. Several of the judges are also now Legal Consultants to the Ministry of Justice, a position given only to the most senior and experienced Supreme Court judges. All Supreme Court judges are regarded as experts across all fields.

The interviews were done and the questions chosen so as to draw on the practical experience of the judges in analysing the legal problems that occur in modern life, as well as their views on the theoretical and academic principles. Senior judges encounter issues in the law on a day-to-day basis and thus must use their knowledge and experience to interpret laws to enable them to make sound judgements. Including first-hand interviews was essential, it was felt, in order to benefit from the personal knowledge of those at the top of the legal system as well as to give a human touch to the study, making it more real and current. The essence of interviews is to give space to the interviewee to tell his/her story because “at the heart of interviewing research is an interest in other individuals’ stories because they are of worth.” Given the age of the judges, and the fact that interviews of this sort have (as far as the author is aware) never been undertaken before, it was felt that it was very important to record their opinions and get the advantage of their expertise before the opportunity was lost.

All of these judges, naturally, have their own views about the current legal practices and a vision as to what it should be and what changes should be brought in. Not only do they judge cases but also an important part of their job is to review Kuwaiti laws on an annual basis and recommend changes to Parliament. It should be noted that many of the judges hold conflicting academic views and do not always agree, even about factual issues. As the majority of these judges were present in the

\(^2\) ibid
industry when the first independent laws were formed and so have first-hand experience of the formation of the legal system of Modern Kuwait, the aim was to enable the reader to understand the views pertaining to when the laws were first established and why they were put together in this form and combination. It brings additional value to what can be studied from academic books and laws, highlighting the issues in the legal system itself, from a practical point of view, and gives the researcher a clearer view of how these gaps may be filled.

5.2.2 Data Collection Procedure and Protocol

This is unique research because, to the best of the author's knowledge, Supreme Court judges in Kuwait have never previously given free and open interviews about their opinions on the law in their own country. As such, it was a very sensitive process. The author was obliged to follow very strict protocol. Kuwait University, the study's sponsor, was required to lodge an official request with the Minister of Justice of Kuwait who in turn issued a letter of permission, without which the judges would not have given the interviews. This process took over four months for access and authorisation to be granted and for the author to be approved. Security was of the utmost importance.

The interviews were conducted in the offices of the Supreme Court judges. Although this was a formal environment, it was in keeping with the judges’ position and prestige and hence allowed for a normal ‘work place’ environment feel. All the interviews were conducted in Arabic and recorded using a recording device. The interviews were then transcribed into written English. Non-verbal points of note were not recorded but were taken into account in the way the interview was handled. Written notes of the interviews were also taken as a point of reference for the interview itself. These only covered the main points but helped in keeping track of the judges’ train of thought.

The political nature of the Supreme Court judges’ position and the sensitivity of the information in question mean that interviews of this sort are never normally conducted. As it was certainly the first time that these particular judges had ever
given such interviews, they were, to varying degrees, rather uneasy about it. Although all were welcoming and polite, some were suspicious as to the motives and the outcome of the study; they thought that asking questions purely for academic research was unusual. There was also a concern regarding publication issues, for example, where the research would be used, who would read it, how many copies would be made, and so forth. Confidentiality, obviously, was guaranteed but this did not allay all their fears. As a young woman asking the questions, this was another issue that was not easy for the interviewees and added to the challenge of the task.

Special regard was had to previous academic research on interviewing the elite. Dexter stresses the point that when interviewing people who are experts or specialists in their field, the process is very different from a standard interview: the interviewer must be willing to be led and be taught what the problem/issue is, rather than demand answers to what they think the problem might be.³

The interview process for data collection was therefore designed on a semi-standardised basis, using pre-determined questions but deliberately allowing ‘freedom to digress’.⁴ A questionnaire comprising ten questions was used as a template for the interviews. The judges did not receive the questionnaire in advance: it served rather as a tool for the interviewer. The questions were not designed to be equal weight, certain ones were ‘follow-on’ questions, as a prompt, if an aspect had not been developed in the previous question. Additional questions were also asked during the time, as part of the on-going interview process, to help generate a normal conversational flow and respond to the flow of each judge’s answers. Thus, in order to emulate a natural conversation manner, the interviews


used both open and closed questions, as well as simple and probing questions.\(^5\) It is believed that choosing to do the interviews on a co-pilot, semi-structured basis (as explained in the introduction)\(^6\) was the right choice in this situation as it enabled the judges to give their own opinions and follow their own narratives. This allowed them to be flexible to talk, not only regarding the specific questions asked but allowing them the space to expand the area of discussion and guide the topic of conversation and permitted more information to come to light, regarding a broader range of topics than perhaps had been considered originally. Using strictly structured interviews, on the other hand, would have limited the area of study. As noted by Aberbach and Rochman:

"Elites especially – but other highly educated people as well – do not like being put in the straight-jacket of close-ended questions. They prefer to articulate their views explaining why they think what they think".\(^7\)

Indeed, as expected, the judges did not stick strictly to the question in their answers. For reasons of respect and standing, it was not permissible to interrupt senior judges or to try to force them to stick to the point, and so a semi-structured method also seemed to offer a good compromise as it allows for a standardisation in the questions asked, making the data more reliable and easier to compare, but also giving the judges the space to make their own points and maintain their flow of thought and narrative. Elite interviewees, especially in the political and social sciences field, are not generally used to being subjected to a stream of questions, requiring short, precise answers.\(^8\) They need the space to develop their answers and this is what gives strength to the data collected. This was extremely important as Supreme Court judges were giving personal and confidential opinions as to the state of the law in their country and it was vital that there was the flexibility for

\(^{5}\) ibid
\(^{6}\) see Introduction, p4
\(^{7}\) Joel D. Aberbach and Bert A. Rochman, ‘Conducting and Coding Elite Interviews’ (2002) 35 PS: Political Science and Politics, 4 673
\(^{8}\) Dexter, n3
them to air their views freely, and allow for an organic thought process to draw out the most open and natural opinions.

For the data analysis for this thesis, it was decided to use a qualitative research methodology, with the face-to-face interviews. This option was chosen on the basis that it allows for a deeper and better understanding, offering a more detailed and introspective study, rather than using quantitative methods. According to Anderson in Presenting and Evaluating Qualitative Research, qualitative research is a better choice for policy research as data can be interpreted and analysed in ways that do not fit well with statistical methods. The legal situation in Kuwait, in terms of it worth and functionality, is very much a question of opinion, a question of narrative, and is not something that can be studied using quantitative or statistical tools. Qualitative methods with direct interviews also allow one to report more honestly and accurately on first-hand opinions. Berg writes that a qualitative approach enables more ‘fruitfulness’ and a ‘greater depth of understanding’. Questioning is more open and detailed and offers greater flexibility. Individual concerns and views are recorded more accurately and the interviewer can respond more intuitively to the interviewee’s answers.

Data based on human experience and personal viewpoints are often more powerful and compelling when compared with quantitative data. According to Starks & Trinidad, using interviews rather than questionnaires means you are more able to get the interviewees’ personal views and perspective. It also allows for significantly deeper and truer understanding and avoids what Berg refers to as ‘sterile survey

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11 Berg & Lune n 4, 2
12 ibid, 3
techniques’. In the author’s opinion, the judges gave substantially more in-depth responses in the personal interviews than would have been possible from simply giving written answers to a specific questionnaire. The answers were real and ‘live’, and thus were more spontaneous. It also means that the replies are 100% reliable and genuine because they came from the original source and were not delegated nor written up, for instance, by a clerk on their behalf. A questionnaire is also not suitable to the ranking of a Supreme Court judge: it suggests an administrative opinion poll or census, rather than research for a high-level academic paper. Senior legal experts who were involved in creating the new modern constitution should be accorded the respect to have their views heard properly.

As an interviewer, it is very important to have the necessary diplomatic skills, to show the required respect of rank and yet not be afraid to ask questions. The interviewer must be neutral, happy to accept that he/she is ‘not the center of the world’, and not state their own views or show any political bias, otherwise the interviewees in this case would have refused to answer the questions directly. Considerable care was taken to try and find the right balance; it is felt that this was achieved successfully.

Using first-hand interviews also means that one can use direct verbatim quotations from actual conversations. It is now standard practice to use verbatim quotations in most qualitative research. This adds immediacy, impact and authenticity. It also reflects better what the participants actually intended to say, including the fine nuances and subtleties that a more positivistic approach sometimes masks. Also,
as opposed to questionnaires, interviews are usually, by their nature, longer and
gather more and varied information.\(^\text{18}\)

### 5.2.3 Data Analysis

The interviews were voice-recorded and transcribed later. Two of the seven judges
refused to be recorded and instead shorthand notes were used. Intelligent Verbatim
was used as the method of transcription, as opposed to Strict Verbatim or
Conversational Analysis Style. This provides an accurate record of what was said
without losing readability by transcribing all filler words, false starts or repeats.

Confidentiality was guaranteed and individual judges are not named in this report.
Anonymised transcripts are attached as an appendix.

The data files were then analysed, colour-coded and categorised using a thematic
approach. A code is a “word or short phrase that symbolically assigns a summative,
salient, essence-capturing, and/or evocative attribute” to a part of the data.\(^\text{19}\) Using
colours to serve the same purpose and represent the code words provided a better
visual representation, especially when confronted with large quantities of written
data. In this case, it allowed the replies to be broken up and then analysed and
arranged according to common themes, thus identifying threads that were common
to all, which was especially important as these themes often did not fit neatly within
the given question. As such, a dual system was used whereby each question was
coded and each answer was also coded under various different headings. It should
be noted that this was a particularly important task as many of the answers covered
a wide variety of different themes as the judges were inclined not to stick to the
specific question but elaborate on their original answer and talk more generally and
at greater length about many issues. Some of the points made were quite abstract,
using elaborate language, which made the coding quite challenging. As such, certain

\(^\text{18}\) Nigel King and Christine Horrocks, *Interviews in Qualitative Research* (London: SAGE
Publications 2010)

\(^\text{19}\) Johnny Saldana, *The Coding Manual for Qualitative Researchers* (SAGE Publications 2010)

p.3
passages in particular had to be decoded first, before they could be encoded. Attempts were made to code both on a factual thematic basis and with reference to emotional patterns, to determine, for instance, areas of approval/disapproval in general, regardless of topic, as well as actual topics when they occurred. As it is a cyclical process, several coding runs were processed.

This was done in accordance with the views of Miles and Huberman\textsuperscript{20} who stress the importance to first earmark each response in terms of views and responses, and to fix colour codes to the answers, identifying common ideas, phrases, words, thereby isolating recurring patterns and threads before deducing the generalisations which then follow on.\textsuperscript{21} Crucially, the goal is not to ‘label’ the data but to ‘link’ it: coding “leads you from the data to the idea, and from the idea to all the data pertaining to that idea”.\textsuperscript{22} In this way it is heuristic, as it is an integral and active part of actual analysis. The process is time-consuming but essential as, in qualitative analysis “the excellence of the research rests in large part on the excellence of the coding”.\textsuperscript{23}

5.2.4 Interview Questions and Rationale

The questions chosen for the judges were as follows:

1. What are your views in relation to the current legal environment in Kuwait?

This was a general introductory question to give an overview of the judge’s position as regards law as it stands in Kuwait. It was chosen also to act as a ‘warm-up’ question; to allow the judge to talk generally and in line with their overall views, not tied down to specifics.


\textsuperscript{21}ibid

\textsuperscript{22}Lyn Richards & Janice M. Morse, \textit{Read Me First for a User’s Guide to Qualitative Methods} (1\textsuperscript{st} edition Thousand Oaks, CA: SAGE, 2002, 3\textsuperscript{rd} edition 2013) 137

\textsuperscript{23}Anselm Strauss, \textit{Qualitative Analysis for Social Scientists} (1\textsuperscript{st} edition, CUP 1987, 14\textsuperscript{th} edition 2003) 27
2. What are your views in relation to the application of contract law in Kuwait?

This question was chosen to focus specifically on contract law as the judges are all either current experts in contract law or have considerable experience of contract law cases. The aim was to move from the general aspect of law, in the previous question, to the more specific.

3. In your opinion, are there currently any problems regarding contract law statutes and their application?

This aim of this question was to highlight specific problems within Kuwaiti contract law. It was a follow-on question from the one above, again increasing the level of specificity, designed to pinpoint and identify more detailed issues and problems within Kuwaiti contract law.

4. If there were any areas that you believe to be in need of review, what would you suggest by way of remedial action? Can you please be as specific as possible?

Again, following the same train of thought, this was an add-on question, in case it had not been covered properly in the previous question, to move on from identifying the problems to suggesting possible alternatives or changes that could be implemented.

5. What is your opinion in relation to the current practice of custom/common law in Kuwait?

This question changed tack. Its reference to common law is in the Kuwaiti sense of the term, i.e. that derived from custom, not from judicial precedent or case law. As such, it means the law common to the people. Custom is an area of much interest to both scholars and the judiciary as it represents the traditions and basis of the country.

6. With respect to legal practitioners in the field of contract and commercial law, what changes, if any, would you like to see implemented?

This question was chosen specifically to highlight the current role of lawyers and legal practitioners. Although the scholarly basis of law is essential to the
fundamental good principles of a legal system, it is often the process of law and the standard of practitioners within the field that make the most impact on the successful day-to-day running and individual’s experience of the legal system.

7. **Looking at the law in general, what amendments, if any, do you think would be beneficial?**

This was a completely open question to encourage the judges to talk about reform in general. It was designed to throw open the field, away from purely the theory or practice of contract law, and to allow room for a broad discussion.

8. **With respect to the judiciary, and as regards contract law, are there any changes that you think should be introduced?**

This question relates specifically to the role of the judiciary, as the judges interviewed, obviously, are experts in that field.

9. **Do you think Islamic Law, customs and practices exert an influence on the administration and application of contract law in Kuwait? Are there any specific examples?**

Having raised the question of custom and common law previously, this question was the first to address specifically the role of Islamic Law in modern Kuwaiti law. This is a slightly sensitive issue and, for this reason, was left till nearly the end.

10. **Do you think the application of contract law in the courts is at odds with or conflicts with the everyday administration of commercial and business affairs? If so, where? If possible, please provide instances of such conflict and why you believe this to be the case.**

The last question was a general, ‘wrap-up’ question to cover contract law application on a practical basis with examples of any current, developing or existing problems. The aim was to set contract law within the context of Kuwait being a thriving business centre of the Middle East.

### 5.3 Secondary Source Research Methodology

For the secondary research, a wide range of materials was used, including reference books, historical archive material, scholarly articles, periodicals, newspapers and
websites. Both Arabic and English source texts were used, and also a limited amount of French texts.

The aim was to provide both what Heaton calls ‘additional in-depth analysis’ of existing research regarding the historical developments of Kuwaiti contract and commercial law, within its wider setting, and also to undertake ‘new perspective/conceptual focus’ research by looking at the previous research from a very ‘modern Kuwait’ point of view.\textsuperscript{24} This is in line with Corti and Thomson’s approach whereby new analysis can give both a contemporary and changed historical view of existing social groups, bodies and organisations.\textsuperscript{25} The evolution of Kuwait from a tribal state to a rich independent country has obviously involved a big change in focus and emphasis, if not of fact, and the older texts merit revisiting for the insight that they bring.

Using secondary sources can be very useful as, when used judiciously, they provide a cost-effective and efficient method of access to valuable information.\textsuperscript{26} Historical material also works very well as a complement to, not a supplement for, primary data.\textsuperscript{27} As a lot of the research source texts are in Arabic, the hope was that by carrying out new analysis, this would ‘lend new strength to the body of fundamental social knowledge’.\textsuperscript{28} Much of the existing Arabic material has not been analysed outside of the Middle East. Indeed, a large number of the texts are only available inside Kuwait as they are now out of print and no longer in publication.

To access material, the main sources used were the:

\begin{itemize}
  \item National Library of Kuwait
\end{itemize}

\textsuperscript{24} Janet Heaton, ‘Secondary Analysis of Qualitative Data’ (Autumn 1998) Issue 22 Social Research Update, Department of Sociology, University of Surrey
\textsuperscript{26} M. Katherine McCaston, Tips for Collecting, Reviewing and Analyzing Secondary Data, (Care 2005) 6
\textsuperscript{27} ibid
The National Library of Kuwait is the main copyright library of Kuwait in Kuwait City, dating back to 1913. It hosts a very large number of books and periodicals, as well as an important collection of rare, original manuscripts. It is open to the public. However, in order to use the extensive facilities of Kuwait University, one has to be a member and registered. As a member both of the University and the Law Faculty since 2003, the author had unlimited access to both the University Central Library and the Law library. The libraries currently contain over 360,000 books and nearly 450,000 journals and periodicals (in both English and Arabic but with the majority in Arabic). In addition, the Justice Palace library, in Kuwait City, has an extensive collection of legal academic and practical material, only accessible to qualified members of the law profession. As a registered lawyer since 2007, the author had access to all the resources contained therein, which was of great benefit to the research conducted.

As with all secondary data and sources, the selection of quality material is obviously essential. Every effort was made to use reputable scholarly sources. It should be noted that most of the material was studied in hard copy. Digital versions are not generally available, especially of the archival texts. Tertiary sources were used very rarely, and only to provide a general overview of certain aspects as a precursor to the more detailed study.

The research was deliberately constructed in this way in order to try and provide a complementary balance and juxtaposition between both (a) the existing data texts (both Arabic and English), and (b) the oral and absolutely contemporary first-hand data from the Supreme Court judges. The belief here is that each part is strengthened by the other, in line with Muslim tenets of ‘one-ness’ and unity, as the judges’ views need the backdrop of historical context in order to be seen for their full worth, and the historical and conceptual analysis is stronger by being made
more relevant thanks to seeing the implications of it first-hand today from the top judicial minds. The judges’ views, for instance, of the influence of custom, or that of Islam, on modern Kuwaiti law, sit well alongside the analysis of historical documents of the same. Equally, their views on modern problems can be seen in the light of a review of the current situation. Thus, the triangulation of the sources used provides a better perspective.

5.4 Limitations and Potential Problems of the Research

An obvious limitation of the primary research is that it is based on only five interviews. In light of the political sensitivity issues mentioned at the start, two judges out of seven, although polite, refused to give specific answers and their interviews were, to a large extent, not usable. They referred the author simply to their textbooks or written articles for information or refused to be pinned down, answering questions with questions, providing only vague, general statements. The other five judges were open and helpful. They were also interested to be part of such a study and expressed a keen wish to see the thesis once completed. Several made a great effort to go and check specific facts and clauses to make sure that the information they were giving was 100% accurate and to be as helpful as possible. However, five respondents is not a big database. It was a shame that two of the original seven judges, although welcoming, refused to be drawn into giving any direct answers and their responses could not be used as actual contributions to the data in this study.

However, it should be noted that the five judges who did participate are five of the most senior judges in Kuwait, and formed an intrinsic part of the formation of the law in modern Kuwait. Their views represent the highest legal views of the land and, moreover, are scarcely ever publicly recorded. Indeed, the fact that the two judges refused to give direct answers reflects and highlights the sensitive nature of this research. It is hoped, therefore, that the importance of the data collected from the five figures represents a significant body of material in its own right.
Equally, the pool of judges is, by its nature, extremely limited. The Court of Cassation is the highest appellate court, with only approximately five circuits, each with 3-5 judges. There are therefore very few Supreme Court judges in Kuwait and, as I specifically wanted to select those who had been in the legal system at the beginning of the 1960s, there are even fewer who have the requisite length of service, experience, and standing as the five represented in this research paper.

It is also worth noting that this is not a problem unique to this research in Kuwait. When Alan Paterson interviewed the Law Lords in the UK during the 1970s, he approached fifteen serving Supreme Court judges. Of those fifteen, nine agreed to be interviewed and taped, one to be interviewed but not taped, one agreed only to give written answers and four refused to participate.\[29\] The numbers here are not dissimilar.

It should be noted therefore that although quantitative research relies, by its very name, on quantity, qualitative work focuses on the quality of the information and as such, the size of the pool is not of the essence.

The duration of the interviews is also relevant. There is a difference of opinion as to the value of short versus long interviews for qualitative research. Some advocate a short, business-like interview approach;\[30\] Berg, however, claims that there is no single correct answer and that it depends completely on the nature of the research questions and the interview situation, with more ‘involved, multi-layered’ questions obviously demanding a greater time length to be answered properly.\[31\] He points out that it depends, not only on the nature of the questions, but also on that of the answers i.e. the style of the answers, given the nature of the interviewee subjects. Respondents who are prone to ‘rich, detailed and lengthy answers’ should be

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31 Berg & Lune n 4, 80
accorded more time than those who prefer a short, snappy response.\textsuperscript{32} Given the Supreme Court judges interviewed were all erudite and eloquent men, it is no surprise, therefore, that they fall into the former category rather than the latter.

Equally, although some researchers believe that interviews should usually be kept deliberately short to discourage respondent unwillingness to participate and prevent participants becoming uninterested and ‘switching off’, the opposite was true in this situation. As a matter of respect, it would have looked disrespectful to interview a senior judge for a mere 20 minutes, say. It could have been taken to imply that his views were only worth 20 minutes of the interviewer’s time. As this was the first time interviews of this nature had been conducted, it also was more appropriate to accord them greater time, not just for the amount of information that could be gathered in a practical sense, but in recognition of this fact in the abstract. Indeed, the time period of 90 minutes (approximately) was deliberately chosen as not only did it instinctively seem the correct choice but also followed the recommendation of Seidman who writes that in general: “\textit{an hour carries with it the consciousness of a standard unit of time ... two hours seems too long to sit at one time}”.\textsuperscript{33} On the other hand, 90 minutes seemed to work well, striking the balance between not taking up all of a respondent’s morning and yet being “\textit{long enough to make them feel they are being taken seriously}”.\textsuperscript{34}

As such, although there were only five interviews, the fact that they were approximately 90 minutes in length denotes that they were in-depth and appropriately detailed; in short, they provided significant insight and thus compensated in the main for the arguably low quantity of interviews in total.

Another issue to note is that several of the senior judges sometimes contradicted themselves and were, at times, rather vague. This is probably normal for interviews of this length but it made it rather difficult in places to ascertain the true opinion of

\textsuperscript{32} ibid, 81
\textsuperscript{33} Seidman n 1
\textsuperscript{34} ibid
the said judge. Equally, as noted before, although the nature of the semi-standardised interview process (using open questions) was designed to allow the judges space to pursue their own narrative and talk freely about issues that they were interested in and passionate about, it meant that many of their answers did not directly answer the question. Previous academic research on interviewing elites suggests using a circular approach to dealing with this problem, allowing the question to move on but trying to come back round to the same question using a different approach or wording.\footnote{Jeffrey M. Berry, ‘Validity and Reliability in Elite Interviewing’, (2002) 35 PS: Political Science and Politics, 4 679} However, on a practical basis, as said above, it proved impossible from a point of view of respect and courtesy to interrupt and correct this. As such, in order to be academically rigorous, the author has tried to convey the judges’ actual views as accurately and as fully as possible, by using a whole approach to the data collected, and not just simply refer to each answer for a direct opinion.

In terms of the author’s personal involvement in the process, it is not surprising that, given the elevated status of the judges, the first interview was rather intimidating to conduct. Naturally enough, however, the process became easier as it went on and by the final consultations, I felt able to gently lead the interviews more effectively.

Furthermore, even from the first interview, the ‘communication’ objective was achieved, as discussed in detail by Becker and Geer.\footnote{Howard S. Becker & Blanche Geer, ‘Participant Observation and Interviewing’, [1957] 16 Human Organization, 28, in: R. Adams and J. Preiss, (Eds.), Human Organization Research, (The Dorsey Press, Homewood 1960)} This notes the importance of language, and the sharing of a ‘common language’ with the interviewee, both so as to be able to ask questions that are comprehensible and to interpret properly the responses received.\footnote{ibid, 28} It is important to note that this does not mean the actual language being spoken (although this is, of course, a factor), but, crucially, the
language as it pertains to the group in question in an anthropological sense. As a native Kuwaiti, with some experience with members of senior government, and the judiciary, I felt that there was a good ‘common ground’ in our mutual understanding and that I was attune to the nuances of the language being spoken, many of which are difficult to translate literally.

It should be noted therefore, that translation into written transcripts always presents some difficulties. Although it is easy to translate in a technically correct way, both Arabic and English are highly evolved, complicated languages, with a lot of layers and subtle nuances. As Vygotsky says, each word of the interviewee’s story represents a microcosm of his/her consciousness.\(^{38}\) Trying to correctly transmit this essence, from one language to another, was not straightforward.

With hindsight, there are also some reflections in terms of the questions chosen. It became apparent during the interviews that the judges were not going to drawn into suggesting specific changes to the legal system, which by its nature implies a slight criticism of the system. As it is their job to form part of the Law Reform Committee, which meets every year, it would not perhaps appear professional for them to suggest changes to the law outside of the committee. For example, there were three questions in the interview that asked about proposals for change in various fields of Kuwait law. These were:

**Question 6:** With respect to legal practitioners in the field of contract and commercial law, what changes, if any, would you like to see implemented?

**Question 7:** Looking at the law in general, what amendments, if any, do you think would be beneficial?

**Question 8:** With respect to the judiciary, and as regards contract law, are there any changes that you think should be introduced?

In terms of question sequencing, it was deliberately chosen to include these questions in this section of the interview, as they were obviously of a more sensitive nature. As Berg says, it is often a good idea to start with ‘mild, non-threatening questions’, which are easier for the respondent and allows the interviewer time to ‘develop rapport through eye contact and general demeanor’. As the interview progresses, one can then introduce more ‘complex and sensitive’ questions. My intention, therefore, had been to follow this reasoning.

However, the effect was not entirely as desired. Although the judges made many interesting general points and comments, there were few direct proposals for change and they were reluctant to be drawn into specifics. As the judges knew that I would be reporting their answers in a foreign research paper, outside of the Kuwaiti political and judicial system, this is perhaps understandable.

With hindsight, substitute questions should have been prepared to use once it became obvious that the judges did not feel comfortable giving open answers to such questions of reform, which could be considered political. A particular interesting question that comes out of the research, and would maybe have been more successful in eliciting a response, is what the judges would have done differently from Al-Sanhuri, given their experience now.

The lack of direct answers to proposed changes may also be linked to the fact that the judges spent a great deal of time replying to question one and, even within a 90 minute interview, less time remained for following questions. The time balance, therefore, was not ideal. However, I did not wish to interrupt too much and for them to feel rushed as it was important at the beginning to establish a cordial interviewee/interviewer relationship of respect. This was beneficial in many ways as it helped break the ice and also allowed the idea of a flowing narrative to be established, which was the purpose of choosing this method. As Seidman says, as

39 Berg & Lune n 4, 79
40 ibid
interviewers, we have to ‘keep our egos in check’, not to dictate terms, letting our actions ‘indicate that others’ stories are important’.\textsuperscript{41}

5.4.1 Conclusion

In conclusion, the secondary research examined reference materials that are, in many cases, difficult to access, with the aim of using a modern ‘light’ to analyse the importance of the setting of contract law in Kuwait. This was done in its own right and to complement the primary data, to bring the resources full circle, as it were. Both branches of research were required and had to be collated to address the research questions of this thesis. As previously noted, prior to this study, there was a glaring lack of primary research into the Kuwaiti legal system and, in particular, the views of the figures so important in the founding of modern Kuwait. These judges were direct colleagues of Al-Sanhuri, who is no longer with us. They worked alongside him, and were hugely influenced by him, although maybe did not always agree with him. They are now some of the most senior figures in the Kuwaiti judicial system. As such, their views and stories deserve to be heard, recorded, and analysed. They provide a narrative which covers the whole period of great change in Kuwait, from British protectorate to independent state. It is unlikely that a period of such fundamental legal and political change will ever take place again. The author is pleased and grateful to the judges in question, that it was possible to achieve this body of audio and written data, comprising first-hand accounts of the views of the most senior members. It has proven to be a very valuable data source. Given the fact these gentlemen are all in their senior years, it was especially important to document their views, now, before it is no longer possible.

\textsuperscript{41} Seidman n 1
Chapter 6 Data Analysis and Findings

6.1 Introduction

This chapter will present the primary data that has been gathered from the interviews with the judges from the Court of Cassation, an analysis of it and the findings. The transcripts are attached in Appendix A. The interviews were transcribed using the Intelligent Verbatim method. This chapter presents the data strictly in relation to each question, even though many answers cover and are relevant to a wide array of different topics. It is preceded by a short background, giving the context of judicial training in Kuwait. The analysis and findings then follow, which are done within themes.

6.1.1 Judicial System

In order to place these interviews in context, it is worth giving a very brief background of the path to becoming a Supreme Court judge in Kuwait.

Law students choose to become judges, as a career option, after graduation. They are not promoted from the ranks of barristers and solicitors. Those who are accepted attend a training programme at the Kuwait Institute for Judicial and Legal Studies and are then assigned to the role of Public Prosecutors where they will spend approximately 6-10 years. This involves both criminal public prosecution work and government administrative legal work. Their experience of private sector work, and defence work, is generally very limited.

Judges who are Kuwaiti citizens are appointed for life; those who are not citizens have medium-term renewable contracts and can be removed for cause (although this seldom happens).
6.2 Data: Interview Questions and Responses

As noted in the Methodology, Chapter 5, two judges refused to reply directly, only talking in the vaguest of terms and answering questions with further questions. As such, their responses are not listed.

The interview data, however, highlighting the relevant part of the judges’ responses to the specific questions, are as follows:

1. What are your views in relation to the current legal environment in Kuwait?

This was a general introductory question to give an overview of the judges’ positions as regards the law as it stands in Kuwait. It was chosen also to act as a ‘warm-up’ question, to allow the judge to open up and talk generally.

The judges all were in general agreement that the legal system in Kuwait was highly developed and had the most experienced, best international lawyers and judges in the Middle East, with three of the five judges specifically stating that it is the best developed and oldest in the Arab peninsula. Judge A refers to Kuwait as having the ‘best legal system in the area’, highlighting in particular the independence and freedom of the judiciary from government. Judge B points out the ‘rich heritage’ of the Kuwaiti legal system and that it is now often used as the law of reference for many neighbouring countries. It was noted that one of the strengths of the Kuwaiti legal system is that it is formed of a unique combination of sources. In a later question, Judge E even went so far as to say that Kuwaiti law is ‘perfect’ and very complete precisely because it is a blend of French Civil Law, the Napoleonic Code and Islamic Law, drawn together by the best legal scholars of the time. Judge D, however, gave a lot of credit to Egyptian law for the current standing of Kuwaiti law.

Judges A and E both stressed how modern and forward-thinking the system is, with Judge E highlighting the many recent updates such as those seen in criminal law in the 1970s and the advancements/improvements in civil, commercial and judges law in the 1980s, bringing with it a fresh constitution. He further specifically pointed out
the fact that crimes against the government were recognised in the early 1980s. However, the system is also praised as being the oldest in the Arab peninsula, thus having a strong base and having had the time to become the most developed and experienced.

However, it was noted that no legal system is ever ‘finished’ but requires constant adaptations to remain applicable to an evolving society and lifestyle. As such, Judge A is a supporter of Kuwaiti judges not being limited by government or royalty, but free to make independent judgments, with the proviso that the constitution is followed and the “the freedoms of its people and the economic stability of the country” remain unopposed.

Judges B, C and D all independently believe the Kuwaiti legal system to be founded and upheld by the best international lawyers and judges, explaining that many of its founders remained within the system as legal advisors. Judge C notes that Kuwait hired “experts from all over the world”. In Judge D’s opinion, the status of the Kuwaiti legal system is high, in part, because Kuwait hired many of the top Egyptian lawyers and judges, thus when they returned later to Egypt, they took with them their knowledge of and respect for Kuwaiti law as a sound basis for future legal judgments. Judge B specifically notes that commercial legal practices are also currently hiring very experienced international lawyers and that this “will lead to a very high standard of notes being submitted to the courts”. The net effect therefore will be that the ‘whole legal process and field’ will become even more highly developed. They also note (with pride) how, despite its relative youth, the law is now established enough to have developed a rich enough heritage to be referenced, even by other nations.

2. What are your views in relation to the application of contract law in Kuwait?

This question was chosen to focus specifically on contract law as the judges are all either recognised experts in contract law or have considerable experience of contract law cases.
The judges feel that Kuwaiti contract law is well formed and applied. Because it uses Islamic Law as one of the sources, Judge B says that it automatically reflects established customs and traditions because Islamic Law ‘aligns’ with custom. He then goes on to say that contract law "was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the laws’ creation". Furthermore, the inherent social aspect of this is acknowledged: Judge A talks about one of the successes of contract law being the engagement of the Ministries and the “level of care they apply to social goals and social economic goals”.

All of the judges, bar one, mentioned the importance of the Supreme Court judges’ yearly report that reviews the application of the law (both contract and other areas) and allows for problems and gaps to be corrected and improved. This is an essential part of the judges’ role and quite different from that of most other countries. As these annual reviews are highly sensitive, the judges would not divulge what is likely to be in line for amendment at the next Committee review; however, there was general satisfaction with the law as it currently stands. However, as Judge E mentions, it is only by the positive application of the law that we know that a specific law needs amending.

The importance of the flexibility of Kuwaiti contract law was also stressed, although only within the context of a ‘good and stable’ system, as “a legal system that is constantly changing does not provide stability or induce respect” (as per Judge B). Judge C called it “adaptable to the context of the circumstances”, being neither ‘fixed’ nor ‘absolute’, although he highlights that this does not give judges complete discretion, they must stick to the intent of the law when first formed. This, indeed, is an important part of the judge’s function – to go ‘far beyond’ the written words and not be necessarily limited by them but to apply them so as ‘to seek the intention of those originally forming’ the law. He also drew attention to the fact that, unlike England, Kuwaiti law does not follow the doctrine of precedent but, instead, each judge is ‘a peer and an equal’. Therefore, each judge has the right (or even the duty) to view and judge each contract case independently.
3. In your opinion, are there currently any problems regarding contract law statutes and their application?

This aim of this question was to highlight specific problems within Kuwaiti contract law. It was a follow-on question from the one above, designed to pinpoint and identify specific issues.

Despite the fact that most judges felt that Kuwaiti law in general, and commercial law in particular, is very highly developed and complete, issues were raised concerning the application of contract law as regards non-compliance, procedural delays and general problems that need to be dealt with. Judge A called it “a lot of problems”. Judge B said that the main problem is essentially not legal but practical, namely that contracts are being not respected, possibly due to a lack of understanding of the terms and conditions beforehand. However, he also highlighted that ‘too few judges and so many cases’ also gives rise to lengthy delays in cases coming to court and being heard. A lack of resources was also mentioned. As such, the issues highlighted were more procedural rather than theoretical.

Judge A says that it is because of these issues that this is “why we have made a whole library in the Justice Palace, full of volumes of publications and books which account and discuss these problems”. He draws attention to the magazine that is published by the Ministry of Justice, containing all of these articles, which discuss these issues and which are “freely available to all judges, lawyers, students and legal professional to look at”. It is via the library resources that you find the accounts of the ‘problems that we believe ought to be fixed’ and full details of “the problems we face in our day to day life”.

Judge C also makes a similar point when he says that Clause 71 of the Judiciary Act requires the Supreme Council of Judges to document annually the legal problems that have occurred over the past year. This allows problems to be highlighted and addressed. Judge A stresses that it is this that also provides protection against ‘false’ judgements, serious error and possible corruption, because even though each judge
is fully independent and not obliged to follow precedent, the decisions are peer-reviewed which provides an inbuilt self-regulatory function.

4. If there were areas which you believe are in need of review, what would you suggest by way of remedial action? Can you be as specific as possible?

Despite being specifically asked, the judges would not be drawn to make specific suggestions for change and remedial action. This was probably because of political reasons and the sensitive nature of the information, as mentioned previously. The fact that the Council meets once a year to address and review current legal problems that have been identified, and that it is very confidential (to avoid unfair pressure from certain people or lobby groups to influence changes to the law), means that the judges were very reluctant to voice their concerns openly as otherwise their views would be known in advance.

Instead, the interviewees gave examples of previous changes to the laws and comments about the process that has to be undertaken in order to enact legal reform. Judge B mentioned that there are a ‘reasonable number’ of laws that need amending but did not identify them specifically. However, he thought that using Western and other legal systems as a reference system was a good way to do this, choosing the rules that fit the needs of Kuwait the best. Judge D looked at the question the other way round, citing the customary practice of appeal and offence which was first founded in Kuwaiti law and then later copied by the Egyptians, as an example of other countries referencing Kuwaiti law. One area he specifically mentioned was that of ‘Appearance’ in court whereby the defendant can be present in court without the presence of a prosecutor. This is because the “judge’s experience is the most important thing”, alongside his knowledge of any judgments from the annual review, and this fills the gap ‘if interpretation is required’.

Judge D also highlighted the importance of the lengthy and detailed review procedure, with a committee specialised in that area of the law being responsible for reviewing each and every recommended change.
5. **What is your opinion in relation to the current practice of common law (custom) in Kuwait?**

This question referred to common law in the Kuwaiti sense of that derived from custom, not from judicial precedent or case law, i.e. the law common to the people.

Custom, in Kuwait, covers social practice, tradition and accepted norms and is an important source of Kuwaiti law. This is especially important, as modern Kuwait is such a comparatively young country.

Interestingly, despite its ‘tribal’ connotations, all the judges agreed that custom plays an important part in the Kuwaiti legal system. Firstly, it is specifically mentioned in the Civil Code thus giving it legitimacy as a source. Judge C points out that Article 1(2) of the Civil Code states that if there is no written legislation, then Islamic Law in applied (which should “match the goals of the law and legal society”). But if there is no match, then custom should be applied. Judge A refers to the civil law system of commercial transactions where, if there is no written code or legislation to govern the case between then two parties, then custom is applied. The general consensus was clearly behind the importance of this Article and of custom being an official source of law.

Judge D also states that custom was recognised as a valid source of Kuwaiti ‘law’ even before commercial law was first implemented and the Civil Law Act i.e. before formal law, custom was recognised as a guiding principle in commercial situations because society accepted it as the way things were done. Judge B agrees, stating that before official laws were created, there was only custom and tradition but that this was effective in managing people’s lives and the legal system. Although legislation has the primary importance in the hierarchy of sources of law, judgements in commercial law therefore can still validly refer to custom and social practice as a source of law. Indeed, he states that there is ‘no doubt’ that custom “is one of the primary sources of law”, although - with the advent of written legislation – it is more normal to call it now a ‘secondary’ source. Judge D makes the same point as Judge C, and indeed Judge A, that because Article 1 of the Civil Code specifically cites custom
as a valid source of law for commercial transactions if there is no written legislation, “any judge can issue a judgement and legitimately refer it to custom” as the basis of the decision.

Judge B also highlights how important custom is in the arbitration process as “arbitration gives a good space for the two parties to create their own customs and rules in the contract and sign it”.

6. With respect to legal practitioners in the field of commercial law, what changes, if any, would you like to see implemented in relation to the administration of contract law?

This question was chosen specifically to highlight the current role of lawyers and legal practitioners. Although the scholarly basis of law is essential to the fundamental good principles of a legal system, it is often the process of law and the standard of practitioners within the field that make the most impact on the successful day-to-day running and individual’s experience of the legal system.

In summary, although certain judges were pleased with the current standard of law practitioners in Kuwait, especially as regards the judiciary, most of the judges were critical of current standards. Judge A said that he was “very happy with the level that Kuwaiti judges are achieving, especially with new judges”. He also states that it is not a question of nationality. He said in his interview: “If I talk about law firms, I feel they have lots of experience, regardless of whether they are from Kuwait or not”. As such, he considers them ‘impressive’. Judge E claims there is a “very high standard of members”. Judge A also notes that there is a sufficient number of judges to handle the current case load.

However, others – and two judges in particular - were highly critical, especially of the lawyers. Judge B said: “I don’t think the standard of notes that the lawyers put forward to the courts is good enough and I think that the lawyers need to be better trained and have more experience prior to joining the legal field”. The poor quality of the notes reduces efficiency in the courtroom. He specifically criticises the lack of
original reasoning from the lawyers, saying that too many rely on old, repeated arguments, and that “lawyers should go and search for new reasoning and provide us with new case reasoning as reference”. He points out that whereas judges receive specific practical training, lawyers are reliant on their original studies and are responsible for their own continuing education. Equally, although the appointment of judges and their training is constantly being reviewed and amended, the same is not true for lawyers: as he says, laws are not, and should not be fixed so “I do not understand why these laws have not changed also”. As such, he believes that the Judiciary Act should be amended and that certain specialised training should be compulsory for practicing lawyers.

Judge C goes one step further, agreeing that lawyers need more training but also believing that judges do too. Judge C says:

“Of course there is a different number of legal firms in Kuwait and their level is quite good, but still the lawyers need to be trained more. The same applies to judges; I believe they need to be trained more”.

Judge C also mentions encouraging more traditional methods of training for young lawyers, although it is not absolutely clear what he means by this.

Despite Judge A’s initial complimentary and very positive comments, even he went on to say that he believes that there is a problem with the level of legal practitioners. This is rooted, in his opinion, in the current Lawyers Practicing Law. He says that, in his view, lawyers should have to have at least two years practical experience before they are allowed to join the Lawyers’ Committee, whereas at the moment they are allowed to join straight after graduation. This was broadly in agreement with Judge B, whose view is that young lawyers need additional post-graduate specialised training in order to perfect the skills needed for the courtroom. They feel this would allow for better notes, and the referencing of more relevant and wide-ranging cases.

7. Looking at the law in general, what amendments, if any, do you think would be beneficial?
This was a completely open question to encourage the judges to talk about reform in general.

However, a large part had already been covered. Judge A reiterated his point that the Lawyers Practicing Law should, in his opinion, be changed so that lawyers cannot join the Lawyers Committee until they have at least two years practical experience, as opposed to simply joining straight after graduation as they do at the moment. Apart from this comment, none of the judges gave a definite answer to this question, although several said that they were very happy with Kuwaiti law as it stood.

However, this was a difficult question from a political point of view and the reason that the judges did not commit to expressing a firm opinion about changes needed in the Kuwaiti legal system may well have been because, as stated before, they are all members of the Annual Law Review Committee. The aim of this committee being to review the current law and recommend changes, it would not have been appropriate for the judges to reveal their hand and disclose possible changes that may well be implemented in the next review. There is a question of confidentiality here and the judges were happier talking more about legal theory in general rather than specific changes, which are more part of their professional function.

It was noted by two of the judges that the Ministry of Justice has established a committee that is open to, and indeed even encourages, suggestions for amendments from scholars and legal practitioners. Additionally, a clause exists within the law to ensure any inconsistencies or impracticalities in the law when practiced are reported: in fact, Judge E felt this was one of the most significant clauses within the whole Kuwaiti legal system. This allows for an ever-adapting legal system that changes with the times. Thus, there did not seem to be many specific reforms that those asked would like to implement (apart from new lawyers needing to have further practical experience and training).

This question, therefore, failed to elicit a wide-ranging response.
8. With respect to the judiciary, and as regards contract law, are there any changes that you think should be introduced?

This question relates specifically to the role of the judiciary, as the judges interviewed are obviously experts in that field.

Similarly to the question above, the judges were reluctant to propose specific changes and had already addressed the issue in previous answers as several points had already been covered as regards this question when answering question six, and the question concerning legal practitioners. However, they talked at length about the general issues and recent changes regarding the judiciary and the administration of contract law. Although this did not address the specific question, therefore, this still provided interesting reflections.

Again, there was a general agreement that the Kuwaiti judiciary is very effective and functions well. The role of the judge is obviously key. Judge C says:

"I believe that the judges are the most responsible judicial members in the judicial system. If a country has a good judicial system the country has no trouble applying the laws. Therefore, the most important person in the judicial system is the judge."

Judge D also notes that it is the role of judges to provide both excellent judgements and also sound scholarly arguments to use as reference for lawyers going forward.

Judge C, however, draws attention to problem underlying the introduction of the new committees, saying that “there were complaints that it takes too long to complete a judgement, so that is why the Minister of Justice has established two different committees. The first is to make the procedures simpler and is managed by the Deputy minister, and another committee to use the electronic system to manage the procedures and make them faster.”

Overlapping slightly with the previous question, Judge C also gave several examples of specific laws where he welcomed the recent changes:
“Examples of laws that have been amended: the Procedure Act and the Companies law No. 25 for 2012, amended again in 2013 and also a new law issued called the Protection of Legal Competition Act.”

The importance of judicial discretion is highlighted by Judge B, although he also stresses the need to balance it with adhering to the established legal principles. He admires the judges who use their discretion correctly: “There are different judgements that clearly state that there are some holes in the law that need addressing and give clear reasoning and judgements with full interpretation to fill these gaps”.

Judge D talked more about what he, as a judge, wanted in an ideal world. Again, overlapping with the previous question, he said that: “personally what I expect from the lawyers, being a judge in the Supreme Court, is that any appeal submitted to the Supreme Court should include purely the fault of the case argument. The lawyers’ report should present the argument detailing in which way the Court of Appeal has incorrectly applied the law with respect to the case; there should be no inclusion of the case details and circumstance”. There are, of course, no oral audiences in the Supreme Court and no new argument is allowed. Therefore, the claimant must present his argument, clearly and correctly, based on existing legal principle. This complaint ties in with the seemingly on-going complaints about legal practitioners, as seen above.

In terms of the judiciary, though, he emphasises that ‘neutrality is the most important thing’. He goes on to say that the question of neutrality is what ‘divides the good judges from the bad and good judgements from the bad’. And it is this that then goes on to form the references for future decisions so has even greater on-going importance. This is why the review is so vital and must not be swayed by outside interests and influences.

Judge C wished more to talk about the role of Islamic Law in the life of a judge, stressing that whilst Islamic principles gave good stability to society, there are areas of society in the modern world that never existed before and therefore Islamic Law
cannot be applied absolutely. Consequently, it is important that these laws are interpreted within the "legal environment and context of the times and situation". In these cases the judge should be apply the law by considering the original intent of the law.

According to Judge E, a major improvement in the nature of the judiciary in Kuwait is that it is now possible to hire very experienced lawyers from abroad for a period of time. This has meant that the quality of the judiciary has improved and has helped the quality of the system overall.

Judge E also expounded on how important changes have already been made to improve the judiciary, such as Legal Act 24, the formation of the Anti-Corruption Committee in 2012, and the rule allowing the hiring of experienced judges from abroad for a period of time. He felt this helped to improve the system overall. Also, good standards of practice had been set in place to ensure that lawyers performed a good job.

Overall, the judges questioned seemed proud of the system and procedures in place that allowed amendments to the country’s laws. None believed there to be a pressing need to make large changes to how the judiciary operated.

9. Do you think Islamic Law, customs and practices exert an influence on the administration and application of contract law in Kuwait? Are there any specific examples?

Having looked at custom and contract law, the aim here was to consider the role of Islamic Law within Kuwait and in relation to contract law in particular.

Judge A makes his view very clear when he says that it must be noted that "the 2nd clause of the Constitution states that the country’s religion is Islam and that Islam is one of the main sources of its law, but not the main source".

A slightly different slant to Judge A’s viewpoint is that of B (whose answers to question 9 overlapped with other questions), who sees no difference (or only very minor and unimportant differences) between Islamic Law and the Kuwaiti written
law, reminding the interviewer that Al-Sanhuri was a doctorate of Islamic Law and as such based the new legal system on Islamic principles. Islamic Law is therefore integral to the legal system, in his belief, because it provides the rock on which the system is based, giving essential stability. Again, this is largely cultural and traditional because Islam forms a basis for people’s upbringing and so “most people have an idea of what the Islamic Laws and principles are without having to read them”. As such, people’s understanding of secular laws will, by their very nature, include reference to their Islamic cultural upbringing.

Similarly, Judge C believes that Islamic Law reflects an excellent coming together of the most important legal principles. Islamic principles govern certain aspects of the law, such as Inheritance Law (Clause18), or Limited Interest for finance. Judge C explains how these are based on customs based on Islamic principles that date from a time before written law. Further examples are those of diyya, financial compensation to a victim, and Shaffa’a, intercession, where a respected person can intercede for a criminal requesting his or her forgiveness. As such, he says that ‘those forming Kuwaiti law kept in mind the principles of Islamic Law’ in creating the new system which reassures him as to the longevity of Islamic Law, as long as the need for modernisation is also accepted in order for the country to remain relevant in a modern world. As he says:

“As a legal system based on Islamic Law, I am reassured that this will last a long time as it has already lasted 1400 years, however it always needs to be updated to keep up with evolution of life and society in the modern world.”

Judges D and E highlight the importance of the High Committee of Islamic Rules, with Judge D saying that the High Committee “ensures all issued laws do not conflict with Islamic Law”. If this occurs, then a draft of the law is written for the Emir’s council to review. As the judge says, “The chair of this committee is a religious figure, not a legal expert”. The role of this committee is to review the laws to ensure that there no laws that conflict. However, “it is not the role of the committee to match the
laws to Islam, purely to highlight laws that directly conflict.” If it does conflict, it is within their power to submit an edited draft to the Emir’s council for review.

An interesting and important point to add is one from Judge A, of which he is very proud, underlining that whilst Islam has an important role within Kuwaiti law, Clause 35 protects the freedom and practices of all other religions.

In conclusion, the answer here is clearly yes, all of the respondents agreed that Islamic Law does still hold influence over modern contract law in Kuwait. It is a fundamental part of the law in that, as Judge E reminds us, “the Kuwaiti legal system has its roots in two systems, French and Islamic”.

10. Do you think the application of contract law in the courts is at odds with or conflicts with the everyday administration of commercial affairs? If so, where? Please provide instances of such conflict and why you believe this to be the case.

The last question was a general question to cover contract law application on a practical basis with examples of any existing problems.

Three judges were very clear, stating that there is not any conflict between contract law and any other form of law or administration. Judge A said categorically that “in all my experience, which is 50 years, I never had any conflict of law”. Judge C said that, “from my personal point of view, I think the laws and clauses are really clear with little conflict between them”. Judge B referred more specifically to Islamic Law and potential conflict there, saying that there was no conflict as “I don’t see a difference between the written laws and Islamic Laws as generally the written laws follow Islamic principles”.

Judges D and E focused more on the fact that the high standard of the judiciary and legal practitioners means that conflicts are very rare or are expertly dealt with. Judge D talks of the need, and having, judges with ‘good experience’, thereby meaning that conflicts, if any, are handled effectively. Judge E said that:

“I think there is good organization in the Kuwaiti Legal System overall and an expectation for judges to have a good knowledge of laws outside of his specialty. He
therefore should be confident that his judgements do not conflict with any of the other legal areas”.

Several judges referred back to the official means of dealing with conflict, if any. Judge A says that if a conflict were to occur then there is “a set procedure, where the new law cancels the previous law, and where private law limits Public Law and the last thing would be to apply Custom Law”. Equally, judge D highlights again the role of the committee, reminding us that it is “charged with reviewing the laws to ensure no laws conflict”.

When addressing possible conflict, Judge C speaks about the importance of the role of the judge, saying that the aim is that he upholds the ‘overall goal’. He says that “the judge shouldn’t interpret every legal conflict separately and should try to integrate it to the overall goal of the case”. He goes on to give specific examples, saying:

“For example, the special clauses of the announcement of the judgement according to the Procedure Act, where there wasn’t a specific clause and each judge had to interpret and determine their own ruling. Another example from clause 5 and all subsequent clauses from the Procedure Act.”

His conclusion is that “it is rare that there is a conflict and where it does occur it should be resolved in the way I have described above”.

There is general agreement that there is no, or very little, conflict between everyday practice of the law in contract law and the application of it in the law courts, although Judge D says there can be and Judge E gives an example. B, C, D and E all believe that even where there are examples these should not be problematic as there is a clear procedure to resolving these conflicts.

Judge B anticipates that there should be no conflict as the laws are based upon Islamic principles, with which most people are familiar and therefore should find easy to follow. Judge C provides a good example of where conflict has occurred, that with the Limitation of Interest for banks, which is upheld in Civil Law, but
Commercial Law has been amended, Clause 110-115 permitting interest to allow competition within international trading.

So overall, conflicts do occur, but not to such a serious extent or on sufficiently numerous occurrences that it stands out with the Judges questioned, and where it does there is set procedure to resolve the conflict.

6.3 Data Findings

Thanks to this research data, there are various important threads that come to the fore.

6.3.1.1 The Importance of Custom

The Kuwaiti system of Contract and Commercial Law is a mixture of many sources. Despite its rather ‘tribal’ implications, the interviews show that custom is still important and viewed as key part of the current legal system. As a trading nation, it is obvious that contracts have been a fundamental part of the country, and respected, for centuries, based on custom, tradition and accepted practice. It was therefore important, and indeed self-evident, that custom was included in the new codified commercial laws. Indeed, it is in contract law that custom seems to be accepted automatically as a valid and important source. The fact that it is specifically listed in the Civil Code as a source of law gives custom a legitimacy. The Kuwaiti focus on arbitration as a dispute resolution mechanism is based very much on traditional pre-written law methods. Moreover, the judges recognise that the country ran very well based purely on customary practices, as accepted by and therefore legitimised by the people. As such, although a new country in terms of independence, Kuwait is proud of its heritage and traditional practices.

6.3.2 Islamic Law

Islamic Law, however, is shown to be an important source but not an overriding one, or not at least in terms of being an independent source. It is interesting to note that there were subtle – but important – differences between the judges’
viewpoints, which is probably to be expected as regards something so politically sensitive. This research shows that, overall, the Supreme Court judges do not view Islamic Law as the main source of law in Kuwait but as secondary to the legislation of the Kuwaiti Parliament and only called upon if legislation does not cover the area in question. It is well publicised that there are certain politicians who wish Islamic Law to be the main source of law and it is a constant topic of discussion, both in Parliament and the press. However, this political movement would seem not to be supported by the highest judiciary.

It should be noted, however, that the importance of Islamic Law is not underestimated, as it is still one of the most important sources, as codified in the Constitution under Article 2 as ‘a principal source’. However, it is also worth noting that the Civil Code, Article 1(2), lays down legislation as the first direct source of law, followed by the Islamic fiqh principles that serve the country's interests. As such, Islam (and even less Shari'a) is not a direct source of law as such, rather the Code says that, in the absence of legislation, the judge “shall exercise his judgment guided by the principles of Islamic jurisprudence which are most consistent with the facts and interest of the country”.

Of course, it can be argued (and was more strongly argued by some judges than others) that the very reason that Islamic Law is not needed to be identified as the single most important source of Kuwaiti law is because, as the judges' interviews show, the view of many is that the laws of Kuwait were drawn up based on fundamental Islamic principles in their inception and, therefore, there is no conflict or need to highlight one particular source: on the contrary, there is harmony between all the sources of law. Any actual differences between Islamic principles and written laws were dismissed as ‘minor’ by one judge, with the importance of written laws not ‘being downplayed’ as such, but simply understood in light of Islamic principles being a given. This applies in particular to contract law as, being based on customary practices, it reflects the Islamic traditions of Kuwait’s history. Kuwait’s Islamic roots, both religious and cultural, thus provide a framework of understanding for society.
Overall, therefore, it is interesting that, in a time of growing radicalisation elsewhere in the Middle East, the Supreme Court of Kuwait still adheres strictly to the views as set out in 1964 whereby the law is governed by Acts of a secular Parliament, albeit ones that are guided by Islamic principles.

6.3.3 Constitutional Freedoms

From a broader religious perspective, the Kuwaiti Constitutional clause that guarantees freedom of religious belief and practice, and respect for all religions is also noted. As Judge A said, it is a very rare clause in the Middle East, unique indeed in its breadth and secured at the highest level, in the country’s Constitution. This is something of which rightly to be proud and sets Kuwait apart. Again, this insistence on the guarantee of religious tolerance, as well as the refusal to elevate Islamic Law to a superior level, shows a broad and all-encompassing acceptance of all religion, in the confines of a secular country, but within a cultural Islamic understanding.

Furthermore, the Judges are demonstrably very proud of the whole modern legal system in Kuwait, as set up under Al-Sanhuri and they support the fundamental philosophy behind it. Several described it as perfect, in terms of old and new, the extent of its development, and its completeness. One judge described it as being a ‘unique democratic system’. The comparative freedom and independence of the judiciary from government in Kuwait is a point of pride, which is understandable as it is rare in the Middle East. The separation of powers is stressed with Kuwait being a country where the judiciary is not subject to any ‘governmental roof’, as Judge A puts it. The Ministry of Justice’s role is purely procedural and not to legislate.

6.3.4 Judicial Discretion

Indeed, there is a consensus that it is vital that judges have a freedom to exercise discretion, although their judgements must of course be backed up by legal interpretation and reasoning. Those questioned felt that it is important that judges do not have to be tied to the absolute word of the law but “should be free to impose their own legal interpretations of the laws”. Thus, whilst the judges felt that Al-Sanhuri did an excellent job forming the Kuwaiti legal system, developments and
interpretations are imperative. In part this is because no system is perfect and all contain ‘holes’, but also because of the multi-sourced basis of Kuwaiti law and the need to move with the times. Moreover, as Judge E commented, this is the sign of a ‘healthy’ legal environment, as there should be problems arising in the application of the law, otherwise there is no balance and the law is, by definition, one-sided. The law does not exist in the abstract but is a practical animal: “without application of the law, we would never know that a specific law needs amendment and review”.

This is one of the reasons that the judges were unanimous in highlighting the significance of the Law Reform Committee and their role within. Constant and arbitrary change is the antithesis of a good stable system. However, with the current system, official amendments are only passed after review by a good number of independent judicial experts. Although this caused a slight problem for the interview process as the judges either tacitly or directly refused to be drawn on the subject of reform, it showed a uniform respect for the system itself and respect for the integrity and confidentiality of the actual process. The annual review of Kuwaiti laws, as performed by the highest legal minds in the land, is thus a significant feature of Kuwaiti law and one of which they are very proud.

6.3.5 The Current Legal System in Practice

The judges are therefore happy overall with the current system and very positive about the way it works and the balance between the judiciary and the executive/legislative functions. It works well because, although the legal system is relatively young, in following Kuwaiti law as laid down by Parliament, the judges can use other Arab states’ law as points of reference to help them in their judgements, if necessary. Indeed, Kuwaiti law is now being used as a point of reference for Egyptian judgements, thus highlighting the sophistication of the Kuwaiti system and the fact that it is now sufficiently well established to be a reference basis for other countries. This is a point of pride, and indeed amusement, to the current senior judges.
The peer-review system of creating new laws is particularly well-regarded. The influence of the peer group is obviously strong. Alan Paterson, in his seminal work on interviewing English Law Lords, writes that is ‘not surprising’ that their fellow Supreme Court judges (previously Law Lords) should be the “principal reference group for most, if not all, Law Lords”.¹ In the same way, it is clear from the Kuwaiti judges’ interviews that the opinion of fellow judges is important and valued.

The pride and respect in Al-Sanhuri’s achievements to set up the modern legal system in Kuwait does not, of course, mean that the judiciary agrees completely with everything now, fifty years later. No system can be rigidly stuck in its time. Although the judges would not state openly which specific changes they want to see implemented, as this is a political and sensitive matter, with ramifications for various lobby groups and different political factions, the Supreme Court judges clearly take their role in this regards, both in court and on the Law Reform Committee, very seriously. As these are men who knew Al-Sanhuri personally and witnessed the birth and growth of the new Kuwaiti system from day one, their views and standing is second to none in Kuwaiti legal circles. Indeed, this is something that the judges approve and promote: they feel personally responsible and invested in the current legal system and take credit from its success, with their views possibly having extra validity precisely because their authority stems from being a part of the group that formed the legal system fifty years ago. Judge C’s emphasis, for instance, on knowing the intention of the original lawmakers and not contenting oneself as a judge with simply following the letter of the law holds far greater weight if one was actually one of those original lawmakers oneself (or had direct contact with them). It will be interesting to see if the new generation of judges, who are too young to have been present in 1964, will have the same effect and follow the same path or strike out in new directions.

¹ Alan Paterson, The Law Lords (Palgrave 1982), 32
On the contrary, although the Supreme Court judges are very proud of the general level of the overall legal system within Kuwait, they are very critical of the level of many legal practitioners. This is obviously a problem that needs to be addressed: a good legal system should have mutual respect between the various layers if it is to function properly. Suggestions were made that legal practitioners should not be allowed to practice immediately after graduation but be obliged to undertake at least two years training. This is felt particularly strongly by the judges because they have to attend the Training Institute for Judges for three years, then spend 6-7 years as a public prosecutor before being allowed to become a junior judge, presiding over the most minor cases. Being allowed to practice immediately upon graduation, therefore, as Kuwaiti lawyers are, is not viewed well by the judiciary. The interviews show that the senior judges are not impressed by the quality of courtroom lawyers, with particular criticism of the standard of the legal notes presented and, interestingly, the quality of the lawyers’ legal reasoning. The judges complain that there is little original thinking from the current legal practitioners, especially the young ones, and that old arguments are simply repeated countless times. This perceived imbalance is an area of concern and would be an interesting area for further research. It should be noted, of course, that this research focuses on the views of the Supreme Court judges about the lawyers and does not address the other side, namely the views of the legal practitioners on the judiciary. It is also worth noting that it is probably more likely to have this problem, between senior judges and legal practitioners, in a country like Kuwait where judges are not drawn from practicing lawyers but a pool of graduates specifically hired and trained by the State to be judges. Neither side, therefore, has any direct experience of the other and there is a ‘them and us’ current underlying the relationship, at least in terms of how the judges describe it.

6.3.6 Conclusion

In conclusion, although there were only five interviews and the interviewees did not provide direct answers to all the questions, I believe that this original research is detailed and gives a very interesting insight into the thoughts of the Supreme Court
judges in Kuwait, both from a practical point of view of current practice as regards law in Kuwait and contract law in particular, and also the fundamental principles and belief-set underlying modern Kuwaiti law.
Chapter 7 Comparative Analysis of the Different Legal Families and Their Impact on Kuwait’s Commercial Law

7.1 Introduction

Legal systems can admit to many complexities, the resultant interweaving of differing philosophies, outlooks and approaches across centuries. Some give evidence of extraordinary continuity and stability, while others are nothing so much as the agglomeration or indeed fractured remnants of competing socio-economic and geo-political tensions. The case of Sudan has already been referred to in this study, where largely incompatible legal systems and philosophies gave rise to protracted difficulties. This chapter will examine how Kuwait effectively assimilated four legal systems – English, Egyptian, French and Shari’a, each in its turn the product of its own unique history and culture - over the course of more than a century from the creation of the Protectorate in 1899 to the present day.

As such, this chapter will set out the background, history and context to the introduction of each of these, their impact and influence on the administration and exercise of justice in Kuwait, and trace the footprint and vestiges of that influence in the current law. It will also detail the changes, which occurred as the commercial code sought to reconcile these competing philosophies and approaches. These aspects will be considered under a number of different rubrics: the make-up and profile of the judiciary; the drafting of statutes; the competing influences, approaches and philosophies involved in that process; the interaction with and accounting of local customs and practices; the periods of transition between systems, issues relating to precedence and the common law, and the development and evolution of contract law within this matrix.
7.2 The Administration

7.2.1 The Advisory Council

Two principal events mark the Kuwaiti legal and political nexus in the early half of the twentieth century: the creation of the Advisory Council in 1921 and the subsequent formation of the Legislative Council in 1938. In the case of the former, the Council, composed of 12 members under the chairmanship of the Sheik, was charged with the administration of cultural, economic and social affairs through a number of dedicated departments, each under the authority of a member of the ruling family. Their role, however, was consultative and not judicial, with judicial authority remaining solely within the power of the Sheik, who ruled on all matters, with the exception of criminal and personal cases, which were held to fall within the remit of the provisions of Islamic Shari’a Law and were adjudicated upon by a Shari’a judge.

With regard to commercial matters, the continued prevalence and force of local custom and practices saw commercial cases referred to established merchants of standing, who would decide on matters by drawing on a mix of both recognised commercial codes and local traditions, this, against a backdrop where informal oral contracts in business matters were more often than not the norm.

The Sheik’s judicial authority, however, did not extend to foreigners or non-Moslems, who were subject to the judicial authority of the British High Commission, demonstrating a bi-partite legal structure, which persisted until 1959.¹

The advisory council was disbanded in part because it’s members were non-elected, but also because for each member this was not their sole role, their main concerns being their own businesses and affairs, leaving them little time to be truly effective.

in their role on the council.²

### 7.2.2 The Legislative Council

In the wake of the dissolution of the Advisory Council, the Legislative Council was formed in 1938, composed of 14 members, elected by the people and presided over by Sheik Abdullah Al Salem Al Sabah. This body issued a written constitution, made up of five articles, and was empowered to draft and enact statutes covering judicial, security, budgetary, education, health and other relevant areas. The Council was also empowered to serve as a Court of Appeal until such a body could be created; no reference, however, was made to the separation of powers and the Council was disbanded controversially after only six months.³

### 7.2.3 Magazine of Judicial Provisions

In the absence of the Council, the so-called Magazine of Judicial Provisions was co-opted by Sheikh Ahmed Al Jaber Al Sabah to act as a source of law. A repository of procedural rules dating from the Ottoman Period, its provisions were informed by the Abu Hanifa School of Jurisprudence, then the official faith of the Ottoman State; prior to 1899, Kuwait was a part of the Ottoman Empire. While the Magazine’s brief did not cover personal matters, such as marriage, divorce or inheritance – these fell within the purview of the Maleki School - it did deal extensively with contract, commercial and property law. Encompassing some 1851 articles over 16 books, these covered in meticulous detail areas such as partnerships, mortgages, damages, sales and rentals, amongst others.⁴

### 7.3 The Post-War Period

The period following the end of World War II was characterised by both growth and change: oil was discovered and exports to the UK commenced in 1946; in addition,

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² Khaled Taama, *The History of Law in Kuwait*, (National Library of Kuwait, 2008 (Arabic Text))
³ ibid, 269
⁴ ibid, 270
there was a broader and more diverse expansion of commercial dealings, spurred by rebuilding and renewal in Europe and elsewhere. The need for a reorganisation of the judicial code became more pressing in the wake of these changes and to that end in 1954 a Higher Commission for Reform was created, which resulted in the formation of 10 principal ministries, with responsibility for the administration of the affairs of state. These department heads, in turn, formed the Collegiate Higher Council, which assumed the functions of a cabinet, with responsibility for budgetary matters, reviewing draft laws and the supervision of government departments.

The importance attached to the need for commercial reform was evidenced in the formation, in 1958, of the ten-member Organization Authority, which was staffed by seven merchants and three department heads, and acted as a consultative body to the Higher Council. In the previous two decades, a number of statutes were enacted; The Trade Organization Rules (1938); The Travel Law and The Diving Law (1940); each of which addressed perceived deficiencies in the legal code with respect to business, trade and economic matters. Additional statutes were also drafted during this period, each of which dealt with a specific area of commercial or corporate concern:

- The Civil and Commercial Procedures Code
- The Commercial Law
- The Corporate Law
- Insurance Law
- The Joint Venture Law
- The Labour Law in Public and Private Sectors
- Rental Law; and
- The Kuwaiti Currency Law

These new statutes not only addressed oversights or omissions in the Magazine, but

5 ibid
6 ibid
effectively led to its being superseded in its role as the principal source of commercial and corporate law – the establishment in 1960 of a Department of Legal Advice and Legislation, charged with the drafting of statutes commensurate with the demands of a new commercial environment, served as effective recognition of this.

Prior to 1959, commercial cases fell within the ambit of several diverse and unrelated bodies, including the police, the courts and municipal authorities, although the persistent influence of local commercial customs and practices in the settling of disputes was apparent in the use of arbitration panels, which looked to such codes and traditions for guidance, or fell back on the professional rules and regulations of recognised professional trade bodies. However, a reorganisation of the judicial structure was given effect through the so-called Law 19 of 1959, which saw the establishment of The Court of Full Jurisdiction consisting of four departments, one of which was dedicated solely to commercial cases.7

Despite the enactment of new statutes, particularly in the areas of commercial and corporate law, which had effectively superseded those of the Magazine of Judicial Provisions, an attempt at revision of the legal code in 1977 still envisaged a role for the Magazine, although it was acknowledged that irregularities existed in the overlap between its provisions and those contained in statutes such as the Commercial Law, the Law of Torts, and others.8 The subsequent revision of the code led in 1980 to the issuing of the Commercial Law, dealing with trade and the Maritime Law.9 Gaps in the commercial code were also highlighted following a securities market crisis two years later, an event, which led to the drafting of Decree Law No. 57 in 1982, Forward Rate Dealing in Shares of Companies, in order to allow for restitution for affected investors and to provide measures, adequate to the complexities of the crisis.

7 ibid, 271
8 ibid, 275
9 ibid, 276
The necessarily pragmatic approach to the commercial domain is perhaps most evident in the accommodation arrived at with respect to the issue of usury or the charging of interest and Shari’a Law, under which it is expressly forbidden. Although Shari’a Law was regarded as a principal source of legislation: “The religion of the State is El Islam, and the Islamic Shari’a is a principal source for legislation”, Kuwait enacted legislation which allowed for the charging of interest on commercial loans. The legislature essentially adopted a dual approach to what amounted to a legislative conundrum, by incorporating the Shari’a principle into its Civil Code (No.67 of 1980), but within the Commercial Code (Law No.68, 1980, an extension of the code of 1961), it was given an effective imprimatur: “The creditor has the right to interest in a commercial loan unless the contrary is agreed. If the rate of interest is not specified in the contract, the interest due shall be the legal interest of seven per cent”. This duality may be attributable not just to the dictates of the commercial environment, but can be seen as a more concrete expression of the notion that the remit of Shari’a did not necessarily extend beyond the personal sphere, evident from the time of the Advisory Council in 1928 (see above).

7.4 Categorisation of Legal Families

As the sources of Kuwait law are so varied, it makes sense to analyse them from a broader perspective, in terms of legal families. Although Kuwaiti jurisprudence draws on two principal sources of law: Islamic Shari’a and French-inspired civil code via Egyptian law, these two primary sources of law were only officially adopted in 1961 following secession from the British Protectorate and the introduction of the Egyptian code under the guidance of Al-Sanhuri; prior to that a

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\[\text{\textsuperscript{12}}\text{Also spelt Al-Sanhouri in many texts}
\]
dual mandate prevailed under the Protectorate. This consisted of so-called British Jurisdiction, which applied to British subjects, those hailing from the nations of the then British Commonwealth, as well as U.S citizens and nationals from a number of other European and non-Arab countries. All others were subject to National Jurisdiction, mainly Kuwaiti citizens, nationals of other Arab states, and the citizens of British-protected states in the Gulf. National Jurisdiction, in turn, was composed of two further subsidiary codes, that of the Majalat al Ahkam al Adleya (Majalat) - the Ottoman Civil Code, which was itself heavily Islamic in character – and Shari’a Law, which governed issues relating to the personal sphere. Despite the extensive codification of the Majalat, it has been claimed that the National Jurisdiction, was, with the exception of those cases that fell within the personal domain, and consequently under the remit of Shari’a Law, largely tribal in character and ill-defined.\textsuperscript{13} In contrast, British Jurisdiction adhered to English court procedures and practices and looked to the English Common Law system’s principles.\textsuperscript{14}

Despite the evident popularity and perceived reliability of the British Jurisdiction in contrast to the less structured and codified ‘National’ alternative, the sense that the former was a product of a colonial protector and wholly un-Islamic in character, among other issues, led to calls for change.\textsuperscript{15} This culminated in the appointment of the Egyptian jurist, Dr. Abdel Razzak Al-Sanhuri, in 1959 to overhaul the Kuwaiti code; as the drafter of the 1948 Egyptian Civil Code, this led to the effective transplanting of the British and National Jurisdictions for a legal corpus that was profoundly Egyptian in character and, by default, admitted of heavy French Civil

\footnotesize\textsuperscript{13} Myra Williamson, ‘The Diffusion of Western Legal Concepts in Kuwait; reflections on the state, the legal system and legal education from comparative and historical perspectives’, in Sue Farran, James Gallen, Jennifer Hendry and Christina Rautenbach (Ed), The Diffusion of Law: the Movement of Laws and Norms around the World (Ashgate Publishing, Farnham, Surrey, UK, 2015), 38-40


\footnotesize\textsuperscript{15} ibid, 38
Law influences.

Within the space of two years, Kuwait had effectively moved from a system of jurisprudence, which was Islamic, tribal and British, in both character and form, to one, which was Islamic and Egyptian. In embracing the Egyptian code, the common law principles and philosophy of the British Jurisdiction were supplanted by those of the civil law French system, which suffused the Egyptian corpus.\textsuperscript{16}

\subsection*{7.5 Legal Efficacy}

In moving to a Civil Law code, Kuwait effectively set aside in its entirety three quarters of its dual pre-1961 system: the British Jurisdiction and the \textit{Majalat} or Ottoman Civil Code. As noted, it has been argued that the move to supplant the British Jurisdiction was as much motivated by the need to symbolically draw a line under the period of the Protectorate as by any belief that the English Common Law system was not adequate to the commercial demands of the day or of those envisaged, as Kuwait's engagement with the outside world grew.

Furthermore, some have contended that from a commercial standpoint the move to a Civil Code was a retrograde step, as there is some evidence to suggest that Common Law systems are more facilitative of and amenable to the transacting of business and commercial exchange, admitting of a greater degree of flexibility than their Civil Law alternatives. There are those who feel that the system created unnecessary complexity, bureaucracy and delays to the business community. Some question whether a combined system of Islamic, Common Law and Customary law such as that used in Malaysia and India could not have been drafted.\textsuperscript{17}

At the time, Al-Sanhuri was a jurist of some renown and standing and the decision to appoint him was widely supported. The interviewees of this thesis certainly view Al-Sanhuri and his work with respect, Judge E described the work as “extremely

\textsuperscript{16} ibid  
\textsuperscript{17} ibid, 39
well done”, Judge C believing it was “formed in an excellent way”, with both believing Al-Sanhuri and his colleagues being “some of the best scholars of the time”. Given Al-Sanhuri’s intimate familiarity with the Egyptian code, which he had drafted in 1948, it was almost inevitable that he would draw heavily on that corpus. Starting with a familiar and established base, and one which was considered in the Arab world to be successful, would certainly have made both the process of drafting simpler and faster, rather than trying to embed three separate systems into one. Sanhuri’s Egyptian working of France’s Civil Law indeed was so well regarded that Kuwait was hardly the first Arab country to adopt it as their own, Jordan, Iraq, Syria, and Libya all preceded Kuwait in their use of his work on which to base their own legal system, although not all were fully completed and integrated for use before his death.\(^{18}\,^{19}\) Qatar with its independence from its status as British protectorate in 1971 followed suit with a commercial law based on that of Kuwait.

In fact, not only was the coded law based on Egyptian law and compiled by an Egyptian scholar, much of the judiciary was made up of Egyptian judges who because of their experience and background consulted Egyptian legal references and books, and thus cited Egyptian cases and judgements.\(^{20}\)

### 7.6 Influences of the Past - Oral Contracts

In the past, trading practices and contract negotiations were conducted almost exclusively on the basis of trust, with individuals following Islamic values of honesty, truthfulness and fairness, or “duty of good faith”, known as *Husun Alniyah*, with most parties eschewing the complexities of formal written contracts. Whilst this has changed with a gradual understanding and acceptance of modern laws, a

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\(^{18}\) Nabil Saleh, ‘Civil Codes of Arab Countries: The Sanhuri Codes’, (1993) 8:2 *Arab Law Quarterly*, 161


large number of contracts are still conducted and agreed orally.

Indeed, in the drawing up of contracts, excluding certain types, commercial law allows a level of choice in the mode of how this is done, via telephone, email, fax et cetera, dependent on the convenience of the parties involved. Thus, as in English law, there is no legal requirement within commercial law (excluding special cases) to have a written contract.²¹ There will be those, therefore, who will continue to follow traditional forms of business, including the formation of verbal contracts, perhaps even as a form of etiquette, especially when dealing with fellow Arab business folk: indeed, the suggestion of a written contract could be seen as an insult and lack of trust, rather than the implicit honour of a ‘my word is my bond’ handshake and verbal agreement.

Furthermore, education programmes for tribal and Bedouin folk, to integrate them more to urban life and improve literacy, are only relatively recent. If we look back to 1975, literacy in Kuwait was at 60% (for adults aged 15 and above) compared to today’s (2016) literacy level of 96%.²² ²³ For a travelling people with little literacy, whose livelihood was dependent on trade, waiting for someone with the skills to draft a written contract would not have been viable. Kennett describes how in the Egyptian tribes of the early decades of the 1900s written judgements did sometimes exist, but even these, because of the nature of the environment, with constant travelling and harsh weather, and the lifestyle, would often be “...inscribed on the back of an old letter, and witnessed with several inky and smudgy thumb prints”.²⁴ If

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²¹ Abdulaziz Alfadhli, ‘Does the Alternative Dispute Resolution Have a Role to Play in the Construction Industry in the State of Kuwait: (Look into the most appropriate methodology that may be taken in Kuwait in comparison with what are available in the English legal system)’, (DPhil Thesis, University of Southampton: Faculty of Business and Law, 2015), 6


²⁴ Austin Kennett, Bedouin Justice: Law & Customs amongst the Egyptian Bedouin, (1st edn Kegan Paul International, this edn Routledge 2010), 34
this is the case with judgements, it seems then unlikely a large number of written contracts would be made, particularly with a lifestyle where everything must be portable and kept to a minimum, the importance of carrying spare paper and storing large numbers of contracts for the many transactions and trade agreements would be unlikely. Especially in a group which values its ability to remember orally, tradition and fact, as well the cultural and religious beliefs in honourable trade. Thus, certainly in the recent past, oral contracts would have been the norm. Of course, with the rapid increase in literacy in the past thirty-six years, and the increase in tribes and Bedouin becoming more settled and static, the general acceptance and adoption of national jurisdiction and the use of written contracts will have become more established. Nonetheless, it is easy to see how amongst traditional families, between their own families and inter-tribally, or where older patriarchs still lead, that oral contracts may remain the preference.

A distinction should be made, as always, between the validity of verbal contracts and the problem of evidence. Of course, there are cases that still present where dispute occurs between parties of oral contracts, that cannot be proved, and the principles of “according to what is right and good” are applied. It is not unknown that, due to necessity of speed to initiate a construction project, a verbal contract can be agreed without an agreed remuneration. This can then require the courts to establish appropriate compensation.\(^{25}\)

Moreover, the current and modern civil law based system in Kuwait allows verbal contracts but, as arbitration and arbitration-based practices are very common, written contracts are usually needed, as alternative dispute resolution methods do not accept oral contracts. Alfadhli describes how, “In accordance with Kuwaiti law, both mediation and arbitration are strictly required to be proven in writing. Oral communication, or any other way of evidence cannot be accepted to prove mediation

\(^{25}\) Alfadhli n 21, 48
and arbitration, and would not be enforceable unless the basic agreement has been made in writing.”

There are also some fundamental differences in the drawing up and agreement of contracts in Islamic Law. Acceptance can be implied by conduct of the offeree, including the offeree’s silence, but only within very specific circumstances. The session under which the contract is drawn up, discussed and agreed is called the majlis al-‘aqd. This session cannot be disrupted if the contract is to hold. Any breaks within the discussion, whether for food, change of venue or prayer, deem the contract null and void. Agreement must be given, or implied, within this majlis al-‘aqd. It is easy to see that by the very existence of this process, particularly that of implied agreement, within the law of Islam, which the majority of the country follow, how oral contracts are still followed and commonly made in Kuwaiti society. This is not limited to Kuwait, but is a common feature of business throughout the Arab world.

In terms of evidence, as in England, problems are bound to arise where disagreements occur over what was agreed and there is no written word to confirm it definitively. In 2012, Sheikh Meshal Jarah al-Sabah, a former senior official at the Ministry of the Interior and member of the Kuwaiti royal family, brought a case against the Dubai branch of Swiss Bank UBS. The parties had allegedly worked together on a deal, selling the African-based assets of Zain, the Kuwaiti mobile phone operator. Sheikh Al-Sabah alleged that UBS, in return for his brokering, promised him 0.1-0.2% of the earnings of the sale, amounting to US$20 million. UBS denied the agreement, suggesting it was only ever an introductory meeting and that Sheikh al-Sabah had not been required to assist with the deal. With no written contract, litigation had to rely on witness testimony, along with crucial documentary evidence. The case was brought at the Dubai International Financial

26 ibid, 198

Centre Courts. Some of the comments raised in the judgement illustrate how difficult it can be to adjudicate in such cases. Such examples included the disparity between witness recollections, how allowances should be made for limitations where the language used was not the natural first language and how the judgement was also based on the judge’s impressions of how the witness handled the questions and whether they appeared reliable. A simple written contract would of course make this much simpler and surer. As it was, the claim was denied, with the judge ruling that the purchase may have been discussed but fell short of a binding agreement.28,29,30

Indeed, the same year, when, Prince Al Waleed bin Talal, of Saudi Arabia was sued by Jordanian businesswoman, Daad Sharab, again over not paying an alleged broker sum, Ms Sharab took the case to the English High Court, a common law jurisdiction, where witness evidence is more accepted and where she won her case.31

7.7 Tribal Law

Kuwait has its origins based on tribal society, with approximately 60% of its population being of tribes’ people.32 Each tribe has its own rules but all share the

29 Camilla Hall, ‘UBS fights legal claim by Kuwaiti royal’ The Financial Times Limited, (online, 19th June 2012), <www.ft.com/cms/s/0/0a68de8e-b9fb-11e1-937b-00144feabdc0.html-axzz3trlfcj9>, [accessed: 10th December 2015]
32 Shafeeq Ghabra, 'Kuwait: At the Crossroads of Change or Political Stagnation,' Middle East Institute, (Washington USA, May 2014), <www.mei.edu/content/article/kuwait-crossroads-change-or-political-stagnation>, [Accessed: 22nd November 2025]
same general morals and cultural heritage, with one’s family name tracing back to each individual’s founding tribe. Recently there has been greater urbanisation of the tribes, helped by the government-supported projects, which have resulted in increased education, status and opportunities.\footnote{ibid} However, some parts of Kuwaiti society still cling strongly to the old tribal customs, whereas others have adapted to and adopted more modern societal norms. As this adaption occurs the tribal laws are fading in many parts of the country, but in some areas they are still a strong part of everyday life and hold more sway than written law. Generally speaking tribal laws are fading from generation to generation, depending on each individual’s education and life experience. Because Kuwait is no longer majorly a desert society, tribal laws are not obligatory to the society, however some people feel they are socially obliged to do or not do certain things that may go against the tribal nature of their family. Particularly with the Bedouin or nomadic peoples. But this is in decline, particularly in comparison to societies like Saudi Arabia or Syria. While in ancient times, people felt obliged to take certain obligations because there is a social pressure to conform this is not the case nowadays.

Tribal laws include commercial laws and criminal laws; as an example if someone were to commit a murder against a person of a neighbouring tribe, the victim’s tribe is permitted to kill someone of the victim’s family, with no time limit on when this vengeance may be enacted by: this is called \textit{Al-Thar}. The Encyclopaedia Lisan Al-Arab defines it as “where the relatives of the victims may kill the murderer or one of the murderer’s family, gaining revenge for themselves, before letting the government or the law’s processes take place”\footnote{Ibn Manzoor, ‘\textit{Al-Thar’}, Lissan Al-Arab (Encyclopaedia), (Dar Al-Ma’arif, Cariro, Egypt, 2008)}. It is of course illegal in Kuwaiti law.

The history of \textit{Al-Thar} finds its routes from the pre-Islamic period and found in very strongly tribal societies such as Yemen and Egypt. When Islam came to these regions it forbade \textit{Al-Thar} for the sake of justice, for to kill an innocent person was
wrong, and this type of vengeance causes unease and unbalance within society.\footnote{A. A. Jundoub, *Al-Thar in both Yemen and Egyptian societies*, (The University of Cairo, Egypt, 2001)} One only has to look to recent British history with vengeance killings in Northern Ireland during *The Troubles* between the republican and loyalists that occurred between 1968 and 1998. The ‘tit for tat’ mentality amongst the para-military arms of these groups ensured that unrest, anger, mourning and danger were never far away from the publics’ everyday lives. If a republican soldier was killed, or worse a civilian, loyalist solders would enact vengeance on republicans and vice versa. Sadly, the same mentality is present in modern-day city gangs, where gang members act partly out of loss, but also out of fear that if they do not retaliate they will be shown to be weak and vulnerable to further attack. The problem with this kind of justice is that it is never-ending and only breeds resentment and further violence. It can be understood that the tribes would want strong laws with a deterrent penalty for murder to discourage this type of crime, and what stronger deterrent than the loss of a loved one?

In the Qur’an the Surah, or chapter, entitled *Al Bakkara*, section 178, instead commands that *Al-Thar* should be replaced with *Al-Qassas*, which set a new definition of personalising the act and the punishment; only the person committing the crime can be punished. *Al-Qassas* commands that everyone should have a fair hearing and trial. The accused must have the opportunity to present all of their evidence and put forth their argument and point of view. It still involves capital punishment, so the ruling for a murder will be death, or the loss of a limb will be an equivalent loss for the perpetrator, however clear evidence must be presented to prove the guilt of the accused and it is strictly governed by law to ensure a just a fair penalty. Despite this Islamic ruling *Al-Thar* is still recognised in some tribes in Kuwaiti society, particularly with the Bedouin tribes, who live out in remote areas, still follow their own laws and where such rules and practices are common. So, *Al-Thar* is fading but is not yet vanished completely from society as yet and is certainly
not as common as in some neighbouring countries, such as Egypt and Yemen where it remains prevalent.\textsuperscript{36} So if you mention \textit{Al-Thar} to a Kuwaiti national they will be unsurprised and have a general idea of what it is.

In fact, in contrast to the idea of retribution being a deterrent, Austin Kennett in his book \textit{Bedouin Justice},\textsuperscript{37} explains that in his experience the Egyptian Bedouin value the life and strength of the tribe far beyond that of the individual. Life in the desert is harsh, in the past infant mortality was high, inter-tribal fighting was rife, therefore the strength and numbers of the tribe and its ability to thrive, eat and trade were vital. Therefore, for any reduction or loss of power of the tribe or its assets is and was what must be either paid for or taken in equal amount from the tribe at fault. Whether that loss be a stolen camel, the life of a tribesman or the inability of a tribesperson to fully contribute due to an inflicted injury. Each tribe as a whole is responsible for the members of its tribe; if an individual commits a crime the cost lays on the tribe as a whole. Kennett believed that at the time of writing (1925), in Egypt, most Bedouin tribes would accept a regular payment of ‘bloodmoney’ or payment for the loss, rather than a like-for-like claim from the tribe. One can see that in view of long-term benefit for the good of the whole tribe, the former would be a greater advantage, as well as being of lesser extremity, not breaking the laws of the Qu’ran and not stirring up a hatred within a fellow tribe.

Another legal custom from the tribes is that of \textit{Al-Aniya}. When a member of the tribe is to be wedded, each male adult member of the tribe must present to the groom an amount of money to help them in their new married life, regardless of whether they are in a stable enough financial state to take on this burden or not. When each of those unmarried men who presented this obligatory financial gift is themselves married, the money is then in turn paid back to help them in their new life. This custom was generally to help new couples in their new beginnings of starting a new home and family, however the financial burden can be great and is beginning to

\textsuperscript{36} BouMalhab, Hutchison & Monahan n 30
\textsuperscript{37} Kennett n 24
become less frequent. Some tribes are beginning to announce in their wedding invitations that they are no longer accepting *Al-Aniya*. This stops the obligatory flow of moneys, meaning they themselves will not have to pay the gift to others.

This idea of capping tribal laws is not unique to Kuwait. The dowry paid by the husband to the wife, also known as *Al-Aniya*, in some countries is now being set at a maximum. South Yemeni family law sets a limit of 100 dinars, whilst the Somali Family Code of 1975 limits the dowry to a token fee of 1000 local shillings. One of Kuwaiti’s esteemed judges talks of how some of the new coded laws are “based on Islamic Law and the customs that pre-existed in Kuwait (tribal law) before the formation of the written law”, for example, “the rules and regulations for the *Al-diyya* (and) *Al-shaffa’a*”. *Al-diyya* is the ruling whereby if a member of the family is murdered; the culprit’s family must pay the victim’s family 10000 KD as a form of compensation. Not so much to make amends for the crime, but to assist with practical matters such as loss of income for the family that otherwise the maid would have earned for the family. In the 1994 case of a Kuwaiti couple that beat their maid to death, the couple offered *diyya* to the family, which was accepted and led to reduced charges for the couple. “Kuwaiti courts are not obliged to accept the payment of *diyya* as are some Islamic-based courts, but the payment often results ... in a reduced sentence.”

In Hart’s book, “The Concepts of Law”, Leslie Green writes in the introduction that simple societies do not have a law system and suggests that they do not need one. It

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39 Judge C, Q9, Chapter 6
40 A. Saleh, ‘*Diyya to be paid to martyrs’ families*, Kuwaiti Times, (14th November 2015), <http://news.kuwaittimes.net/diyya-to-be-paid-to-martyrs-families/>,[accessed 14th November 2015]
42 Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (CUP 2007)
can be argued, and perhaps Green comes to this conclusion later on, that at least in the case of tribal communities in Kuwait, that this is not the case; these tribes do have a legal system; they had rules and laws, they were just not written and were different from what came later. Hart’s simile likening such communities to an ancillary group of a general’s army, works well here, where a general does not interfere with the commands given by his subordinates.

This is perhaps similar to tribal chiefs having sole rule of and the right for arbitration for his own people without interference of a distant Sheik. He knows his people; his people know their tribal laws. However, as tribes begin to move closer to cities and merge with urban populations, this can no longer be workable. They become part of the greater community and must adhere to the laws and rules of that community, for the good of all and to prevent confusion and conflict. The civil code must apply to all. Perhaps also people hold their tribal customs and adjudications because they do not feel fairly represented or incorporated into the mainstream society. Despite government support for tribal commercial projects, and despite constituting a majority of the population, allegedly the tribal people feel that power and influence is not fairly distributed, but remains with the “leading urban merchant families”. This has led to an increase in politicisation of the tribes’ people, particularly amongst the educated young, a larger majority as 70% of Kuwait is below the age of 29, who wish for greater equality and democracy.44

So in conclusion here, tribal law can be so strong a part of the culture, particularly where it is based on Islamic Law also, that they become part of the established written laws. Contrastingly, even where forbidden by Shari’a Law, older tribal laws do prevail through to modern times, although their influence is reducing as time moves forward. However, such occurrences conflict with the law and cause confusion with the people in following the law; do they follow the rules of their family, tribe and society, or do they follow the legal rules of their country. These

44 Ghabra n 32
laws conflict with each other and make the application of the law harder. Whilst the Bedouins of Kuwait, who most commonly follow their tribal origins, were originally nomadic folk, many now have fixed homes in smaller districts outside of Kuwait City, and thus live more urban lives, and as such these kind of conflicts can come more to the fore.45

7.8 Consequences of Lack of Precedent

Common law, in the sense of case law, in its essence is following established precedent, as determined by a hierarchy of courts. However, there will always be cases that legislation does not cover absolutely. The Kuwaiti system of civil law means that judges are bound to apply the code but, in the absence of a direct codified rule, they are allowed the freedom to make judgements based on Islamic principles, custom and their own ethical opinion, using their own experience, judgement and moral guidance, with no legal requirement to follow past precedent. As such, judgements can vary quite radically based on their own views. This is seen as a sensible course of action: certainly Judge C, in his interview in Chapter 6 (and Appendix 2), clarifies that each case is individual and that, despite any surface similarity, there will be circumstances unique to each case: it seems obvious therefore to allow each judge to come to his own judgement, rather than being tied to precedent. This particularly makes sense in a rapidly changing world, where technology, culture and ideas of social norm are constantly evolving from those of the past: it would be short-sighted to remain tied to out-dated ideals.

Furthermore, many of the actual coded rules specifically grant discretion to the judge and this discretion is now unfettered by the strict need to follow previous judgments, thus conferring considerable flexibility. Indeed, Sanhuri thought this to be a vital part of the judge’s role. His belief was a judge should represent the

<www.countriesquest.com/middle_east/kuwait/the_people_of_kuwait.htm>
country and the people because a country’s laws apply to all the people and not be a simple enforcer of written doctrine. With reference to Egypt, he wrote that “jurisdiction is the best manifestation of the needs of the country”. As such, a judge has to be skilled in all aspects, not just be a legal scholar: as early as 1923, in his diaries later published by his daughter, Sanhuri wrote that for a judge to perform his function at the highest level, “he is required not to confine himself to the study of laws and justice, but to add to these the social sciences, economics and finance, and he must study these scientifically”. These must be reflected in his rulings. However, this does not mean that he is allowed to include specifically personal opinions into his judgments, rather he should “adopt a general school acceptable to society as a whole”. In short, Sanhuri did not favour the versions of civil law systems that see judges primarily as scholars to apply the dry bones of the code but as wise men (and later women) with judicial discretion to use the code not on a “frozen basis” or “shackled by a narrow text” but in a flexible manner to “meet changing circumstances and conditions”.

Judge C, however, indicates that there exists at least one disadvantage with having a relatively new, comprehensive written system, in that it can be time-consuming for judges, lawyers and clerks to search to find the appropriate laws. As such, they may effectively have to rely on previous cases, either from other judges (insofar as they are known), and on their own previous decisions. Without a strict hierarchy, however, this can perhaps lead to conflict in judgements of similar cases, or differences in interpretation with respect to disputes. He confirms that each judge may consider different aspects differently. Distinction can be more noticeable

46 Al-Sanhuri, Explanatory Notes to Proposed Egyptian Code, Al-Qanun al Madani, Vol. 1, p 18
47 Nadya al-Sanhuri & Tawfiq al-Shawi (editors), Diary of Abd al-Razzaq al-Sanhuri, entry for 29th September, 1923 (Cairo: Al-Zahra lil-Allam al-Arabi, 1988). Note: Sanhuri kept a diary for over 50 years. Although they were not intended for publication, his daughter has published an abridged version.
48 Explanatory Notes, n 46, vol 2, p.223
49 ibid
50 Encarta, n 45
between those who hail from the coastal regions and those who are from a rural background. People from the capital city and its surrounds are known as “inner” Kuwaitis, with a “more liberal and cosmopolitan atmosphere.” The “outer” Kuwaitis are those more strongly influenced by “conservative Bedouin and tribal influences.”

Kuwait traditionally tends to be patriarchal; there can be a fear of change and a strong pull of tradition and religious beliefs, often at odds with what are held to be more liberal prescripts. Informal oral contracts between parties in Kuwait have almost invariably been between men; however, women are starting to have a much larger role in commercial life. Conservative judges are perhaps more likely to favour the less formal traditional code of oral contracts and to be less willing to interfere in disputes between parties. If a woman is party to such contracts, she can often be at a disadvantage with respect to her male counterparts.

Indeed, women are vulnerable in many respects to judicial interpretation. Women have become more fully involved in all aspects of Kuwaiti commercial life, with Dr. Mohammed Azam of Hazara University’s Department of Political Science, Pakistan, stating they are “in charge of half of the country’s half of the economic activities” with more than two-thirds more females than males majoring at university.

Contract law, as opposed to the system of informal oral agreements, has been seen by some as weakening the body of traditional values, covering those aspects of Kuwaiti life that many still wish to keep constant, whilst change occurs all around them. The reality is that women are dependent on the interpretation of the judges and whether they are of a conservative or more liberal frame of mind in some cases. There is a sense of tensions arising from a clash between long-held informal traditions in relation to trade and the application of a new system of codified contract law. Whilst this may be the case, or at least the feeling of some, it is

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51 ibid
probably important to point out here that there is an annual judicial peer-review system. This is covered by the Law of the Judges, Clause No 3 (1990) and Clause 71, where conflicts, appeals and any disputed judgements are held to account and discussed to try to maintain good alignment and calibration. An annual report is published and presented to the Minister’s Consul at the Ministry of Justice, whilst the judges themselves study these works. Judge D believes that judges do keep in mind the conclusions and discussions that arise from the annual review to try to follow best practice and compliance. Judge A says how whilst judges are free to make their own judgements, the Supreme Court “ensures that all judges are following the constitution and not interfering with the freedoms of its people and the economic stability of the country.” Judge B also feels that whilst free to interpret the judgement, it must be "backed up by interpretation and explanation", concurring they “must fit in with the overall legal goals and principles of the country.”

Even if not binding, precedent and custom do still play a part in the modern legal system in Kuwait. It is a relatively common procedure used by lawyers in court notes; Williamson writes that lawyers will use past rulings to illustrate a point or influence a judge in their favour. As noted before, however, lack of systematic case reporting can be an issue.

Judge B feels that whilst custom has become secondary as a source of law, it is particularly useful in arbitration. All of the judges that spoke to the author spoke of the set procedure to include custom. Whilst these respected figures felt that the current system is well developed, it is of course in constant evolution. There are gaps or conflicts that do occur within the Civil and Commercial codes. These conflicts are highlighted and reported, as with disputed judgements, and where it is felt necessary they undergo a in depth analysis to decide how best, if at all, to amend them, and to ensure that resulting amendments adhere to Islamic principles and do not further conflict with existing laws. In the meantime, judges faced with such

53 Judge E, Chapter 6
54 Williamson n 13, p.43
conflicts follow a set procedure, laid out in Clause 2: Article 1, of reverting to Islamic Law to settle the matter, as long as it fits with the over-riding goal of the law and general opinion of legal society and, where it cannot, judges should look to custom. Judge B describes Kuwait now as having a rich history of judgements to refer to, not least because it can also refer to Egyptian precedent, but also is now itself used as a source of reference for custom and precedence.

7.9 Internal Conflicts and Amendments to the Constitution

From the beginning of its foundation there was conflict and contention on how to construct this new legal system. The question that arises is this, was Al-Sanhuri contracted to compile this legal system because he held doctorate in Islamic Law and in the hope that he would take the present system and create something wholly defined by Shari’a Law? He was described by Judge B as “one of the founders of Islamic Law”, so this is wholly possible and it would seem from the criticism he received that this had certainly been the hope of some. However, examining Al-Sanhuri’s history, this would seem that that would never have been the case, despite some people’s anticipations. Al-Sanhuri’s doctorate thesis of 1929, Jurisprudence of the Caliphate, details his hopes for the creation of an updated, modernised Shari’a, with laws founded to a committee based on both Muslim and non-Muslim members. His continuation then, in the years between 1946-49 developing the Egyptian code attempted to do just this, using conventional Shari’a for Family Law but for the remainder using the principles set out in the Qur’an, which he believed to follow ‘natural law’, alongside French Civil law to found a new, modern system; a system that was Islamic but would work in a modern country that wished to be an international player. It is unlikely that those who conscripted Al-Sanhuri were unaware of his stance, especially in light of the type of system he had developed for Egypt. Was he brought in because of his expert knowledge of Islamic Law? Most certainly, but with the full knowledge that his would not be a purely traditional

55 Judge C, Chapter 6
Shari’a system, but a re-envisioning.\textsuperscript{56}

There is a group of politicians within the Kuwaiti government whose agenda is to change Article two of the state constitution, that which states, as we have seen elsewhere, “The religion of the State is Islam, and Islamic Law shall be a main source of legislation”.\textsuperscript{57} Some translations use ‘Shari’a Law’ instead of ‘Islamic Law’.\textsuperscript{58} These said politicians would have the Constitution amended to read that Islam be the only source of Kuwait’s legislative system, not a main source. For example, in 2012, 31 out of 50 of Kuwait’s MPs proposed this amendment in parliament. This was not sufficient as a majority of two-thirds is required. Reuters quoted the Islamic political and legal expert, Mohammed Al Dallal, as saying “a lot of people request laws that comply with Shari’a...we do not have a stable political system”,\textsuperscript{59} suggesting that he believes this would make Kuwaiti law-making less chaotic. The Emir blocked the proposal. However, this ideal is not completely accepted by all members of society. During one of the interviews conducted in this study, Judge C suggested that this step is just not necessary as agreement with Shari’a is already implied within the law to a practicable level. He said, “Replying to people who say we should adapt. We cannot adapt pure Islamic Law as the people and society it was adapted for were a society and people of that time, however we cannot adopt Islamic Law in full now; now is very different, from people, life and society now, however we can still adopt Islamic principles and use them as guidelines.” In other words, Islamic principles should be used to interpret the laws, however because times and societies change, it just would not be practical to follow Shari’a in a literal sense for


\textsuperscript{58} see Abdullah Al-Salim Al-Sabah, The Constitution of the State of Kuwait, Kuwait, URL <www.kuwaitconstitution.org/kuwaitconstitutionenglish.html>

\textsuperscript{59} Sylvia Westall, ‘Kuwait’s ruler blocks MPs’ Islamic Law proposal’, Reuters, (May 2012), <http://uk.reuters.com/article/2012/05/17/uk-kuwait-sharia-idUKBRE84G0G420120517>, [accessed 18th November 2015]
the modern world. This overall perception is held by all of the Senior judges interviewed for this work, Judge C uses the example of the Civil Act, where “we can see the main source of Law is Islamic Law, they therefore cannot be interpreted in an absolute way, they must be interpreted within the legal environment and context of the times and situation” and states, “Laws by their nature are something that should be continually adapted.”

To explain this in more detail, we can take a look at the work of Abdullahi Ahmed An-Na’im, a Professor in Islamic Family Law. His book, Changing World: A Global Resource Book explains that Shari’a is not a legal system, but a way of life, a guide. Muslim jurisprudence developed it over a period of two hundred years, 700-900 CE, after the death of the Prophet Mohammed. So indeed it has always been a product of human interpretation, but specific to the time in which it was written. Shari’a does have its basis on the Qur’an which is considered to be the Divine word of God, and in the Sunna and hadith, teachings and customs of the Prophet Mohammed, which the Qur’an commands its followers to obey; however, An-Na’im emphasises that it was a ‘way to live’ interpreted from those sources, by leaders of the time in the context of the time in which they lived. There has been much debate over many centuries as to what should be included in Shari’a, as far back as the Ummayyad and Abbasis rules in 8th Century AD, with the Ummayyad rulers opting for a more pragmatic approach compared to the Abbasis who wished to return to a strictly scholarly approach and religious ideal. The Qur’an contains only between 200-500 versus or suras that focus on legal issues, thus of course whilst there will be other aspects of law, such as family law, that can be based on other aspects of the Qur’an’s

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63 Elbayar 61
texts, it makes sense that interpretations from other sources must also be used to form a complete legal system. An-Naim argues for a “normative system that is guided by modern notions of social policy as well as Islamic precepts, but not bound by Sharia”. Each of the judges, interviewed and transcribed in Chapter 6, also highlighted this point.

Additionally, Judge D spoke of the High Committee of Islamic Rules, whose role it is to review laws to ensure that they fit with Islamic Principles. Ballantyne\(^\text{64}\) supports these ideas, recalling the Civil Code's accompanying commentary declares that no custom can offend “public policy or morals”. And with Islam the state religion, it follows that that public morals are set within Islam and that no custom would be allowed if it contravened Islamic edicts. It is stated in the Qur’an:

“Oh ye who believe, mention (remember) God often, praise him both early and late”, \(^\text{65}\) i.e. keep Islam in everything that you do. Judge B also states, “Contract Law is based on Islamic Law in a large part..., which aligns with the customs and traditions of the country. It was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the laws creation.”

Thus, essentially the amendments to Article 2 are redundant, as Islamic Principles are followed, even if the interpretations of Shari’a are not always followed in a literal fashion.

For example, the situation with banking and interest in Kuwait: the civil code forbids interest to be charged on loans to protect borrowers from exploitation, debt and bankruptcy, however the Kuwaiti Commercial Code, a special law, which according to Article 3 can override Civil code rulings, allows for the charging of interest on commercial loans.\(^\text{66}\)

\(^{64}\) William M. Ballantyne, Essays and Addresses on Arab Laws (Curzon, Surrey, UK, 2000), 212
\(^{65}\) ibid
\(^{66}\) ibid
To specify, Article 547 of the Civil Code clearly dictates that:

“loans shall be without interest. Any condition to the contrary shall be void without prejudice to the loan agreement itself”.67

Articles 102 and 115 of the Commercial Code allow that:

"The creditor has the right to interest in a commercial loan unless the contrary is agreed".

It adds that unless specified the legal rate of 7% will be applied.

This would seem to be in line with European laws. In the UK, business-to-business loans, where no set fee is stated, can be charged a statutory interest of 8% over the base rate of the Bank of England (currently 0.5%).68

Whilst consenting to this allowance, Kuwaiti Commercial law insists that,

“interest may not exceed the capital fund, except in cases provided in Law”.69

This seems a sensible move when a quick online search will demonstrate that in the UK laws permit payday loan companies to charge everyday folk APRs of over 1000%.70

This kind of amendment was the first of its kind in the Gulf. At the time of writing of Ballantyne’s initial edition of his book, Essays and Addresses on Arab Laws in 1999, Kuwait was the only Gulf state allowing interest in the commercial arena, although

69 Saeed n 67, 12
70 ‘Money, Compare Payday Loans’, [Dot Zinc Limited 2016], <http://paydayloans.money.co.uk>, [accessed 3rd April 2016]
Ballantyne believed that both Saudi Arabia and the U.A.E were exploring the idea.\(^{71}\)

Although in Saeed’s book on *Islamic Banking and Interest* it quotes the Charter of the Saudi Arabian Monetary Agency as stating: "the Saudi Arabian Monetary Agency shall not pay or receive interest but shall only charge certain fees on services rendered to the public and to the Government in order to cover the Agency’s expenses."\(^{72}\) He later claims that all commercial banks in Saudi Arabia, not including Al-Rajhi, an Islamic bank, "conduct their business on the basis on interest". Moreover, the Saudi Banking Control Law which was passed by Royal Decree M/5 of 22 Safar 1386AH is "totally silent" on the subject of interest.\(^{73}\)

This was also back in 1999 and it would appear that things have moved on. Trade Economics reports that as of April 2015 the benchmark rate of interest of the Saudi Arabian Monetary Agency was 2%.\(^{74}\)

These amendments built within the Commercial code of Kuwait are imperative to allow the country to compete in an international commercial market. Yet they remain strictly regulated by the 1968 and 1977’s Laws 32 and 130, respectively.

Additionally, to these items here discussed, Law 67, passed in 1980, introduced various principles allowing the negation of application of Shari’a Law, and therefore a more secular practice as necessary, as long as the customs and morals of Kuwait were not infringed.\(^{75}\)

It is on the other hand clear that whilst Kuwaiti Commercial Law is founded civil law, Islamic principles are still at its foundation; its inclusion of Sanctity of Contract, duty of good faith and honourably dealing, Huson Alniyah (Articles 193 and 194 of the Civil Code) and lack of presumed liability (Article 746) all show evidence that

\(^{71}\) Ballantyne n 64, 82

\(^{72}\) Saeed n 67

\(^{73}\) ibid

\(^{74}\) "Saudi Arabia Interest Rate" (Copyright ©2016 Trading Economics), <www.tradingeconomics.com/saudi-arabia/interest-rate>, [accessed: 3rd April 2016]

\(^{75}\) Hafeez n 27, 31
Kuwait already follows Islamic Law and principle in its commercial dealings;\textsuperscript{76} although in a practical way such that “honourable dealing be guided by the nature of dealing and current customs.” In fact, such Islamic a principle is implicit, so that where wording in a contract is not clear it is to be taken as an assumption that trading be guided by ‘good faith and honourable dealing’ and be fair to both parties.\textsuperscript{77}

Even with regard to arbitration with foreign parties, Islamic principles are given due consideration. Looking to non-convention awards (arbitration awards for non-signee countries to the 1958 New York Convention), Articles 199 and 200 are followed, which include provisions such as:

- the subject matter must be allowable for arbitration under Kuwaiti law
- the country in question must have good relations with Kuwait allowing reciprocal arbitrations
- the parties entering into arbitration must have been “served with the proper notice and were duly represented”
- “the judgement is final and binding (res judicata)”
- the judgement must not be in opposition to any known Kuwaiti judgement
- the judgement must not “offend the public policy or morals of Kuwait”.\textsuperscript{78}

So even with regard to its foreign policy and relations the ‘morals of Kuwait’ which of course being an Islamic Country, albeit with a civil code, will have an Islamic basis, must be adhered to.

\textbf{7.10 External Pressures to Amend Kuwaiti Law}

Regarding finance and banking law, there have been pressures on various sides to amend the laws, from foreign investors to ease regulations that can fetter and delay

\textsuperscript{76} ibid
\textsuperscript{77} Cotran & Mallat n 20, 19
\textsuperscript{78} ibid, 264
international investment and from internal or neighbouring forces to clean up Islamic banking.

Looking at easing policies that hinder foreign investment, on one side, equality for all is provided for within the Kuwaiti Constitution, this includes foreigners, allowing them the full protection of the law. Kuwait also has treaties with various countries to protect foreign investment within the law. However, difficulties are experienced; the government employs 90% of the workforce, foreign companies are barred from direct involvement in oil and real estate, and it is reported that there are long bureaucratic delays and requirements for sponsorship.

In the past this was even more strongly felt. Pre-1994, when this law was over-ruled by the Human Rights Committee of the Parliament, Law No. 44 of 1993 permitted that where a company was owned jointly by a Kuwait and foreign investor, if the foreign investor was absent from Kuwait for six months consecutively, or if he or she violated the Law of Residence, the Kuwaiti partner could request in a court of law that his or her share in the company be sold to protect the company's interest. This law was in the past abused, and such recent-historical occurrences remains in peoples' minds and do not inspire confidence with foreign investors, where they vulnerable to their partners’ whims.

Also, the commercial culture in Kuwait still follows traditional forms based heavily on tribal or family connections, which can make it difficult for outside investors without inside connections. In 2013, the Emir updated the Commercial Companies Law to facilitate foreign investment and conducting of business in Kuwait and, specifically, to encourage the growth of the Islamic financial markets by allowing SPVs (special purpose vehicle corporations), covering specialised financial instruments such as sukuks (convertible bonds), to be set up. In 2014, a Foreign Direct Investment (FDI) passed, although it is said this is yet to be properly

79 Mansour Al-Saeed, The Legal Protection of Private Foreign Investment in the State of Kuwait (University of Aberdeen 1998)
80 Cotran & Mallat n 20, 266
implemented. Foreign banks are now allowed to open multiple branches in Kuwait, whereas they were previously limited to one. Despite this, the 2015 World Bank survey of Ease of Banking still rates Kuwait at 86th of 189, down from its 82nd ranking of 2013.  

With regard to Islamic banking, firstly it is important to reiterate, Islamic banking is not a state regulation; Law 67, Article 47 states that Shari’a-enforced restrictions do not hold, particularly in commercial law. Indeed, in 1992 a case was brought to the Constitutional Court challenging the commercial code’s allowance of interest, but this was dismissed on the grounds that Shari’a, again particularly in the arena of commerce, is not the sole source of the law. However, Islamic banking has existed in Kuwait since the 1970s. Many have criticised the motivations and methods by which banks offer Islamic financing. Islam, as we have mentioned, forbids the adding of *riba* or interest and also of *gharar* or uncertainty, where only one party can benefit from the other’s loss, such as in insurance. The principle is that all lending of money should include an aspect of mutuality, where both parties benefit are partners, and where parties are not encouraged into excessive risk, which could result in bankruptcy or loan default, where one or both parties lose out. Instead of insurance, Shari’a encourages *takaful*, a “pooled liability”. Here all participants pay regular contributions, which are stored for a time, should the need arise, when an individuals may need to be compensated, an Islamic form of insurance. Instead of interest, bonds are given, where a percentage of assets, such as rent are paid to the lender instead. Mohammed El-Gamal describes it as follows: “*The spirit of Islamic jurisprudence allows the transfer of credit and risk only if bundled within a financial transaction such as sales, leases and partnerships*”. The idea is to “encourage financial

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83 Hafeez n 27
growth and investment, minimizing wild fluctuations that can occur from economic values." Each Islamic bank has an advisory committee of Islamic jurists to oversee decisions and ensure the bank follows Islamic principles.

However, there was concern that rather than start banking systems afresh, following a purely Islamic mode of operation, the banks followed the methods and procedures of conventional banks, which early pioneers predicted would allow established international banks to capture market share and offer their own ‘Islamic banking.’ Indeed, they were correct. The past decade has seen a significant rise in Islamic finance, with growth in double figures, covering the Islamic digital economy, halal meat, Islamic fashion, and consequently a huge rise in Islamic banking, in part due to huge growth in the its core markets, such as the Gulf and Southeast Asia. This has led to a multitude of banks and nations offering Shari’a compliant debt to profit from this increased demand Islamic finance. Due to the added complexity and lack of standardisation banks are able to charge higher transaction fees to customers for Islamic banking. However, El-Gamal believes that in many of these banks are adhering to Shari’a in the “shallowest way,” part of the problem being that banks still have to answer to share-holders whose attitude to risk is different to that of the depositor or account holder and therefore the benefit is unlikely to be in the depositor’s interest. This has partly been shown by the fact

84 Mahmoud El-Gamal, Islamic Finance: Law, Economics, and Practice, (CUP, New York, 2006), 163
86 ibid, 163
89 El-Gamal n 84, 163-165
that over the past year there has been a decline in growth in Islamic areas, which has led many banks to cease investment in Islamic banking and close their Islamic banking branches blaming a lack of vision for long-term growth, concentrating instead on short-term profits and investments.\textsuperscript{90} This throw-away attitude with a low down in growth would not seem to follow the ideal of Islamic banking to devote to social and economic development. Further criticism in Islamic banking suggests that whilst Islamic banks claim to have eradicated riba it is just renamed and incorporated in a different way. Henry and Wilson\textsuperscript{91} give the example of murabaha contracts, where one may have a bank buy a car on your behalf and in return a year later you repay the cost plus a fee. This fee essentially calculates at ten percent of the original cost, so they ask, is it really any different from taking out a loan with ten percent interest, something forbidden in the Qur’an. There is contention between the jurists who set the law and take it perhaps from a practical sense of business and an international banking competitive market and those who argue for a more pure Islamic system where finance and lending would follow a more venture capital approach, where money is lent, and the lender in return receives a share of the capital earned, known as mudaraba. In 2008, the Memri Economic Blog\textsuperscript{92} summarised Dr. Mohammed Ibrahim Al-Rumaithi’s, of University of Arab Emirates, opinion, namely that “there are three types of Islamic banks: those that adhere to the shari’a and are less preoccupied with making profit; those that ignore the shari’a completely, and those that only carry the title ‘Islamic’,” whilst the difficulty, Henry and Wilson say, is “attempting to adapt Islamic instruments originally designed for pre-industrial trade and handicrafts to a post-industrial global economy”. In the same year that Ibrahim Al-Rumaithi spoke out, Sheikh Taqi Usman, a leading mufti and scholar in Islamic finance from the Hanafi School, once holding a position of Supreme Court judge in Pakistan, deemed some Islamic bonds too lenient. The

\textsuperscript{90} Al-Arabiya News, n 87
\textsuperscript{91} Henry & Wilson n 85, 3
following year, the International Islamic Fiqh Academy deemed *tawarruq*, similar to an interest-based loan, forbidden.\textsuperscript{93, 94, 95} The issue seems with some to be the act of being un-Islamic itself, but with others in the deception of claiming to be Islamic. Overall the issue is in striking the balance, that between strictly following Islamic Law, which is part of the constitution, adhering to the Civil and Commercial Law of Kuwait, protecting the people and being practical and competitive in the modern world-wide market.

\textbf{7.11 Conclusion}

The aim of this chapter was to assess the different legal families that have existed throughout modern Kuwait and determine how they and the associated changes have impacted commercial law. Throughout this chapter it has been illustrated how, since the turn of the last century, the Kuwaiti legal system has undergone a multitude of transitions.

It has examined the development of a gradually more sophisticated, complex and encompassing system, as Kuwait as a country itself has grown and developed, from a country of relatively local trade to an international centre of trade and industry. From local respected merchants settling trade conflicts based on traditional widely accepted, but unwritten, commercial codes, to the establishment of various councils, statutes and even a constitution. From tribal laws through a binary legal system of English Common law coupled with the Majalat and Shari’a, to the commissioning of Doctor Abdel Razzak Al-Sanhuri in 1959 to draft an entirely new legal system for Kuwait, based on the Egyptian-French Civil code, with Shari’a governing family law.

\textsuperscript{93} Robin Wigglesworth, ‘Islamic finance: Niche market defies its critics, gaining in depth and sophistication’, \textit{The Financial Times}, (21\textsuperscript{st} September 2011), <http://www.ft.com/cms/s/0/2cb63e42-d3cb-11e0-bc6b-00144feab49a.html#axzz3sR9QCS7i>, [accessed 24\textsuperscript{th} November 2015]

\textsuperscript{94} Habib Ahmed & Nourah Mohammed Aleshaikh, 'Debate on tawarruq: historical discourse and current rulings.', \textit{Arab Law Quarterly}, (2014) 28 3 278

\textsuperscript{95} Hill n 56
So a complete shift from Common Law system, with the concept of precedent, to a mostly written system of laws, into which over time has been inserted a Commercial code; an addendum to specifically cover commercial transactions where different handling may be required. The chapter has also addressed the persistence of oral contracts and tribal laws, examining the influence that this has on modern day commercial cases, whether the changes to the system has had disadvantages, such as the exclusion of precedence and how people have responded to these changes. Principally, looking at how some have kicked back against the Al-Sanhuri system, hoping and pressing for a stronger Islamic influence, whereas others feel that where an Islamic influence exists such as in Islamic banking that it has lacked rigorous regulation to maintain its true intent.

1899 saw Kuwait become a protectorate of Britain, adopting a dual legal system. Non-Muslims fell under the judiciary of the British High Commission and English Common Law, whilst National Jurisdiction followed Shari’a Law for familial matters and the Majalat, based heavily on tribal laws, for all other matters.

Kuwait was a strongly tribal country; during this time, we have seen that traders relied on traditional business customs and oral contracts and agreements based on the Islamic principle of *Huson Alniyah*, or ‘duty of good faith’. When oil was discovered and then when the Second World War ceased and rebuilding was key across Europe, international trade became more significant, thus it was important to have laws that could easily be applicable to this new kind of trade. During this period the judiciary underwent constant adaption and development with many new codes and laws and builds being put in place to cover joint ventures, currency and commercial law. Come 1958, with the approaching newly found independence, Kuwait felt a change was in order; thus the request of Doctor Al-Sanhuri, with his recent success at developing a legal system for his own country of Egypt, to develop a new civil code for Kuwait.

The idea has been examined that his expertise and PhD in Islamic Law allowed Al-Sanhuri the opportunity to construct and establish a system based on Islamic
principles, what he calls 'natural law', rather than Shari’a as it is. It allowed him to follow the arguments developed during his written works that Shari’a is in essence interpretations from hadiths and sunnas, constructed in some cases hundreds of years after their origin, and interpreted to reflect the way of life at the time of their construction, and could be re-interpreted for modern way of life. Therefore, Al-Sanhuri’s system of Civil law fits with Kuwait’s second article of the Constitution, that Islam is one of the sources of law, and in doing so has perhaps freed the country from principles that no longer work functionally in a modern state of international trading. The system allows judges to not be tied by precedent, such as in the obsolete English Common Law system, which is perhaps important in a rapidly changing world, with new ideas and new technology, but instead allows them the freedom to truly judge, within the principals and ideals of Islam, but with the sight of the way the current world functions. Contrarily a lack of precedent does give potential for conflict in how judgments are made, based on the outlook and level of conservatism of the judge, although systems in place such as peer-review should prevent this to a large extent, if peer-respect does not interfere too strongly. Al-Sanhuri’s system also allows for amendments, one example being Law 67: Article 47, permitting a lift of Shari’a-enforced restrictions within Commercial laws, which amongst other things has allowed a lifting of usury in commercial situations; an important step to retain international competitiveness, whilst retaining it within Civil law to protect the layman.

Despite challenges from areas of the government that the law should be more strongly Islamic, it is generally felt that this is a redundant attitude. There exists a panel to review all new laws and statutes to ensure they adhere to Islamic principles. If laws do not currently exist to fit a situation judges follow a set procedure to then look to Islamic Law for a ruling. The civil law system is written with Islamic philosophies at its heart, just not with a strict pursuance of Shari’a, a system derived to fit a world 1400 years ago that did not have many of our modern day challenges, such as international travel, cross-cultural dealings and technology to contend with.
Where Islamic Law is more closely adhered to, such as in the arena of Islamic banking has been seen that there is a potential for exploitation of the principles, or at least those keen to follow them. Strict monitoring is required; each bank has an Islamic committee of jurists to oversee it. Their job being to ensure the institute truly upholds its values, to protect the trusting investor and to ensure it does not concede to compromises or deceit. Whether this is from foreign commercial banks wishing to take advantage of the market conditions, or where banks feel pushed to conform or compete in a competitive market. If compromises are to be made laws should ensure banks and business are held to account or at least act in a transparent way with the compromises clearly explained to the customer.

It’s been examined that the world has changed significantly during the last 116 years of Kuwaiti history; this has had a huge impact on its legal system and the way it conducts business. Kuwait has moved from a largely desert-based country, consisting of tribal families and communities, to a largely urban one. It is a country with strong traditions and culture, including those of how to conduct business. It was a world where, despite tribal variances, everyone understood those traditions; they knew the tribal laws. Trading was relatively local. Tribal laws worked where communities were smaller and everyone knew the rules.

Both oral contracts and tribal laws do still persist today. Some tribal laws have been so enduring to become etched into the civil code; some even persist despite contrasting command of the Qur’an. Oral contracts also worked in this world, as did local law, but the world has changed; tribes are no longer isolated. Their members are well educated and pushing for social and political integration and equal representation in governance. If tribes’ members wish to live as part of the whole, it is important that they abide by the laws of the whole. Of course tradition and culture are important, but a fair and equal society is for all, including its laws.

It is a much larger trading world, with international travel, cross-culture and cross-language commerce. A written code of law, the civil code, is perhaps a safer way to proceed. Everyone knows where he or she stands. With a written contract,
misunderstandings in language or culture are more easily clarified and brokered. As has been seen from the cases presented, it is much harder to prove liability where conflicts arise from an oral contract.

Shari’a still has its place in the Kuwaiti legal system; it covers family law. Precedence is used as a fall-back should a loophole be found in the still relatively new system, and Shari’a cannot fill it. The judiciary seems to be balancing these families well, and as the senior judges interviewed in this thesis have suggested, any legal system should be an organic body, constantly being reviewed and updated to fit in with the world it is being used in. Commerce and the way it is practiced in Kuwait has changed and the legal system has undergone huge changes to adapt with it; most likely it will continue to do so.
Chapter 8 The Influence of Islam on Modern Kuwaiti Contract Law with reference to Two Contractual Principles: Interpretation of Contract and Remedies for Breach of Contract

8.1 Introduction

“[Kuwaiti Contract Law] was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the law’s creation”.

This is the evaluation of Kuwaiti Supreme Court Judge B, interviewed as part of the primary research for this body of work. This chapter provides a focused analysis and critical evaluation of two important contractual principles under Kuwaiti law – interpretation and remedies – through the lens of the first research aim of this work, namely to explore the influence of Islamic traditions, culture and law on the evolution of contract law in Kuwait. These two principles have been chosen as challenging contractual doctrines that provide a good base, both in terms of theory and current practice, for exploring the complex nature of the intertwining influences. Thus, the validity of the Supreme Court Judge’s statement will be analysed from a historical and religious perspective in order to explore the importance of the different legal roots in these two specific areas: contractual interpretation and remedies of breach of contract.

Despite certain overlaps, an important distinction is made throughout between Islam as a religion and Islamic Law (the different schools of Shari’ā). The distinction between Islamic religious influence and Kuwaiti cultural and traditional influence is more difficult as the two are strongly intertwined: as Ballantyne writes: “for the Muslim Arab, his religion is inextricably interwoven with the whole of his existence”.

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1 Judge B, Appendix 2, 303
2 W. M. Ballantyne, Essays and Addresses on Arab Laws (Routledge, London 2000) 277
The separate influence of Kuwait’s history as a tribal trading region is also evident. The respective influence of French Civil Law on these two contractual principles is also analysed in order to draw out the relative importance of Islamic traditions, culture and law.

Using important, very recent, Kuwaiti Supreme Court decisions, academic literature and the primary research conducted with the Supreme Court judges, this section analyses the important distinction between the influence of Islamic historical traditions and culture on the one hand, and that of Islamic Law on the other. In particular, this chapter focuses on: the academic debates regarding the nature of obligation with reference to specific performance under Shari’a; the Islamic principle of balancing the harm; judicial discretion to go beyond the actual contractual terms in light of intention, normal business practice, and the ‘truth’ of the contract; and the overarching concept of good faith in interpretation.

The two contractual principles of interpretation and remedies will be examined separately; each section will be drawn together by an individual conclusion. The chapter will then present a final, cohesive view of the two doctrines as a whole.

8.2 Contractual Interpretation

Many contractual disputes arise from disagreements between parties about how a particular clause should be interpreted. What seems clear at the outset is not always so later on. Interpretation is, by its nature, ‘elusive’. It is for this reason that one of the most important functions performed by a judge in a contract case is to interpret the disputed contractual provision.

The main principles of contractual interpretation in Kuwaiti law are set out in the Kuwaiti Civil Code. This chapter will analyse these principles and their application,

in terms of their historical roots, namely the role of Islam, Kuwaiti culture and traditions, as per the overall aim of this thesis and its first research aim.

This section will argue that the traditional view of contractual interpretation being rooted first and foremost in the actual wording of the contract is too simplistic. Although a literal, dictionary approach is often easier, and it is this that must be followed for unambiguous statements according to the Code, the true meaning of words can only be understood by looking at the context of the words and, indeed, the context of the whole nature of the deal. Customary dealing and business practice are even incorporated, despite having no place in the Code’s Article covering unambiguous clauses, as will be illustrated by two very recent Supreme Court decisions. The scope is therefore a lot wider and shows an evolution towards a more Islamic interpretation of the Code.

Even the secondary interpretive focus on ‘common intent’ is not strictly correct. Rather, all contracts have to be considered in light of good faith and honour and this is an overarching principle of contractual interpretation in Kuwait to which there are no exceptions. Without good faith, the rules relating to ‘clear’ and ‘unclear’ statements have no solid base. Furthermore, although the concept of good faith has solid roots in Islam, both as a religion and a system of law, and overlaps with Kuwait’s historical Majalla-based legal system, this section argues that it is not – as many believe – a principle imported directly from Islam, but is far wider in its origins and scope.

8.2.1 Clarity of Statement

8.2.1.1 Traditional Reliance on the ‘Clear Statement’

The traditional understanding of the basic interpretational rule in Kuwaiti law is that the terms of the contract are binding as agreed. As such, the judge must first

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4 Kuwaiti Civil Code 1980, Article 193(1)
5 The Majalla is the body of Islamic legal rules of the Ottoman Empire from the late 19th/early 20th centuries, see n 20 and n 44
look to the clause in question. The judge is limited by the boundaries of the actual wording. This can be seen in both the Civil Code and the Majalla, as well as being in Shari’a Law, showing the combined influence of civil and religious law.

Professor Ibrahim Abo Al Lail analyses the overall approach to general interpretation, saying that ‘inner’ and ‘outer’ methods are used. ‘Inner’ means both what is actually said in the clause or what the contract refers to, and what is understood from the clause or the clause’s ‘soul’. ‘Outer’ covers the will or purpose or wisdom of the relevant legal system, its preparatory drafts and its historical source. This applies to both contractual and statutory interpretation. Indeed, these are not two completely distinct areas: as Mitchell writes, “disputes about the general concept of interpretation account for many of the controversies surrounding contractual interpretation, although this may not always be recognised.”

This essence of the ‘inner’ part of contractual interpretation is seen in the Kuwaiti Civil Code Article 193(1), whereby if the statement of the contract is clear, the judge should respect it, as agreed, as per the actual written terms. In principle, therefore, there is no place for interpretation and any proof of intention that contradicts the actual wording is expressly forbidden. Rather, the words prove the intent. This was confirmed by the Kuwaiti Supreme Court in 1988, in Appeal 74, 1995, and the decision of the Supreme Court in 1996. It can also be seen in a 2016 Supreme

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6 Abo Al Lail, The Theory of Law (Kuwait University Press 2006) 395 (in Arabic)
7 ibid
8 Mitchell, n 3
9 Kuwaiti Civil Code 1980, Article 193(1): If the wording of a contract is clear it is not permissible to deviate therefrom by interpreting it to ascertain the intent of the parties.
10 Supreme Court of Kuwait, 2 Magazine of Judges and Law (Ministry of Justice, Kuwait, 30 May 1988) 113 (in Arabic) cited in Abo Al Lail n 6, 397 (in Arabic)
12 Supreme Court of Kuwait, 5/5/97, Case No. 308/96, Commercial Court, (1996), 25(1) Magazine of Judges and Law (Ministry of Justice, Kuwait) 306 (in Arabic)
Court decision where it was held that it is the words themselves that are binding:13 Nakaas and Abdul Riddah sum this up by stating that it is ‘common sense’: judges must respect the actual contract.14

It is only ‘common sense’ however in that the direct opposite makes no sense: if judges were to assume a contract meant something fundamentally different from that which was clearly agreed, they would open themselves up to ridicule. From a commercial point of view, there is also an obvious attraction to the clear wording being binding with no further questions asked. All binding agreements should be clear and reflect what was concluded by the parties. Business could not operate otherwise. This will apply as much to contracts in historical times when Kuwait was a tribal, trading region as to modern international commercial contracts.

It is also compatible with the rule of law. A legal system must be trusted in order to be effective: if clear agreements could be overturned too easily, people would have no faith in the system to honour their contracts and there would be a collapse in respect for the law. Again, there is no distinction between traditional tribal ‘law’ and sophisticated 21st century legal systems.

Accordingly, although the civil and religious influences are clear, there is also a clear vein of practical and commercial necessity which ties in with Kuwait’s history as a trading region. These influences are not completely separate, however, it is clear that religion and tradition are intertwined, as Judge B stated: “Contract Law is based largely on Islamic Law, which aligns with the customs and traditions of the country”.15

Even if one gives overall priority to the actual wording, this is not the same as saying that the clear wording must ‘win’, irrespective of all the other considerations

13 Supreme Court of Kuwait, 16/11/16, Case No. 685/16, Commercial Court 1
14 Jamal al Nakaas & Abdul Rasool Abdul Riddah, Al Wajees (The Summary), (School of Law Kuwait University, Kuwait), 141 (in Arabic)
15 Judge B, Appendix 3, Question 2
and circumstances. Although the intent of the parties is excluded in Article 193(1)\textsuperscript{16}, Nakaas and Abdul Riddah add that the initial basis is that the judge must respect not only the actual contract but also the ‘will of the parties’: the difference is subtle and takes it one step further as the will might not be obvious in the wording, even if the strict wording is supposedly clear.

In current practice, courts often prefer to respect the literal wording of the contract, erring on the side of caution. This is especially so for the lower courts. This can be seen in Commercial Court Case No. 308/96 where the contractual term ‘revocation’ had to be interpreted.\textsuperscript{17} When the supermarket failed to re-new the head lease of the supermarket complex, one store in the complex claimed compensation. The court found in favour of the supermarket, refusing to consider the will of the parties or the original intent, holding that the term ‘revocation’ clearly does not cover non-renewal. A slightly more complicated problem can be seen in the contractual use of the word ‘investor’. In another supermarket case, the owners leased one unit to a printing company. The lease contained a non-compete clause for other ‘investors’.\textsuperscript{18} However, the supermarket itself set up a printing section in their main store. When the printing store claimed breach of the non-compete clause, the court again found in favour of the supermarket as, in terms of normal language, ‘investor’ could not include ‘owner’. The understanding of the parties at the time was not relevant. This narrow approach can also be seen in the Supreme Court in 2016, where the Court held that, if the words are clear, this alone gives the ‘truth’ of the contract and nothing more is needed.\textsuperscript{19}

However, despite the case above, the Supreme Court is becoming increasingly bold and willing to look beyond the actual words. As analysed below, this incorporates a more Islamic approach and ties in with an evolution towards the increased

\textsuperscript{16} Kuwaiti Civil Code 1980, Article 193(1)
\textsuperscript{17} Supreme Court of Kuwait, 5/5/97, Case No. 308/96, Commercial Court, see n 12
\textsuperscript{18} Kuwaiti Commercial Court of Appeal, 14/6/99, Case No. 546/98
\textsuperscript{19} Supreme Court of Kuwait, 16/11/16, Case No. 685/16, Commercial Court 1
importance of the traditional Majalla's overarching Maxim that intention is the central focus. In an important recent case, the Supreme Court held that the courts have the authority to search for the common intent of the two parties, in light of custom, trust, honesty and good faith, even if this conflicts with the actual wording of the contract. In this case, despite a clear clause in a bilateral contract stating that payment was not due until payment had been received from a third party, the Court held that the defendant was obliged to pay because it is customary dealing and normal business practice that anyone who does a job should be paid for it. This basic norm is also seen elsewhere in the Code, and is part of standard trading.

Furthermore, the Supreme Court said that a judge is not bound completely by what is written because although Article 193(1) states that you cannot go against the clear words of the contract, the Explanatory Memorandum to the Civil Code states that when it says ‘clear’, this means that the ‘intention’ is clear, not the words themselves. This is not an undisputed reading of the text. It is true that the Explanatory Memorandum states that if a clause is clearly worded, this does not necessarily mean that interpretation is not needed. However, the Explanatory Memorandum does not specifically distinguish between Articles 193(1) (the rule for clear statements where the actual wording has to be respected) and 193(2) (the rule for unclear statements where intention is included). Therefore, in using the Explanatory Memorandum’s comment to cover all clauses, the Supreme Court

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21 Supreme Court of Kuwait, 13/04/16, Case no. 275/14, Commercial Court 1
22 Kuwaiti Civil Code 1980, Article 676: payment is due when the work is delivered unless agreement or custom states otherwise. Article 678: if the price is not stated in the contract, the party should be paid a ‘similar’ price to that of the time when the contract was signed
23 Kuwaiti Civil Code 1980, Article 193(1)
24 ibid
25 Kuwaiti Civil Code 1980, Article 193(2)
Judge in the aforementioned case is giving the Explanatory Memorandum a broad scope, moving away from literal definitions, and allowing judges more flexibility and placing far greater emphasis on the parties’ intentions.

This Supreme Court judgement ties in with the Islamic emphasis that actions should be judged by their intention. A strong hadith\textsuperscript{26} is shown when the Prophet says: “The value of an action depends on the intention behind it”.\textsuperscript{27} In the Judge’s opinion, the parties in the case must have intended to pay, and be paid, for work done, because no normal business partners could have intended otherwise. As such, wide discretion is given, in accordance with Supreme Court Judge C’s interview in Appendix 2, 305, when he states that judges should “not be limited to the written words of the clause”.

Equally, the even more recent Supreme Court case confirmed this and went one step further.\textsuperscript{28} A firm of lawyers had a contract with their clients containing a contingency fee win-share percentage clause, giving the lawyers 12\% of any eventual compensation award the client received from the court. Due to the governmental nature of the work, the claim ended up being settled by a separate insurance company. Despite the contract referring only to an award in court, the judges held that the lawyers were still entitled to the contingency fee, on the basis that the electricity company received the insurance settlement as a direct result of the lawyer’s legal claim (the claim having been filed before the settlement). The Supreme Court said that the Court has both “general and Supreme Court authority to understand the consequences of each case”. Furthermore, the Court has “general authority to interpret contracts and to extract what the Court thinks is the intention of the parties without following the certain words”. The role of the judge is to find the ‘truth’ of the contract, and can take the ‘full’ meaning of the sentences until it finds

\textsuperscript{26} Hadiths are sayings from the Prophet which provide guidance for Muslims, as a complementary source to the Qur’an

\textsuperscript{27} Hadith, Sahih Muslim, Kitab Al-Imara

\textsuperscript{28} Supreme Court of Kuwait, 14/06/17, Case Nos. 586 & 633, Commercial Court 1
“the truth it is aiming for and the initial intention of the two contractual parties at the time of the contract, within the nature of dealing, good faith and custom”.  

Significantly, the Supreme Court specifically stated that judges should not stop at the “actual sharp wording”.

This seems clear cut. Despite the instruction of Article 193(1) and the obligation to stay within the actual wording, the Kuwaiti Supreme Court seems increasingly willing to look beyond in a quest to identify both the will of the parties and what the parties must have willed, in light of normal practice. Under the Code, this is only allowed for ambiguous clauses (Article 193(2)), but this does not seem to be hindering the court. This evolution from the narrower approach of previous courts is quite marked and, as analysed below, shows an increasingly Islamic bent towards the importance both of intention, and of good faith, honour and customary dealing, as these represent the ‘truth’ of the contract.

The fine line here is to interpret the words both in a dictionary sense and in light of the will of the parties – did the parties ‘will’ the words to mean what the judge thinks they mean? One judge may see something as clear when another does not. In a system that is not based on precedent, each judge is allowed to make their own judgment based on their own interpretation of the law. Clarity is not an absolute but is subjective. Trying to read the words in light of what the parties meant is not the same as trying to work out what the parties intended despite the words. It is not always clear if something is clear or not.

8.2.1.2 When the ‘Clear Statement’ Lacks Clarity

As such, even a clear statement case is not necessarily black and white. How ‘clear’ does it have to be for the clause to be taken as given, purely on face value? As stated above, the definition of a ‘clear’ statement can refer not only to the words themselves but the meaning of the clause in light of other clauses. Even a seemingly clear, ‘healthy’ clause can lead to several different meanings. Abo Al Lail explains

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29 ibid
that there are three ways to interpret this clause: by Dalalat al ebara (actual wording); by Dalalat al eshara (what is referred to); or by Dalalat al mafhoom (what one understands by it). The ‘actual wording’ method of interpretation, previously more favoured by the Supreme Court, fits well with the initial reading of Article 193(1). Including what is referred to by the words also seems linguistically sensible. However, interpreting a clear statement in light of what is ‘generally understood’ opens the gates to a rather subjective and overly broad approach. It is for this reason that Abo Al Lail presents the traditionally correct view when he writes that judicial discretion to use a broad interpretation should be used ‘very narrowly’.

Nakaas and Abdul Riddahs’ view is slightly different. They write that whether a statement is clear, or not, is not sufficient to determine whether interpretation is required. This seems to contradict Article 193(1). However, their argument is that interpretation may still be required, as even though the actual statement may be clear on its own, it may not be clear in the context of the contract as a whole. Different sentences of the contract can explain or contradict each other. Thus, to make sense of the clause, all has to be read at the same time, and as a whole. This would also seem obvious on a practical basis as words do not stand alone. This also ties in with the two important Supreme Court decisions above, where even clear statements need to be read in light of commercial norms and the true intention of the parties.

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30 Abo Al Lail n 6, 397
31 Supreme Court of Kuwait, 21/11/83, confirmed that words must not be twisted to mean something different from their obvious meaning without any reason, cited in Kuwaiti Supreme Court, 21/11/83, cited in Abo Al Lail n 6 398
32 Abo Al Lail n 6, 398
33 Nakaas & Abdul Riddah n 14, 141
34 Supreme Court of Kuwait, 13/04/16, Case no. 275/14, Commercial Court 1; Supreme Court of Kuwait, 14/06/17, Case Nos. 586/16 & 633/16, Commercial Court 1
Sometimes, indeed, two clear sentences can contradict each other. The example given is where the price on one page is stated as $100, but $80 on another page: each clause is clear, but the contract, taken as a whole, is not. In this situation, the rules for ‘unclear statement’ need to be applied (see below). Therefore, despite Article 193, it can be seen that it is the contract overall that needs to be clear, not the exact wording of one clause in isolation.

This can be seen further in the new amended Kuwaiti Code 1996 which extended the Islamic influence, as described below. The old Civil Code allowed contracts to be agreed, subject to the price being determined by a third party, for instance. This was a valid contract. The new Article 459 requires that a contract must be one hundred percent clear before the contract is valid: as such, a conditional contract is not binding, indeed it is not even a contract. This is to avoid the Islamic principle of gharar and uncertainty. As such, the amended Code has a broader emphasis on clarity, to conform more with Shari’a. This seems not entirely consistent with the Islamic religious emphasis on the intention and reinforces the distinction between Islam as a law and a religion.

The ‘clear statement’ rules therefore need to be viewed in terms of linguistic arguments of how words can be understood without reference to other words. A word does not have a scientific, empirical meaning – words do not exist in a vacuum. Rather, a word only makes sense in the context of the person saying it and the person who is understanding it. Professor Corbin writes that “language at its best is always a defective and uncertain instrument”; words are not self-defining, the meaning of clauses in a contract consists of “the ideas that they induce in the mind of some individual person”, and this will vary between people. This broader

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36 Kuwaiti Civil Code 1980, Amendment 1996, Article 459
37 Gharar means speculation or uncertainty and is expressly forbidden by Shari’a Law
38 Arthur Linton Corbin, Corbin on Contracts (West Publishing Co, St Paul, 1960) 474
approach to ‘plain’ or literal meaning fits well with the Islamic understanding, as shown below.

Moreover, a term can have a dictionary meaning, yet between the parties it may be used colloquially to have a different connotation or even a completely different meaning; therefore, knowledge of the background and the parties’ understanding would be necessary for a correct interpretation. An illustration of this is given by Jan Smit where a person is selling her motorbike, which she always refers to as her ‘little trike’. The entire family know of her pet name for her motorcycle: however, if she were to draw up a contract selling her ‘little trike’ to a family member, the literal interpretation as read by a judge would be that she was selling a child’s tricycle. Yet, between the parties, the term is understood to mean something different, thus a motorbike would be expected to exchange hands.

This is the issue at the heart of the debate here. Article 193(1) only makes sense if we all agree what it meant by ‘clear’. The Supreme Court’s recent interpretation of ‘clear’ was that it is the intention that must be clear, not the words, and that this extends to incorporating ‘clear’ business practice. Abo Al Lail’s explanation of ‘inner’ interpretation is also broader than the strictly ‘clear statement’ idea in contractual interpretation seen in Article 193(1), encompassing not only the actual words but what is referred to and understood by those words. This seems correct and especially relevant in a civil context where, unlike many large commercial contracts drawn up by lawyers, agreements will be concluded between regular members of the public and there will be significant room for misunderstanding. As such, it is true when Abo Al Lail writes that by ‘actual wording’, we do not necessarily mean the dictionary meaning but what people in general understand by

39 Jan M. Smits, Contract Law; A Comparative Introduction (2nd Edn., Edward Elgar, Cheltenham UK 2017) 127
40 Supreme Court of Kuwait, 13/04/16, Case no. 275/14, Commercial Court 1
the words, and the clause: if the words have a ‘sensible’ meaning, we stop there, there is nothing else to do. However, this might be saying the same thing: after all, how do we ever understand actual words if not by reference to other words, and ideas, and understandings?

As such, the general belief, based on a normal reading of the Code, that an unambiguous clause does not need interpretation and – furthermore – is not allowed to be interpreted, is not correct. A judge will, by necessity, have to ‘interpret’ the wording to decide if it is clear or not. And this can only be done within the context of the contract itself, in its broader setting, because that is the context of the words.

8.2.1.3 The Importance of Clarity in Islam

Islam, like all major religions, is rooted in broad, sweeping, general principles: love; justice; faith; peace; spirituality; charity. These principles have little direct relevance to contract law. However, in looking at Kuwait’s Civil Law premise of interpretation being based on the literal wording, Islamic Law follows the same principle and Shari’a influence can clearly be felt in the Code. The need to avoid all gharar, uncertainty and speculation, is an essential part of Shari’a Law.

Despite this emphasis in Shari’a Law, the broader scope of ‘clarity’, incorporating the other factors detailed above, can be seen in the Maxims of the Majalla, the Islamic legal rules used in the Ottoman Empire in the late 19th/early 20th centuries and used by Kuwait for the law of contract before the country’s independence in 1961, and for family matters up until 1980. This was comparatively recent; indeed Nyrop points out that in 1976 only two countries (Jordan and Kuwait) were still

41 This is similar to Lord Hoffman’s statement in Investors Compensation Scheme Ltd. v West Bromwich Building Society (1998) 1 WLR 896, 912 regarding the ‘reasonable person’, given in full at footnote 68, and discussed in more detail below

42 Kuwait used the Majalla for civil and family matters up until 1980 when the Civil Code was first implemented. Contract law was covered by the Majalla until 1961 but incorporated into Book 2 of the Commercial Code by Al-Sanhri in 1961 when the country became independent
using the Majalla for their country’s Civil law. As such, the Majalla played a significant role in the development of Kuwaiti law and the thinking of Kuwaiti judges; many of the senior judges having been educated and trained during the period that it was in use.

It is important to remember that, unlike Kuwait, Egypt never used the Majalla. Despite this, Sanhuri’s based Kuwait’s Commercial Code on the Majalla as Sanhuri believed in making a country’s new legal system coherent with the existing one. This has many advantages in terms of stability and continuity. The Kuwaiti legal understanding, and the Kuwaiti Code, are in many ways far more similar to that of Iraq than to that of Egypt, precisely because of the common root of the Majalla for both Iraq and Kuwait, but not Egypt. It is interesting, although outside the scope of this research, to consider that the Iraqi Code is very seldom credited with having any relevance to Kuwait, the traditional view being that Egypt was the main Islamic source of Kuwaiti law. Political considerations are almost certainly the main reason: the attempt by Abdul Karim Qasim to annex Kuwait in 1961, and the 1990 invasion by Saddam Hussein, form part of a consistent threat by Iraq to Kuwait’s sovereignty.

The Majalla sets out the Maxims of Islamic Jurisprudence, and has been described as “Islamic in content but European in form”. At least 16 of the 100 maxims can be


44 The ‘Maxims of Islamic Jurisprudence’ have been collated and developed over centuries by scholars and fiqhā (experts in Islamic jurisprudence). Many originate with the companions of the Prophet and thus pre-date Islamic jurisprudence as such; many are based on Qur’an, hadith and Sunna. There are 5 maxims accepted by all schools of Islam: Matters are (judged) by their intents; certainty is not to be overruled by doubt; Hardship begets facility; No harming and no counter-harming; and Custom is authoratative. Each school of Islam has accepted a differing number of the other maxims. The Majalla al-Ahkam describes their purpose as “reliable and agreed upon rules” which assist fiqhā to set laws and derive decisions. It states, “in order to be familiar with injunctions of Islamic jurisprudence together with their background, their study is indispensable.” None is of greater import than the other; the appropriate maxim should be selected as per the situation, see: Hafiz Abdul Ghani, ‘A Study of the History of Legal Maxims of Islamic Law’, (2012) 1(2) International Journal of Arts and Commerce, 90; Muhammad Shettima et al, ‘The Relevance
considered to be directly relevant to contract law. It is worth noting that the Majalla was based purely on the Hanafi Islamic school, which is only one school of Islam. This is not the same as the influential Hanbali school used in Saudi Arabia, for instance. As previously stated, there is no single set of Shari’a Laws, and there are key differences between certain schools, making it more difficult to discern the influence of Islamic Law in general. However, as the Majalla was adopted voluntarily in Kuwait, without being forced by the Ottoman empire, it was a popular legal system and the most significant in terms of Islamic influence in the drafting of the Kuwait’s codes. The Majalla, therefore, may be the original root for this broader interpretation of being bound by the actual words.

The Majalla, however, has a seeming contradiction in its tenets. As explored below, the emphasis on unambiguous statements needing no interpretation can be seen in Maxims 13 and 14. The need for the whole contract to be seen in terms of intention and truth is shown in Maxims 2 and 3. These two different threads, however, can be drawn together if examined in more detail. This work proposes that it is the broader scope of interpretation that takes priority.

of Islamic Legal Maxims in determining some Contemporary Legal Issues’, (2016) 24 (2) IIUM Law Journal, 415, 431


47 It should be noted that, for religious purposes, Kuwait now follows the Maliki school
Maxim 13 of the Majalla declares that “if the ‘actual’ is clear, any interpretation shall be ignored”. Maxim 14 lays down its instruction on ‘Clear Statement’, namely “where the text is clear, there is no room for interpretation”. This is a direct instruction to Islamic judges and very similar to Article 193 of the Kuwaiti Civil Code. Professor Abo Al Lail writes that the Islamic understanding of Maxim 14 is that ‘no effort is needed’, the thing speaks for itself. This also ties in with the fundamental Islamic maxim, revered by all schools of Islam not only the Hanafi, that “Certainty is not to be overruled by doubt”.

As Iraq also used the old Ottoman Empire’s Majalla, Iraqi academic scholars have a deep understanding of its history and workings. Dr. Abdul Karim Zedan, head of the School of Law at Baghdad University, goes one step further in his understanding of Maxim 14. He accepts that, as above, interpretation is unnecessary when the clause’s meaning is clear. However he adds that, furthermore, it is expressly forbidden. Maxim 14 is, therefore, a direction to the judge.

Clarity is an attractive quality in all law and must be protected as a priority. In Shari’a Law, Zedan claims that interpretation is only necessary if a clause has more than one meaning. Phrases must be seen in their absolute sense, not their implied sense, i.e. on a simplistic level, ‘don’t go out’ does not mean the same as ‘stay in’ – one could lead to the other but the contract statement must be seen in light of what it actually says (‘don’t go out) rather than the opposite way or what might be implied (‘stay in’).

48 Pasha n 20
49 Abo Al Lail n 6, 397
50 Maxims of Islamic Jurisprudence, Al-Majalla Al Ahkam Al Adaliyyah, Pasha n 20
52 One example is the word ‘period’ in the Qur’an, which is unclear: this needs to be interpreted and is so in different ways by different schools within Islam.
53 Zedan n 51
Significantly, Kuwait’s 1961 Code incorporated the exact wording of the more broad Maxim 3 of the Majalla and, indirectly, Maxim 2. Under Maxim 2, it is a general rule that intention lies at the heart of the matter in question. More specifically to contract law, Maxim 3 stipulates that in contracts, the intention of the parties is key, as opposed to the specific words used. By codifying verbatim this emphasis on intention over the wording of the contractual clause, judges until 1980 were under clear instruction to prioritise the parties’ intention. This must have influenced those judges who are now in the Supreme Court.

The different emphases of Maxims 2 and 3 from 13 and 14 could be seen as contradictory. In the first two, intention is prioritised above all else. In the latter, the literal wording is more important. However, unlike Maxim 3, Maxim 14 does not refer to contracts specifically. Maxim 14 is broad in its terms, potentially covering both legal clauses and contractual clauses. Looking at Maxim 14 as more statutory based, it is perhaps not surprising that a judge must respect the words of lawmakers more than those of contractual parties. As such, Maxim 3 with its direct reference to contracts is more overarching in terms of contract law. And it is this Maxim, and its emphasis on intention over words, that can be seen in the recent spate of Supreme Court decisions detailed below.

Moreover, there is also slight confusion in the normal reading of Maxim 13. Zedan explains Maxim 13 as the ‘meaning’ (al dalala) is not counted if there is ‘actual’ (al tasarih). The meaning is what comes from the situation and relies on other factors: the actual is just the words by themselves. The standard English translation, however, uses the term ‘obvious facts’, which seems to be moving away from the words themselves. This is not a correct translation but it is true that, again, the words are not always restricted to their pure meaning. Rather, in Islam, the words themselves are understood in terms of the surrounding facts: in Islamic Law, if you kill a sheep that belongs to someone else, that is forbidden. But if you killed it

54 Kuwaiti Commercial Code 1961, Book 2, Article 154
55 Pasha n 20
because it is sick and it will infect others, the farmer loses nothing because it cannot be eaten (Shari’ā rules) and so the permission is implied from the situation, even if no actual words gave permission. Zedan points out that unless there is a direct conflict with the words (the farmer told you not to) the overall meaning will win.\textsuperscript{56}

The Maxims are not in order of precedence – no maxim is more important than another. Rather it works from the general rule to the more specific. In talking about ‘clear statements’ where interpretation is not needed, the Majalla here shows a broader scope, in line with the argument earlier in this chapter that words do not stand alone because they cannot.

It is important to note that Sanhuri’s 1961 Kuwaiti Code directly included Maxim 13’s caveat that there is no need to spend time on interpretation if the words seem to be clear in themselves.\textsuperscript{57} Maxim 14 did not become part of the 1961 Code but as this was primarily an instruction to the judges, complementing Maxim 13, this was probably unnecessary. However, the 1961 Code also explicitly included Maxim 3 and the overriding importance of intention for contract law, see Article 154.\textsuperscript{58} Equally, Maxim 12 is also incorporated in the same Article, stating that the “starting point of the talk is the truth”.\textsuperscript{59} It is this word for word copy of the Majalla, using a broad scope of interpretation, that sets the tone in terms of Kuwait’s contract law doctrines.

The Civil Code of 1980 was not a direct mirror of the 1961 Code. This is partly because it adopted more modern Arabic, using for the first time the words ‘will’, ‘clarity’ and ‘interpretation’. More importantly, Article 193\textsuperscript{60} stresses clear wording

\textsuperscript{56} Zedan n 51
\textsuperscript{57} Kuwaiti Commercial Code 1961, Article 155
\textsuperscript{58} Kuwaiti Commercial Code 1961 Book 2, Article 154: What we take into consideration in the contract is the intentions and the meanings, not the actual wording. The original in the talk is the truth. If we cannot find the truth, we must imply the truth. The truth can be found from custom (adhaar).
\textsuperscript{59} Pasha n 20
\textsuperscript{60} Kuwaiti Civil Code 1980, Article 193
first, leaving the intention only to be used if cases on uncertainty. This perhaps shows a more Shari’a-based approach, veering away from all uncertainty, but it is not in line with the Hanafi school of Islam and the overriding importance of intention. The Supreme Court judges, though, have seen no problem recently in using this broader lens to view Article 193, with even the Explanatory Memorandum of the 1980 Code being interpreted to imply the word ‘intention’ into ‘clear words’.61

Accordingly, although clarity is essential in Islamic contract law (and ‘uncertainty’ is forbidden), this work’s broader reading of Article 193(1) and the need for the judge to focus on more than the actual wording, has direct roots in the Majalla: indeed, it may well be the reason, even subconsciously, for even the secular academic scholars’ acknowledgment that the actual words cannot stand alone, despite what Article 193(1) would seem to imply.

8.2.1.4 ‘Unclear Statement’

Most litigation that centres on contractual interpretation however, does not concern unambiguous clauses – there is generally no need. Rather, the law has to address what rules should be applied if the clause is not clear. Again, Kuwaiti law can be seen to incorporate not only its French Civil Law roots but also a strong influence from Islam in the importance of the parties’ intentions.

Article 193(2) acknowledges that wordings of contracts may not always be completely clear, however broad a brush we use to paint the idea of ‘wording’ and ‘clear’.62 Contracts with ‘unclear statements’ need interpretation. In Kuwaiti civil law, the codified rule is that if - and only if - there is a need to interpret the contractual clause, the judge has to look at the common intent of the parties.

61 Supreme Court of Kuwait, 13/04/16, Case no. 275/14, Commercial Court 1
62 Kuwaiti Civil Code 1980, Article 193(2): Where, however, there is room for interpretation of the contract, the common intent of the contracting parties must be ascertained from the totality of its tenor and the circumstances of its execution without considering the literal meanings of its words or phrases, and be guided by the nature of dealing and current customs and the good faith and honourable dealing which must be satisfied by the parties.
The concept of common intent for ambiguous clauses goes beyond what can be deduced from the actual wording of the contract: indeed, the law specifically says not to be tied to the literal meaning. Rather, the important part of 193(2) here is that, in terms of the contract, due respect must be given to the ‘totality of its tenor and the circumstances of its execution’. Al-Sanhuri refers to this as the ‘reality’ of the contract. The concept is therefore very far-reaching, and deliberately so.

The Kuwaiti Court of Appeal confirmed the importance of this clause, and its logical implication, stating that the court should look for “the common intent of the parties at the time and try to reach the truth”. The 2017 Supreme Court case also made specific mention of the need for the court to discern the ‘truth’ of the contract, however clear the actual terms may be. The ‘truth’ of a contract is obviously very subjective in its interpretation and gives wide scope of discretion to judges.

This can be seen in the breadth of sources that are available to the judge: Article 193(2) specifically says that, in order to do this, guidance must be taken from the nature of normal dealing between the two parties, common customary dealing, and the requirements of good faith and honorary dealing. This overriding importance of the principle of good faith in contractual interpretation, for all contracts, not just those that are ambiguous, is discussed below.

8.2.1.5 A Subjective or Objective Standard?

In reviewing whether an objective or subjective approach should be used, a marked distinction can be seen here between the Common Law and Civil Law approach. Kuwaiti law shows a clear French basis but also reflects the importance of custom in Islam and Kuwaiti tradition.

63 ibid
65 Kuwaiti Commercial Court of Appeal, 16/02/09, Commercial 11
66 Supreme Court of Kuwait, 14/06/17, Case Nos. 586/16 & 633/16, Commercial Court 1
An unclear or ambiguous sentence or clause or term needs interpretation. In theory, this can be done on an objective basis or a subjective basis. Should the judge look at what a reasonable man would take the term to be? Or should he or she try to ascertain what the parties meant by the term?

The initial premise in Kuwait is that interpretation should be on a subjective basis: when looking beyond the written words, judges in Kuwait must look for the ‘common intent’ of the parties to the contract. There is no mention of the ‘reasonable person’, it is only the parties themselves who matter. This ties in strongly with the premise of the primary remedy under Kuwaiti law being specific performance in the later section on Contractual Remedies: the intrinsic nature of an agreement is that it is a meeting of two minds and therefore it is that agreement between those two minds that has to be enforced. In interpreting ambiguous clauses the essential aim therefore is to ascertain what the ‘minds’ of the parties intended when they came together. It is irrelevant what the ‘reasonable man’ might have thought as he was not a party to this meeting of the minds.

The influence of French law is highly relevant here. Articles 1189-1192 of the French Civil Code provide Maxims of Interpretation, whereby courts have also traditionally interpreted an ambiguous contractual provision in light of the specific subjective intention of the parties. Again, their interest is not to use an objective lens on the actual words of the contract because that does not reflect the true agreement of the actual parties.

As such, in general, there is no room under Article 193(2) for the Anglo-American idea (brought by Lord Hoffman) of needing to interpret any ambiguous contractual provision as a “reasonable person” might understand them, were they in the circumstances of the parties in question. It should be noted that Lord Hoffman’s

67 Smits n 39, 130

68 ibid, 124. Smits refers to the case of Investors Compensation Scheme Ltd v West Bromwich Building Society (1998), in which Lord Hoffman ruled that Interpretation is “the ascertainment of the meaning which the document would convey to a reasonable person
approach is not universally accepted or without criticism. According to Sir Christopher Staughton,\textsuperscript{69} moving away from the words and using a ‘matrix of fact’ to interpret what was actually meant by the contract paves the way for uncertainty and allows lawyers to submit evidence that is of not necessarily relevant.\textsuperscript{70} It is for this reason that the English Supreme Court has seemingly ‘gradually moved away’ from Lord Hoffman’s approach,\textsuperscript{71} reaffirming the importance of the natural, ordinary meaning of the contract’s words.\textsuperscript{72} However, the recent English Supreme Court case of Wood v Capita Insurance Services re-opened the debate, with Lord Hodge again emphasising the necessity to consider not only the actual language and text, but also the facts at the time and commercial common sense.\textsuperscript{73} Overall, however, English Common Law focuses on the normal understanding of the actual wording of the clause. To a Kuwaiti lawyer however, the claim that contractual interpretation is ‘not to probe the real intentions of the parties’,\textsuperscript{74} but just to look at the context of the words themselves, seems bizarre and contradictory.

Interestingly, the recently revised French Civil Code has moved away from its exclusively subjective stance, allowing an objective element: if the mutual intention of the parties cannot be determined, the contract is now to be interpreted according to the understanding of a reasonable person placed in the same situation.\textsuperscript{75}

having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract.”

\textsuperscript{69} Christopher Staunton, ‘How do the Courts Interpret Commercial Contracts?’ (1999) \textit{CLJ}, 303

\textsuperscript{70} Lord Hoffman rebuts this by saying that it went without saying that he did not mean lawyers should ‘trawl’ though all background information but only that which was relevant, that there was ‘no conceptual limit’ to what could be included, see Bank of Credit and Commerce International SA v Ali (2001) UKHL 8, para 39

\textsuperscript{71} Rohan Havelock, ‘The “Unitary Exercise” of Contractual Interpretation’ [2017] \textit{CLJ}, 486, 487

\textsuperscript{72} See for example, Marley v Rawlings [2014] UKSC 2; Arnold v Britton [2015] UKSC 36

\textsuperscript{73} Wood v Capita Insurance Services [2017] UKSC 24

\textsuperscript{74} Deutsche Genossenschaftbank v Burnhope [1955] 1 WLR 1580, 1587, per Lord Steyn

\textsuperscript{75} New French Civil Code 2016, Article 1188
Despite Kuwait’s initial subjective stance, as per the French Code, the Kuwaiti Code actually presents a fine balance. In this way, the original French Code is counterbalanced by the Islamic and cultural importance of custom. It is true that Article 193(2) starts off on a subjective basis – it is the ‘common intent’ of the parties themselves that must be ascertained. However, common intent is also found in the ‘totality’ of the contract and the ‘circumstances’ of its formation. This allows for background evidence to be admitted. Furthermore, guidance can – and should - be taken from the nature of dealing and current custom. Custom is one of the sources of Kuwaiti law in the Civil Code. It is recognised by all the Supreme Court judges in their interviews as still being a fundamental part of current law in Kuwait. It is also heavily intertwined with the Islamic religion. There is a linguistic nuance here in that the word for custom used in Article 193(2) (al aada al jariya) is not the same as orf (general custom) in Article 1(2) in the 1996 amended Code76. Instead, al aada al jariya refers to general customary dealings and therefore also clearly gives an objective element to contractual interpretation as current customary dealings, by definition, is that of normal members of society.

Moreover, the ‘reasonable person’ is a standard test that can be seen in several other areas of the Kuwaiti Civil Code,77 and is readily accepted.78 Therefore, it is probable that the idea of a reasonable person will inherently be part of the judge’s consideration when he or she takes all circumstances into account, as the Code stipulates. Hence, the idea (as per the Rainy Sky case)79 of commercial common sense being implied into the interpretation of a contract in ambiguous cases, is not explicitly stated in the Kuwaiti Code but will be incorporated because, if the case is unclear, it is to be assumed that the parties did not intend an uncommercial or

76 Kuwaiti Civil Code 1980, Article 1(2), 1996 Amendment
77 For instance, the Kuwaiti Civil Code 1980, Article 290(1) states that to fulfil one’s obligation, the effort required is that of a ‘reasonable person’ (unless otherwise laid down in law)
78 Egyptian Civil Court, 27/03/12, Case No. 4536/80
commercially nonsensical agreement. Similarly, other terms will be implied, as per the reasonable man, because if the contract is unclear it will be assumed that the common intention of the parties is to behave as the reasonable man would behave, unless there is clear evidence otherwise.

8.2.2 The Interpretive Power of the Judge

The word ‘interpretation’ implies the need for an interpreter. It is the judge who performs this role. In analysing the importance of the influences of Kuwaiti culture and tradition, as well as Islamic Law and religion, on contractual interpretation, the power of the judge can be seen in different degrees.

Academic scholars have differing opinions on how far this power of interpretation can reach. The Supreme Court judges interviewed as part of the primary research conducted for this work also demonstrate this. Their views relate primarily to statutory interpretation but are also directly applicable to contractual interpretation because, in Kuwaiti law, the contract is not just an exchange but takes on its own personality and forms a ‘law’ between the two parties. The ‘law’ of the contract itself is interpreted in the same way as the law of the land.

Nakaas and Abdul Riddah write that we should not look at each thing independently, we must look at the contract overall, in light of everything.\(^\text{80}\) The Kuwaiti Supreme Court in 1995 stressed the continuing importance of the contract, making clear that to ascertain the common intent of the parties, even given all the other factors, one must still look at the actual meaning of the contract: one must stay within the contract and not interpret the contract so radically that the judge ends up actually changing it.\(^\text{81}\) Supreme Court Judge B writes that ‘judges have discretion but their allowed interpretation is limited’.\(^\text{82}\)

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\(^\text{80}\) Nakaas & Abdul Riddah n 14, 142

\(^\text{81}\) Supreme Court of Kuwait, 20/03/95, Commercial Court, (1995) 23 (1) *Magazine of Judges and Law* (مجلة القضاء و القانون) (Ministry of Justice, Kuwait) 184 (in Arabic)

\(^\text{82}\) Judge B, Appendix 2, 303
On the other hand the Egyptian scholar, Samir Tanago, said that the judge ‘can adjust the visible meaning to another, or contradictory, meaning if, according to his own interpretation, the actual clauses thereby better fulfil the intention of the parties, in light of the overall circumstances of the contract’. 83 Supreme Court Judge C, in the primary research interviews, similarly stated that “the Judge, in application of the Law, should not be limited to the written words of the clause; he should go far beyond to seek the intention”. 84 However, as per Tanago, this is strictly ‘on condition that the judge can justify his judgement and makes it very clear why he contradicts the visible meaning of the actual words’. 85 The Kuwaiti Court of Appeal stated clearly in 2009 that their role is more broad, stressing the importance of judicial interpretation, holding that ‘the court has authority to interpret the contracts to be able to recognise the common intent and try to reach the truth’. 86

There is an attraction to the first argument of strictly limited interpretive intervention as it provides important clarity to the law and business. Tanago’s view, reflects the broader linguistic argument made above for the clear statement: the understanding of the common intent must be done in light of all circumstances, even if this contradicts a superficial understanding of the actual meaning. The judge’s role is a complicated one; it is for this reason that his or her expertise and experience is so valuable. As Judge D said, ‘the judge’s experience is the most important thing if interpretation is required’. 87

Using a subjective lens can be challenging: the judge has to look at what is needed to understand the whole picture between the parties. Great consideration must be given to the importance of trust between the contracting parties, in light of common

83 Samir Abdul Sayed Tanago, Sources of Obligation, (Alexandria, Egypt, 2000), 143 (in Arabic), cited in Nakaas & Abdul Riddah n 14, 143
84 Judge C, Appendix 2, 305
85 Tanago, 142, as cited in Nakaas & Riddah, n 83
86 Kuwaiti Court of Appeal, 16/02/09, Commercial Court 11
87 Judge D, Appendix 2, 308
deals in such contracts. As per Article 193(2), the judges must look at the
nature of dealing, the relationship of trust and common custom as applicable to the
contract in question. Al-Sanheri also points out that intent can be inferred from
conduct. If the contract has been performed, or partially performed, it seems
obvious that this indicates the intention of the parties.

The will of the parties is paramount: the judge while interpreting the contract must
use all methods possible to ascertain the actual will of the parties. This is the
important Kuwaiti legal principle of the Kingdom of the Will, as confirmed by recent
Supreme Court cases. The origins of this principle is considered in detail in the
section following on Remedies, showing the clear influence of Islam, tradition and
religious law.

In order to determine the will, once one has moved from the actual words, no one
factor takes priority. There is no official scale laid down anywhere. Tanago explains
it well when he writes that the ‘Seen Will’ comes first (i.e. as shown in the wording
of the contract) but the judge should not be completely tied to it, rather he or she
must try to find and comply with the ‘Actual Will’, not the seen will, as long as there
is a reason for this. The question here, though, is whether the only reason for
going beyond the seen will is lack of clarity in the words (and what this means in
itself), or whether the actual will is relevant in itself.

One key principle of interpretation is that, combining these elements, if a sentence
of a contract has more than one meaning, the judge should interpret the meaning in
the way that makes it produce the more ‘legally effective’ result. This is in
compliance with the Kuwaiti legal maxim that it is ‘better to make the clause work
than to ignore it’.

\[ \text{References}\]

88 The word ‘trust’ was specifically used by the Supreme Court of Kuwait in 2016
89 Al-Sanheri n 64, 829
90 Supreme Court of Kuwait, 29/02/12, Case No. 1064/09, Commercial Court 5; Supreme
Court of Kuwait, 16/11/16, Case No. 685/16, Commercial Court 1
91 Tanago n 83, 147; Supreme Court of Kuwait Appeal, 20/01/97, Case No. 141/95, Civil
Court, see n 12, 359
This approach is tied to the ‘freedom school’ of interpretation that was expounded by Frenchman, Francois Gény, in the 19th century, which argues that one must take what is useful from the other schools and ignore what is not useful. A judge must have the freedom of research, to not be tied down by specific authority, but only by the general rules of the country and the nature of justice. Abo Al Lail claims this is the most rational approach, the most practical, and ‘makes perfect sense’. What matters is to get to the heart of the matter, both in terms of truth and effectiveness. It is this approach, he claims, that is followed in Kuwait now.

This is quite radical. It is also not an unchallenged view of what Gény meant. O’Toole points out that, despite Gény’s personal scholastic philosophy, he ‘dilutes’ this premise and ‘makes a conscious effort’ to include practical considerations, his aim being to give judges an interpretative tool, rather than undermine the supremacy of the actual legislation.

In this way, it is true that there is sense in not staying strictly in the clause if one ends up overpowering the clause with things it cannot support: words by themselves and references are limited – as Abo Al Lail says, a judge cannot just dig and dig into one clause because sometimes there is nothing there. But, if one allows the judge complete freedom to look at whatever sources he or she wants in order to interpret the contract, there is a risk it becomes overly discretionary and even arbitrary. Given the judicial reluctance that has been discussed elsewhere in this thesis, the claim that Kuwait adheres to Gény’s supposed concept of the judge as a free spirit may seem far-fetched. However, its roots of not being bound to the

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92 François Gény, Méthode d’Interprétation et Sources en Droit Privé Positif, (Paris, A. Chevalier-Marescq, 1889, XIII) 606; (L. G. D. J., 1919, vol. 2, XXV) 446 & 422; (1954, vol. 2) 910, as cited in Abo Al Lail n 6, 393
93 Abo Al Lail n 6, 394
94 ibid
95 Thomas O’Toole, ‘The Jurisprudence of Francois Gény’ (1958) 3 Vill. L. Rev. 455, 457
96 Abo Al Lail n 6, 394
words themselves, even when the clause is clear, seems coherent with the wider way of reading the Civil Code that this paper proposes.

The argument here comes down to what is meant by Article 193 (2): a contractual clause cannot be interpreted unless unclear; the contractual wording must be followed. Initial reading of Abo Al Lail’s viewpoint seems to strongly oppose this.

Yet a truer impression of current practice is found by looking to the judges themselves. As discussed above, the examination of Supreme Court case 13/04/16 2014/275, (referring to the explanatory memorandum of article 193 of the Civil Code) along with the statement above by Judge C, also of the Supreme Court, (judges should “not be limited to the written words of the clause”), shows that while the contractual clause may be clear linguistically, if there is ambiguity of party intention, the court is free to interpret, as long as they provide clear and fair reasoning. Additionally, in the other interviews conducted for this work, the Supreme Court judges talked freely on the subject of interpretation: for the judiciary, it obviously goes to the heart of their role. Judge A states clearly that “judges are free to impose their own legal interpretations of the laws”.97 This gives a broad discretion. It is clear that they do not see their role as being restricted by the precise wording, but rather to uphold what Judge D calls “the overall goal of the case”.98 However, it must be noted that this is only “as long as they [the judges] adhere to the constitution” and do not interfere with “the freedoms of its people and the economic stability of the country”99. Equally, certain judges sounded a note of caution: Judge B acknowledged that judges “have discretion” but their “allowed interpretation is limited”.100 Furthermore, it has to “backed up by interpretation and explanation and fit with the overall legal goals.”101 It must be remembered, of course, that these were interviews with Supreme Court judges and it is probable that a

97 Judge A, Appendix 2, 301
98 Judge C, Appendix 2, 305
99 Judge A, Appendix 2, 301
100 Judge B, Appendix 2, 303
101 Judge B, Appendix 2, 303
Supreme Court judge will assume broader interpretive authority than that of trial judges. However, the overall sentiment seems to be in favour of important judicial discretion in contractual interpretation.

### 8.2.3 Islamic Oaths: Do Not Break What You Intended

To try and ascertain to what extent this emphasis on common intention in the Code and in current practice is based on Islamic Law, one has to look at the Qur’an and hadith. In the Qur’an, Al Maiedah, verse 89, speaks of intention when it says that “*Allah will not impose blame upon you for what is meaningless in your oaths, but he will impose blame upon you for breaking what you intended in your oaths*”. The emphasis on one’s intention under the oath, rather than the absolute nature of the oath, or a judge’s idea of its nature, is clear. Moreover, in the hadith, Abu Huraira reported Allah’s Messenger as saying “*An oath is to be interpreted according to the intention of the one who takes it*”.  

In both examples, the emphasis is clearly on the perception of the oath taker, as opposed to the perception of the person who received the oath. The oath is not interpreted according to the understanding of the person who received it. Nor, indeed, according to the ‘common’ intention: Islam looks simply at the heart of the person who promises. Indeed, the nature of a sale in Islam is not that of the delivery of a bargain between two people but that of a pledge, the guarantee of a debt. This is principally an individual, subjective approach. In this way, the Civil Code’s focus on ‘common’ intention is not the essence of religious teachings. However, in practice, a contract is a two-way thing, both parties make a promise and exchange those promises. Therefore, it could be argued that the hadith covers both parties individually, and equally, even if not jointly at the same time.

A similar emphasis can be seen in one of the five key maxims of all schools of Islam. The fifth maxim, as stated by Imām Tāj al-Din al-Subki (d. 771 AH), holds that:

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102 *Hadith*, Abu Huraira  
103 Chibli Mallat, *Introduction to Middle Eastern Law* (OUP UK, 2007) ix, 303
“Deeds are judged by aims and objectives”. This is phrased differently by different scholars but it is accepted as a fundamental tenet of Islam, that it is the aim of the person that must be analysed, not the matter itself.

Equally, the Majalla’s legal rules seem to happily embrace the idea of intention and it is also broader than simple common intention. According to Maxim 2, it is a general rule that intention lies at the heart of the matter in question. More specifically to contract law, Maxim 3 stipulates that, in contracts, the intention of the parties is key, as opposed to the specific words used. There is linguistic meaning and actual meaning. A clause or word that is 100% clear will be interpreted as stated: the word ‘gift’ in an agreement can never be interpreted to be part of an exchange for money, a gift is given ‘freely’, that is its very nature. But the judge must look at all ‘linked’ meanings. This needs to be read in light of Maxim 14 above where the clear statement needs no interpretation.

Again, the maxims are not in order of priority but the overarching nature of Maxims 2 and 3 is important. Sanhuri writes that in Islam, ‘intent is the prevailing rule’. If the intention conflicts with the wording, the primary focus must be on the intention. However, where specific words do not contradict the assumed intention of the parties, words are to be taken literally - they cannot be ignored, unless the word is meaningless. This seems to imply that, for contracts, Maxim 3 indeed takes priority: it takes the negative as the starting point, i.e. that the common intention comes first and foremost and that the clear statement is only used as written if, and only if, it supports – or at least does not contradict - the common intention. It should

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105 Pasha n 20
106 Abdel-Razzaq Al-Sanhuri, Al-Wasit fi Shar al-Qanun al-Madani all Jadid (Middle Commentary on the New Civil Code) (vol 1 part 1 1981) (cited in Mallat n 103)
107 Pasha n 20, Introduction: Part II
also be noted that Maxim 16 states there is no room for interpretation when interpretation has already happened.

The question of whether contract law looks at the individual parties, or the parties as a joint unit, can also be seen elsewhere. Arab contract law refers to both *rida* and *taradi* in areas where Western law would translate both as consent, rather than intention. Although *taradi* clearly means ‘agreement’, implying ‘joint consent’, the concept of *rida* refers simply to just one person’s state of mind: a state of contentment, by each party individually, that the contract is agreed and will happen as agreed. Accordingly, intention overlaps with consent as, whether you consented or not, depends on what your intention was. But the two are not the same. Al-Sanhuri’s writings however, focuses more on *taradi*, the mutual consent based on mutual will, as showing mutual intention. This would tie in with the ‘common intent’ requirement in the Civil Code.

In contrast to the Islamic emphasis on intent, the Kuwaiti Code lists the clear statement rule of interpretation first, with common intention coming second. There is an obvious logic here in that the clear statement case is dealt with first. Indeed, Sanhuri writes that even religious judges, for reasons of simplicity, often prefer to stick to the actual wording even though they have a duty to look at the ‘real will’.108

However, the idea that even clear statements need to be read in line with general good faith is also important. Professor Zedan stresses how Islam is focused very much on the intention behind the person’s word, not on the apparent nature of it.109 Again, Shari’a Law applies general principles of interpretation to all matters. If a man were to place a net in the water to catch fish, then someone who takes those fish is stealing. However, if the man puts the net in the water to stop debris coming onto his beach, for instance, and someone takes the fish that happen to get caught in it, then that is not stealing as the intention was not to catch fish. It should be noted

108 Al-Sanhuri n 64
109 Zedan n 51
that this does not cover every circumstance – taking something with the intention of returning it later will still count as stealing because the idea of responsibility takes priority.

It is of interest also to note that in France, it was not until the very recent reform in 2016 that the judge specifically not being able to interpret an unambiguous clause was actually coded into French Law, although it was previously accepted in cases.\footnote{Smits n 39, 129} The underlying freedom of the judge was therefore obviously felt in the French system, as well as the Islamic one.

If something is implied, it will be taken to be the intention of the party, and if acted upon there is now a common intention. In Shari’a, if a quasi-agent (\textit{al fadoly} – literally a ‘nosey-parker’, someone who is acting on behalf of someone else but without their express permission) has been given the implied permission to contract a sale on behalf of someone else, and does so without being able to check if he has real permission or not, then how should that contract be interpreted? There are three possible answers: the Hanafi school of Islam interpret it as conditional sale; most other mainstream schools say there is no sale; other schools say it constitutes a sale. It is all based on how the \textit{al fadoly} understood the instructions he was given – the principal cannot go back on what he implied.

Custom is also relevant here. This is based firstly on the assumption that if a thing is general custom and universally accepted, this is more likely to be the intention of the parties, over and above the words spoken. However, it also has a more substantive quality, namely that custom \textit{is} the law.\footnote{Majalla, Maxim 36: Custom is an arbitrator, Pasha n 20} The Majalla tells us that what is common practice between merchants will be deemed to be part of the contract. Furthermore, convention forms the basis of all law. Judge B stated that “Custom, no
doubt it is one of the primary sources of law” because, historically, “there was only Custom, which was managing peoples’ lives and legal system”.

Care must be taken in the translation of the word ‘custom’. Maxim 40 is translated as ‘in the presence of custom no regard is paid to the literal meaning’. Maxim 40 of the Majalla was directly incorporated into the 1961 Commercial Code by Sanhuri, in the same new article that covers contractual interpretation, the importance of intention and the truth of the contract. However, again, the Arabic word is al aada al jariya, not general custom (orf) but the idea of normal dealings for that person. It covers the tradesman’s normal rules of business. Importantly, this is also the same word that is used in Article 193(2) of the Kuwaiti Civil Code which is also generally – and rather misleadingly - translated as ‘custom’. The fact that both the Majalla, the 1961 Code and the modern Kuwaiti Civil Code use the same term, in the same way, shows a clear tie between the different systems.

The more general idea of custom (orf), however, is used later in the Majalla and also has an effect on Islamic contractual interpretation. Maxim 45 is the overarching rule that custom equates to the law, as per Judge B above. More specifically to contracts, Maxim 43 lays down that if something is recognised in custom, it counts as a condition of the agreement. Maxim 44 applies it in a more precise manner to an agreement between traders where custom will be taken to be part of the contractual obligation between the two specific parties. This use of ‘custom’ (orf) is the same as that in the Kuwaiti Constitution where custom is one of the sources of law. As such, the influences of the Majalla are seen in the principle of interpretation in Kuwaiti contractual law both in terms of the normal dealings between two people and custom as an overall principle.

112 Judge B, Appendix 2, 303
113 Kuwaiti Commercial Code 1961, Article 154
114 Pasha n 20
However, again, there is a certain inherent conflict here with Maxim 14\textsuperscript{115}. The obligation on the judge to look at the clear statement of the contract would again seem to be only insofar as the contract already complies with the obligation to look at the nature of the contract, current customs, and the importance of honourable dealing and good faith. As such, both Shari’a judges and Kuwaiti judges are trying to harmonise the same two principles.

Indeed, the importance of Islamic \textit{fiqh} and its position in the judge’s rationale is clearly laid out at the very beginning of the Civil Code and has changed emphasis between the original 1980 code and its 1996 amendment. The original 1980 Kuwaiti Civil Code Article 1(2) states that if there is no legislation, the judge should give his judgement with reference to Islamic \textit{fiqh}. As discussed earlier in this work, \textit{fiqh} is not the same as Shari’a: \textit{fiqh} is the theory and philosophy of Islamic Law as opposed to specific Shari’a Law. Interestingly, Abo Al Lail writes that this does not mean that the judge should actually apply \textit{fiqh}, indeed the judge’s reference could actually be as to why he was NOT using \textit{fiqh}.\textsuperscript{116} This is probably not what was intended, and Islamic factions strongly disapproved. Following the 1996 amendment, proposed by the Islamic faction,\textsuperscript{117} the new Article 1(2) now states that if there is no legislation, the judge must give his judgement in accordance with the Islamic \textit{fiqh} which is the most suitable for the country’s interests and direction. If there is no \textit{fiqh} that is applicable, then the judge should use custom. This has made it clearer - \textit{fiqh} has moved ahead of custom in priority - and would seem to show that in the evolution of Kuwaiti law the Islamic influence is now stronger. However, it must be remembered that \textit{fiqh} is very general and formed only to give guidance, not to lay down specific laws. Also, and as Abo Al Lail emphasises, the amendment deliberately did not specify any particular school of \textit{fiqh}, leaving the judge free to

\textsuperscript{115} ibid
\textsuperscript{116} Abo Al Lail n 6, 250
\textsuperscript{117} This amendment was put forward by the High Committee for Applying Islamic Legislation and was approved in Parliament
choose whichever school he favours or thinks is suitable. The reason here was to keep harmony between different sections. It should be remembered, however, that the judge does not have to use *fiqh* in a special subject area but only in any case where there is no law laid down. This is not a common event. In this way, Islamic Law, or even guidance, is not directly imported into Kuwaiti law in the main, but only now as an official source if there is no direct legislation. However, the fact that it is there, before custom, gives it a certain ranking priority and judges will know that, directly or indirectly, religious law is part of the system when they apply their interpretative skills.

The question of the subjective intention is seen here too, with different branches of Islamic Law having different emphases. Nabil Saleh describes the allowances of subjective agreements as coming from the teachings of Ibn Taymiyya and the Hanbali school, but being overstretched by interpretation, with Shari’a only recognising nominate contracts with no liberty of contract. However, from the examination of the maxims and the *hadith* of Abu Huraira, it would seem that as long as custom is followed, and no Islamic principles are broken, the intention of the parties is the principle matter. Thus, again, the ‘clear statement’ rule that no interpretation is needed seems to be compromised.

Moreover, Professor Zedan says that in Shari’a, once interpretation is begun, one cannot go back to looking at the actual wording. A person’s intention is proved not only by what they said but by how they acted, what was understood between the two. And once this process is undertaken, one cannot claim that a lack of a clear statement meant that it was not intended.

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118 There are four main schools of *fiqh*: Maliki, Hanafi, Hanbali and Shafie’e, as well as also other lesser-known schools
119 Abo Al Lail n 6, 244-245
121 *Hadith* Abu Huraira
122 Zedan n 51
On a side note, it is of interest to observe that French Civil law included the doctrine of 'Incorporation', where the “will of the of the parties was sovereign”, and similarly parties could exclude terms they did not like, essentially creating their own contracts. It was not until 1950, a year after the Egyptian Civil Code was introduced, that the Court of Cassation decreed that contracts must be linked and fully incorporate the law of a particular state, rather than picking, choosing and editing aspects of legislation from different states or countries for inclusion.\textsuperscript{123} This would suggest it is possible that part of the bending of the Shari’a rules, if indeed that is what it is, came from inclusion of this idea from the doctrine of Incorporation. It would lead to the requirement for more individual interpretation of contracts. However, it could be argued that an increase in International trade, as Kuwait experienced with the discovery of oil, would have led to this evolution naturally.

\textbf{8.2.4 Presumption in Case of Doubt}

Given the difficulty of contractual interpretation, certain presumptions have to be incorporated into the law. The presumption in case of doubt in Kuwaiti law demonstrates a small but important difference from Egyptian law, arguably showing the evolution of Al-Sanhuri’s legal draughtsmanship.

In case of doubt, where the contract is unclear, it is generally considered that the contract has to be interpreted in the defendant’s favour. This is the normal translation of Article 194 of the Kuwaiti Civil Code\textsuperscript{124}. The starting point is that each person is an individual in their own right, each party is innocent: finding someone liable is the opposite, so this exception must not be interpreted widely or in a manner which relies on a comparison with something else. Nakaas and Abdul Riddah state that the basic premise is that ‘everyone is innocent and under no obligation’\textsuperscript{125}. The claimant therefore has to prove the obligation of the defendant, and so bears the burden of proof. This should be seen against the ‘contra

\textsuperscript{123} Peter Ed Nygh, \textit{Autonomy in International Contracts}, (Clarendon Press, Oxford 1999) 174
\textsuperscript{124} Kuwaiti Civil Code 1980, Article 194
\textsuperscript{125} Nakaas & Abdul Riddah n 14, 144
proferentem’ rule in English law whereby an exemption clause, or a clause with any ambiguity, will be interpreted against the person wishing to rely on it.

However, the situation in Kuwaiti law is rather more complex. Article 194(1) actually provides: ‘if it is difficult to remove the ambiguity from the clause in the contract, and the common intent of the parties is also unclear, this ambiguity is to be interpreted ‘in favour of the party who will be harmed by the enforcement of the condition’. This is not the same as saying it must be the defendant. Rather it shows that in case of doubt, Kuwaiti law favours the party who will suffer greater harm by the enforcement. This can be useful for the claimant because sometimes it may be him who will be harmed more. Article 194(2) elaborates further by stating that the ambiguity goes in the debtor’s favour if this condition puts more obligation on him or makes his obligation heavier. It is therefore the role of the judge to determine and weigh up the respective obligations of the parties under the contract and to interpret the contract in favour of the party more likely to suffer.

This should be contrasted with the Egyptian code, Al-Sanhuri’s original major work of legal codification. According to Egyptian Civil Code Article 151, interpretation specifically goes in the defendant’s favour. It refers specifically to the ‘defendant’, the clause is shorter and does not provide the further details that Al-Sanhuri added when he later drew up the Kuwaiti code.

The question, therefore, is whether interpretation in case of irreconcilable doubt in Kuwaiti law is different from Egyptian law and, if so, why? However, it seems likely that the two clauses are actually fundamentally the same and that it is a question of what is meant precisely by ‘defendant’. It is an immediate assumption that ‘defendant’ means the defendant in the court case, the opposite of the claimant. However, Abdul Fatah Abdul Al Baaki explains that, in Egypt, “in the case of doubt, when we say that we favour the defendant, we mean the defendant of the obligation,  

\[126\] Egyptian Civil Code 1948, Article 151
not of the contract, it is irrelevant if he is the defendant in the contract.”127 This seems logical as, depending on the actual case and the process of the litigation, it can simply be a technicality which party actually commences the proceedings. As both parties are under an obligation, the judge is looking at the circumstances to determine who in each case is actually ‘defending’ that obligation. As such, it is possible that Al-Sanhuri drafted the Kuwaiti Code more specifically and in more detail to make the term ‘defendant’ clear, as there had been confusion in Egypt. Indeed, this highlights the very need for interpretation (whether contractual or statutory) in the first place.

In short, it is the Egyptian law that has caused speculation as to meaning, whereas the Kuwaiti law is clear. If it is ambiguous, the Kuwaiti judge must favour the party who will suffer more. However, it must be remembered that, as Abdulmenem Al Badraywi writes, this does not give blanket permission to the judge to always interpret the contract in favour of the victim or defendant – it is only in the case where there is definite and irreconcilable ambiguity.128

The Exception of Ethaan contracts

There is a distinction made from the basic premise in the case of ethaan contracts. Al-ethaan is a way of drafting contracts using a set template where one party draws up the contract unilaterally, shows it to the other party and that party does not have a choice: as it says in Arab law: he has to ‘take it or leave it’.129 It especially applies to standard-form contracts for things such as utilities and transport.130 Article 151(2) of the Egyptian Code says that the judge is not allowed to interpret the ambiguity in the ethaan contracts to harm the company.131 This sphere, however,

127 Abdul Baaki n 35, 525
129 This is generally referred to in Anglo-American contract law as a ‘boilerplate contract’ or a contract of adhesion
130 Egyptian Civil Code 1948, Article 149
131 Nakaas & Abdul Riddah n 14, 145
only applies in case of doubt and we need to find the will of the parties; if the judge was able to discover the common intent of the parties, there is no doubt, then it goes to the will and this exception is not needed.\textsuperscript{132} This part is mirrored in the Kuwaiti code. Article 194(3) states that the preceding clauses in Article 194 must be read in light of Article 82\textsuperscript{133}. In al-ethaan contracts, the case of doubt goes in favour of the person who has done the ethaan i.e. the doubt goes in favour of the company. French law recognises the concept. However, in contracts of adhesion in France, the new Article 1190\textsuperscript{134} provides that, in the case of doubt, the contract is to be interpreted against the party who proposed the contract, provided that new or unexpected circumstances do not cause one party to be at a greater disadvantage than the other (mirroring Article 198 of the Kuwaiti Civil Code). Even prior to the reform, this was the point of view followed in France, as per case Cass. 3 civ. 29 October\textsuperscript{135}

\textbf{8.2.5  Good Faith and Honourable Dealing}

\textbf{8.2.5.1  Good Faith and Honourable Dealing: The Basis for All Interpretation}

A crucial influence of Kuwaiti culture, religion and Islamic Law can be seen in the concept of good faith and its importance in all contractual interpretation. This thesis further contends that the general belief that the words of the contract must be viewed first for clarity is incorrect. The requirement of good faith not only covers cases of ambiguous clauses but even those of clear clauses. It is an overarching principle.

Good faith is as an essential legal requirement and a base for all contractual interpretation in Kuwait. It is found in several key articles in the Civil Code. As noted above, Article 193 specifically requires the judge to be ‘guided’ when

\begin{footnotesize}
\begin{enumerate}
\item Al-Sanhuri, \textit{Al Wajeez} (1966), 246 (cited in Nakaas & Abdul Riddah n 14, 144)
\item Kuwaiti Civil Code 1980, Articles 82, 193, 194
\item French Civil Code 2016, Article 1190
\end{enumerate}
\end{footnotesize}
interpreting the unclear statement by not only the ‘nature of dealing and current custom’ but also by the requirement of ‘good faith and honourable dealing which must be satisfied by the parties’.\textsuperscript{136} This could be read to imply that it only covers ‘unclear’ contracts, as it is not specifically mentioned in the clause referring to ‘clear’ statements.

However, this would be wrong. Article 195 also encapsulates the general overarching principle of good faith in contractual interpretation when it states that a contract is not limited to its actual provisions but includes what are considered to be the ‘essentials’ of the contract (\textit{mustalzamat}) and that all must be viewed in terms of generally accepted custom, justice, the specific circumstances and nature of the dealing, and the ‘requirements of good faith and honourable dealing’.\textsuperscript{137} It could be argued that interpreting a contract in terms of good faith does not actually require the parties to be \textit{in} good faith,\textsuperscript{138} but this is also incorrect – good faith is an obligation, either expected by both parties or as an outside force that has to be there as part of all your dealings. Moreover, the standard of good faith depends on the nature of the person, it is not absolute.\textsuperscript{139}

In addition, the need for good faith also covers performance. Article 197 stipulates that it is a requirement to fulfil the contract according to the condition of the contract and in a way that matches good faith and honourable dealing\textsuperscript{140}. This, therefore, lays down another layer, namely that good faith and honourable dealing are also requirements of the actual performance of the contract, not only the agreement itself. Moreover, this is a universal rule, applying to all contracts, and cannot be contracted out of.

\textsuperscript{136} Kuwaiti Civil Code 1980, Article 193(2)
\textsuperscript{137} Kuwaiti Civil Code 1980, Article 195
\textsuperscript{138} Kareem Bola’abi, \textit{Good Faith in Contracts} (Al Manhal, Tunisia 2015) 81-82
\textsuperscript{139} ibid, 87
\textsuperscript{140} Kuwaiti Civil Code 1980, Articles 197
As such, it is obvious from 193(2) that all ‘unclear’ contracts need to be interpreted in light of good faith. However, given 195 and 197, this is also necessary for all ‘clear’ contracts. Moreover, this applies both to the agreement and the performance, because if the performance is required to be in good faith, the agreement (even if 100% clear) will have to also be viewed in light of the good faith requirement or else the performance will not match the agreement. And this is the baseline of all contractual interpretation.

Al-Sanhuri explains that the judge must look at the contract, its construction, and the underlying intent of the parties. But he must also look at the equity and nature of the agreement.\(^{141}\)

The judiciary follow a similar approach. The Kuwaiti Court of Appeal stated clearly that the contract itself provides the governing law between the parties and must be viewed in light of the overall need for good faith and honourable dealing.\(^ {142}\) The Supreme Court of Kuwait in its 2016 judgement stated that everything has to be seen in the light of good faith.\(^ {143}\) Therefore, although scholars may often state that the starting point of contractual interpretation is the words of the actual contract, and that a clear statement cannot be interfered with, the truer position is actually that this is only so if the more fundamental requirements of good faith and honour have been met.

This conclusion leads to a need to try to define good faith. Taha writes that, in the main approach to good faith there are three sorts of good faith that a judge needs to consider: personal good faith, good faith of both parties in the subject and legal good faith.\(^ {144}\) The judge’s consideration will take into account all these elements and all contractual terms will be interpreted in light of these categories. Other

\(^{141}\) Al-Sanhuri n 64

\(^{142}\) Kuwaiti Court of Appeal, 16/02/09, Commercial Court 11, as cited in ‘Al Rai’ in the Economic Section, 4327

\(^{143}\) Supreme Court of Kuwait, 15/06/16, Case No. 724/14, Commercial Court 1

approaches, Taha writes, focus more on one or other of the three parts. As in France, the actual concept of good faith is not defined in the Kuwai Civil Code and so has many shades. The importance of good faith as a unilateral element or a joint concept, however, and the religious and cultural basis for it, is an important part of understanding the applicability of good faith in interpretation.

8.2.5.2 Good Faith in Islam, Kuwaii Culture and Tradition

Islamic Law is clearly rooted in the principle of good faith. Shari’a Law respects both the aqad, which means the sanctity of the contract as it stands, but also the principle of huson alniyah, the need for good faith. Maxim 12 of the Majalla\textsuperscript{145} states that the ‘starting point of the talk is the truth’. The tenet of good faith is linked to integrity, honesty, personal morality and justice, but this refers not only to the stand-alone position of each party but to the situation between two people.

This ‘broad brush’ definition can be seen in the Qur’an where it holds that Allah ‘commands justice’ and forbids all ‘shameful deeds and injustice’.\textsuperscript{146} This gives a religious basis, as well as an Islamic legal basis.

The concept of good faith, however, is even broader than just in relation to the parties: it is considered to be further reaching; in other words, how a contract is understood also reflects what sort of society we want to live in and the worth of that society. Goods, for example, should be sold at a fair price to the consumer, and a person in debt to a creditor should be given a period of time to enable them to pay.\textsuperscript{147} This is not connected to the parties’ honesty but to the morality of society as a whole. As such, Kuwaii culture places a very high importance on the concept of good faith in all aspects of the law.

\textsuperscript{145} Pasha n 20
\textsuperscript{146} Qur’an, Surah Al-Nahl, 16:90
\textsuperscript{147} Hassam A. El-Saghir, ‘The Interpretation of CISG’ in Janssen and Meyer (Eds), \textit{CISG Methodology}, (Sellier, Munich 2008) 370
In this sense, good faith encompasses the agreement and the performance of the contract, as shown in the Civil Code above. Moreover, a breach of good faith equals a breach of contract, hence a contract has to be interpreted under the guidelines of good faith or the contract is not a valid contract to start with. This is seen both in religious and secular law. Amkhan writes that a transaction will only be considered valid under Shari’a Law if – and only if – it is performed in absolute good faith and honestly.\textsuperscript{148}

Good faith is not confined within the ties of Islam. Kuwait is not a strictly Islamic country, there are Christians and Buddhists, and others, with the constitution respecting all.\textsuperscript{149} It is argued in this thesis that the concept of good faith in Kuwaiti law is too often treated as a purely Islamic principle. Rather, ‘good faith’ has a universal moral definition and it applies as such in a country that is not based on religious law. The term is difficult to define and is not constricted by Islamic ideals.

It must be remembered that the need to interpret all contracts in light of the requirement of good faith is a common clause in Civil Codes, and thus also a very important clause in the French civil law, the source of Al-Sanhuri’s legal education. It is also much used; indeed, although not a country based on precedent, French case law had effectively extended the scope of good faith so much that it is one of the reasons that the new 2016 Code was drawn up and now gives ‘new prominence’ to the principle.\textsuperscript{150} The new Article 1104 now explicitly requires all pre-contractual negotiations, as well as the performance, to be done in good faith. And although ‘good faith’ requirements for contractual termination have not been codified as such, it is readily accepted by French judges.\textsuperscript{151} Al-Sanhuri therefore, who did his

\textsuperscript{148} Adnan Amkhan, ‘Specific Performance in Arab Contract Law’ (1994) 9(4) Arab Law Quarterly 326

\textsuperscript{149} Kuwaiti Constitution 1962, Article 29: the people are peers in human dignity and have, in the eyes of the law, equal public rights and obligations. There shall be made no differentiation among them because of their race, origin, language or religion


\textsuperscript{151} ibid
Doctorate of Law at the University of Lyon, would have learned that all stages of a contract must be looked at in light of good faith and the French requirements of 'loyalty, cooperation and coherence'.

However, Al-Sanhuri was also very committed to making Islamic Law a fundamental basis of law in the Middle East. Enid Hill writes that Al-Sanhuri’s passion for Islamic Law, as an abstract theory of law, on a par with Roman law, held a “prominent position” throughout his life, and that one of Al-Sanhuri’s life’s endeavours was to use Islam as a foundation in the science of codification as much as possible.

English Common Law-based systems have traditionally excluded the principle of good faith, preferring personal autonomy and individualism, allowing parties the freedom to negotiate in their own best interests. This rejection of a general overarching principle of good faith also applies to performance of the contract. There are concerns in Common Law jurisdictions that application of an “ad hoc basis with inconsistent views” leads to “unpredictability”, as explained by Morrison, and which John McManus says increases the likelihood of “protracted litigation”, which of course any commercial operation wishes to avoid. This ties in with McKendrick’s clear statement of the general arguments against the inclusion of good faith.

152 ‘devoir de loyauté, devoir de coopération, devoir de cohérence’, see J. Bell, S. Boyron and S. Whittaker, Principles of French Law (2nd edn., OUP 2008), 332-4
153 Hill n 45, 3
154 Lord Ackner in Walford v Miles [1992] 2 AC 128 held that “the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations”
155 Bingham LJ in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433 at 439 states that, in terms of good faith, “English law has, characteristically, committed itself to no such overriding principle”.
157 Ewan McKendrick, Contract Law (12th Edn. Palgrave, 2017) 238-243. The three main reasons given are England’s premise of ‘rugged individualism’, a dislike of broad principles with a preference for specific solutions, and the uncertainty that implying a term of good faith would cause
Despite this, these systems have seen a growing inclusion of good faith in certain areas. America has included a general duty to act in good faith by statute.\textsuperscript{158} England has developed a ‘piecemeal’ approach,\textsuperscript{159} addressing the need for good faith in certain areas such as employment and consumer law. Moreover, Canadian and English case law have recently been more amenable to accepting good faith in their judgements, Canada’s particularly for construction and franchising.\textsuperscript{160} These exceptions are generally imposed by the courts to equalise an unequal relationship with regard to power or are based on the parties’ intentions but must pass the ‘officious bystander’ or ‘business efficacy’ tests. In 2007, the Supreme Court of Canada confirmed its previous ruling against assuming the intentions of the parties to include a term, including good faith, unless there is a “\textit{certain degree of obviousness on the part of either party}”.\textsuperscript{161} However, more generally, the important case of 1958 has been widely approved, holding that parties should exercise their rights in “\textit{good faith and not in a capricious or arbitrary manner}”,\textsuperscript{162} and this is the “\textit{minimum standard}” to be expected.\textsuperscript{163} In England, Leggatt J’s recent judgement in \textit{Yam Seng PTE Limited v International Trade Corp Limited} caused widespread controversy with its seeming acceptance of good faith as an overriding contractual

\textsuperscript{158} USA Uniform Commercial Code 1952, Articles 1-304, states that ‘every contract or duty within [the UCL] imposes an obligation of good faith in its performance and enforcement’
\textsuperscript{159} \textit{Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd} [1987] EWCA Civ 6, [1989] QB 433
\textsuperscript{160} Shannon K. O’Byrne, ‘The Implied Term of Good Faith and Fair Dealing: Recent Developments’ (2017) 86(2) \textit{The Canadian Bar Revue}
\textsuperscript{161} \textit{Double N Earthmovers Ltd. v City of Edmonton} [2007] 1 S.C.R. 116 at para. 31
\textsuperscript{162} \textit{Mason v Freedman} [1958] S.C.R. 483
\textsuperscript{163} ibid
principle.\textsuperscript{164} However, it has been doubted in subsequent cases,\textsuperscript{165} and has had, at best, what Burrows calls a ‘lukewarm reception’.\textsuperscript{166}

Although England may still be an outlier,\textsuperscript{167} international law confirms this trend towards the acceptance of good faith as a universal principle. Indeed, Egypt is one of four Arab countries that is signed to the United Nations Convention for the International Sale of Goods (CISG). Article 7(1) of this convention includes the “observance of good faith in international trade”.\textsuperscript{168} Some countries and scholars take this to be left to the judges’ interpretation. Egypt, however, has references to the inclusion of good faith, both in Islam and through its Civil Code in Article 148 which states that contracts must be \textit{performed} in good faith\textsuperscript{169}. Thus, within Egyptian law, Article 7 of the convention is interpreted as an obligation. El-Saghir gives a brief mention of the case of a buyer defaulting on a purchase at a pre-contractual stage, where the judges made passing comment that good faith should be respected.\textsuperscript{170} Aldmours\textsuperscript{171} similarly describes a 1966 case at the Egyptian Court of Cassation where the claimant had had no intention of completing the contract with the defendant, merely using the ruse of a deal to gain knowledge and experience from the defendant to set up a business with another. The judge here ruled this was

\textsuperscript{164} Yam Seng PTE Limited v International Trade Corp Limited, [2013] EWHC 111 (QB). Leggatt J, as para 131, said that he had “no problem implying such a duty [of good faith] in any ordinary commercial contract based on the presumed intention of the parties”.

\textsuperscript{165} See Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (trading as Medirest) [2013] EWCA Civ 200

\textsuperscript{166} Andrew S. Burrows, A Restatement of the English Law of Contract (OUP 2016) 93

\textsuperscript{167} McKendrick says that England ‘appears to stand out’ from most other jurisdictions, n 157, 238. Leggatt J claims that England would be ‘swimming against the tide’ if it did not accept the principle of good faith, para 124


\textsuperscript{169} Egyptian Civil Code 1948, Article 148

\textsuperscript{170} El-Saghir n 147

not in the spirit of good faith. Whilst these cases were Egyptian, we can assume similarity with Kuwait from the parallel systems at work, both an Islamic culture where good faith and a spirit of altruism is key, and a civil system with good faith both to perform and at the pre-contract stage. Again it would seem very much to be a combination of both Islamic principle and civil law which drives the belief in good faith, along with some reasonableness that a certain level of good faith is required to build trust in a business relationship and for both parties to be able to carry out their obligations.

In this way, it is clear that good faith is a pervasive concept. The question therefore, is whether Shari’a ‘good faith’ has a different scope from non-Shari’a ‘good faith’. Samir Saleh argues that many Westerners believe that French-based statutes in countries such as Kuwait will provide basically Western principles, as written. However, as Saleh points out, the behaviour of the Arab contractual party may well be judged very much de facto by Shari’a tradition which may appear to be powerful and pervasive, even when Western-inspired statutes have been enacted.\textsuperscript{172} He takes this further by claiming that there is ‘still a body of uncodified Shari’a tenets, mainly with regard to individual behaviour, which may remain influential, even though they are not embodied in a modern statute’.\textsuperscript{173} This may follow naturally from the Constitution’s second clause stating Islam is the religion of the country and Islam is a main source of law.

This is no different from the French code not defining ‘good faith’ and yet the French courts having no trouble in assigning the requirements of ‘loyalty’ and ‘cooperation’. Or indeed, extending the scope of the principle to not only the performance of the contract but its pre-contractual and termination stage. Even in civil law countries, many understandings are brought into law, although they are

\textsuperscript{172} Samir Saleh, ‘Fading Vestiges of Shari’a in Commercial Agency/Distribution (Termination and Compensation)’ (1994) 9 Arab Law Quarterly, 91, 97
\textsuperscript{173} ibid
not directly codified as such: this is as true for Islamic tenets, as much as for French societal beliefs.

The French system’s insistence on good faith as being founded on loyalty and cooperation is worth highlighting: it is not the requirement of honesty that it often seen as the core of good faith, particularly in Common Law countries.\textsuperscript{174} This ‘French’ idea is found in the Kuwaiti understanding of good faith, with Abo Al Lail and Nakaas & Abdul Riddah stating that the court must look very much to the situation of trust between the parties. The idea of trust and cooperation is similar to common intention in that it is a shared concept – trust and cooperation needs to be between two (or more) people, unlike honesty which exists in the absolute in one person’s actions. As such, the extent and nature of this Islamic influence on the law, and in particular on concepts such as good faith, is difficult to quantify. There is a line, albeit somewhat blurred, to be drawn here between the direct and indirect influence. ‘Good faith’ may easily be understood in Islamic terms but it is not specifically limited or defined as such (as Islamic good faith) in the Kuwaiti Code; but neither is common intent.

8.2.6 Conclusion – Interpretation

In pursuit of the first research aim of this thesis, this section has explored the extent of Islamic Law, religious and cultural influences upon the creation and application of the rules of interpretation applicable to clear and unclear statements, and the need for the whole to be interpreted in light of the requirements of good faith, custom, the nature of the transaction and honourable dealing.

There has been a complex overlap of different influences shaping Kuwaiti law in its approach to contractual interpretation. Kuwait’s history is important. Al-Sanhuri, with his mixed French/Islamic legal backgrounds, believed in developing a system that reflected a country’s historical backgrounds and not just a ‘one-size-fits-all’

\textsuperscript{174} “Shorn of context, the words ‘in good faith’ have a core meaning of honesty”, as per Auld LJ in Street v Derbyshire Unemployed Workers’ Centre [2004] EWCA Civ 964, [2004] 4 All ER 839
Accordingly, Sanhuri’s Iraqi code was more Majalla-based than the Egyptian one, as the Majalla was part of Iraq’s tradition. In this way, it is perhaps not surprising that Sanhuri’s Kuwaiti Code is also more slanted towards the Majalla, given Kuwait’s history. Indeed, despite the widespread belief that it was the Egyptian Code that Sanhuri used primarily (along with the French Code) as a foundation for the Kuwaiti Code, Sanhuri’s main source was the Iraqi code, which he had also written. Political considerations may well be behind Kuwait’s general reluctance to credit the Iraqi Code, but Iraq was a Majalla country, like Kuwait, and it is for this reason that Sanhuri used Iraq as a template, wanting Kuwait’s new Code to reflect Kuwait’s history and to provide a system the people understood and were familiar with. It should be remembered that Sanhuri did not even create a separate Civil Code in Kuwait in 1960, unusually covering Obligations in his Commercial Code, leaving the country to rely on the Majalla for the next 20 years in civil family matters.

In light of the above, this research points to the overall importance of Kuwaiti custom and religion in its reliance on intent and the ‘truth’ of the contact in contractual interpretation. This runs opposite to the traditional academic understanding of the overriding focus on clarity of statement. Accordingly, despite the importance attached by Shari’a to certainty, and the Civil Code’s clear instruction to stay within the actual wording, the evolution of Kuwaiti law is towards a more flexible approach, to find the truth of the situation. This highlights the different emphasis under Shari’a and under general Islamic and Kuwaiti cultural principles.

The need to interpret contracts in light of good faith is also critical. The French Code is influential here, as is Islam. However, this requirement of good faith is not in itself a religious tenet, nor one attached to a specific legal system, but an overarching principle of interpretation based on common beliefs in integrity, honesty and trust.

175 Hill n 45, 35
176 ibid
between parties. With the increased emphasis upon good faith in the new French Civil Code, and its adoption by a growing number of Common Law countries, as well as its presence in international treaties, it is possible that Kuwait’s emphasis was ahead of its time. Although most Kuwaiti scholars rely on Article 193(1), basing their arguments on the sanctity of the contract and the clear statement, this work contends that the need for all contracts to be read in light of good faith and honourable dealing, as shown in the other Articles, is overriding and forms the basis of all interpretation. It is emphasised that the concept of good faith is not a strictly religious one, nor indeed a secular one, but one rooted both in Islam and the Roman Civil Code, the two great legal systems loved and revered by Al-Sanhuri.

8.3 Contractual Remedies

This section explores the evolution of, and current practice around, remedies for breach of contract under Kuwaiti Contract Law through the lens of the first research aim of this thesis, namely the extent of the influence of Islamic traditions, culture and law. The aim of this section is to draw out where, how and to what extent Islamic traditions, culture and law have shaped a legal structure grounded to a large extent in French Civil Law.

Using academic literature, the primary research and current practice, this section analyses in detail the important distinction between the influence of Islamic historical traditions and culture on the one hand, and that of Islamic Law on the other. The important distinction between obligation under Shari’a, in Islam and in Kuwaiti law will be presented. Also, the key Kuwaiti principle of 'balancing the harm', that has no place in either Shari’a or the French Code will also be addressed.

This section will consider first the primary remedy of specific performance and then address compensation/damages, including the heads of loss and the question of compensation for ‘moral’ harm (non-pecuniary damages).
8.3.1 Specific Performance

8.3.1.1 Specific Performance: The Contract Requires Enforcement

This section analyses the primary contractual remedy of specific performance.\textsuperscript{177} The influences are evaluated, focusing firstly on the history of Kuwait as a tribal trading nation. The French jurisprudential philosophy and Civil Code are then considered. The importance of Islam, both as regards the religion and culture, and Shari’a Law, are analysed in detail. These two bodies of influence are linked but do not necessarily have the same central focus.

The fundamental belief in Kuwaiti law is that a contract is a coming together of the minds, a commitment which must be performed and respected, as per the agreement. ‘What is agreed upon, is agreed upon’.\textsuperscript{178} The contract is inviolable: if there is a breach, the primary remedy is that of specific performance, namely an order to fulfil the contract as agreed.\textsuperscript{179} This would also cover the remedy of injunction where appropriate. Accordingly, claimants can demand the contract be fulfilled, in accordance with the principles of good faith and honourable dealing.\textsuperscript{180} Performance is at the very heart of the contract; it is its essence.

The Egyptian Supreme Court expressed the general principle well: “In principle, an obligation is to be performed specifically. Damages are not to be given instead unless specific performance is impossible”.\textsuperscript{181} The caveat of ‘only if impossible’ is specifically recognised in the Code.\textsuperscript{182} It is therefore not in the claimant’s power to refuse an offer of specific performance – the primary duty is always to fulfil the contract, the

\textsuperscript{177} Remedies are covered in the Kuwait Civil Code 1980 under Articles 284 – 292, comprising the section entitled ‘Actual Performance’, and Articles 293 – 306, the section entitled ‘Performance with Compensation’
\textsuperscript{178} Kuwaiti Civil Code 1980, Article 196
\textsuperscript{179} Kuwaiti Civil Code 1980, Article 284(1): The defendant is obliged, after being notified, to fulfil specific performance when possible
\textsuperscript{180} Kuwaiti Civil Code 1980, Article 197: The contract should be performed and comply with good faith and honourable dealing
\textsuperscript{181} Egyptian Court of Cassation, 20/05/79, Case No. 364
\textsuperscript{182} Egyptian Civil Code 1948, Article 284(1)
promise. This assumption of enforceability contrasts with the position in Common Law countries where damages are the remedy as of right and specific performance and injunctions are equitable remedies and only awarded if damages are not an adequate remedy.

Specific performance has clear roots in French jurisprudence: it is the remedy as of right because performance of the contract is the contract’s ‘fate’, it is what ‘must be accomplished’. In a purely practical sense, therefore, Al-Sanhuri’s choice of specific performance for Kuwait was very much influenced by the Civil Code, as per the French Civil Code, that provided Al-Sanhuri’s bedrock: allowing anything other than specific performance ‘would tarnish the idyllic image of the contract’s enforceability’. As such, Treitel’s Common Law-based statement, that specific performance is a “drastic remedy”, is a completely incomprehensible to Kuwaiti lawyers: after all, what could be ‘drastic’ about enforcing a contract, as agreed?

However, Islamic culture’s respect for keeping one’s word is also important, as is Kuwait’s historical trading status, and its use of barter. The Ottoman Majalla 1876, the Islamic legal provisions, based on the Hanafi school, which governed Kuwait up until 1961 and 1980, also clearly recognised the primary importance of specific

183 “In cases of non-performance, the party in default is nonetheless expected, at least in principle, to perform specifically: to do what he promised to do”, see Adnan Amkhan, n 148, 326
185 French Civil Code Article 1184: A condition subsequent is always implied in synallagmatic contracts, for the case where one of the two parties does not carry out his undertaking
186 Laithier n 184, 109
188 Kuwait used the Majalla for all domestic national matters up until 1961 when Sanhuri’s Commercial Code was implemented. This also covered Obligations in Book 2. The Majalla
performance, stating in Maxim 53 that a substitute remedy can only be given if the original obligation cannot be fulfilled. Interestingly, as discussed below, Shari’a Law has a different basis, not founded on the promise but on the nature of the goods. In this way, the influences underlying Kuwait’s adoption of specific performance are varied and interwoven.

8.3.1.2 Specific Performance: Kuwait as a Tribal Trading Nation - the Difficulty of Awarding Damages

Specific performance has a fundamental basis in Kuwait’s culture and commercial history. As a trading country, the importance of contracts to Kuwait was paramount. It is obvious that those contracts must be respected if trade is to flourish.

It is often thought that the Common Law system of damages is more conducive to the aims and success of a trading system. Mulcahy highlights how the ‘market economy’ and ‘market principles’ mean that the party should be able to choose whether to perform the contract or compensate the innocent party for not performing, selecting whichever is the better economic decision.\textsuperscript{189} It is true that an award of damages certainly provides a flexibility, often providing a middle ground between the two claims, and incorporates the theory of ‘efficient breach’. In the past this has favoured commercial dealings, confirmed by World Bank statistics.\textsuperscript{190}

\footnotesize{continued to be used for all other civil matters up until 1980 when the Kuwait Civil Code was enacted
\textsuperscript{189} Linda Mulcahy, \textit{Contract Law in Perspective}, (5th Edn., Routledge-Cavendish, 2008) 210
The most recent edition of Doing Business (2018) does not have such an analysis. However it does still show the ranking of the top countries in terms of ease of business, rather than financial success, with the UK at number 7, France at 31 and Kuwait at 96. Of the top 10 countries, four are Common Law countries, three are Civil Law countries and the remaining three utilise a mix of Common and Civil law. The World Bank’s most recent report, 2018 Doing Business, surmises that now countries with the most (recent) legal reforms are best at enabling and facilitating International business.
However, this view might apply more to a sophisticated system, where (in general) national law is firmly established, judgements respected and awards enforced, as has been the case in England for centuries. A tribal law system, however, does not enjoy this luxury. Although Kuwait has shown a gradual evolution in its judiciary, it was not until the early 20th century that a national judicial system existed, with the first officially recorded ruling being in 1921 and a law regulating the judiciary not passed until 1959.\footnote{Wael B. Hallaq, \textit{Shari'a: Theory, Pratice, Transformations} (CUP 2009) 561} Before that, respected ‘judges’ existed, who facilitated decisions at a local level, as shown by the long list dating back to 1705, with Judge, or \textit{qadi}, Mohammed Bin Fayruz.\footnote{See Yaqoub Al Gunaim, ‘Times and Places’ \textit{Al Wattan Newspaper} (Kuwait, 18th June 2008); this also shows a photograph of a written judgement of a subsequent Judge, Al Adsani, from 1802, Kuwait-History.net, posted 15\textsuperscript{th} January 2016, \texttt{<www.Kuwait-History.net/vb/archive/showthread.php?t=13409>} accessed 14th February 2018; Michael Casey, \textit{The History of Kuwait} (Greenwood Publishing Group, 2009) 30} However, this is not the same as a national system, universally recognised, with nationally qualified judges. Compounding this, those with more nomadic lives would still have dealt with disputes within their tribal system.\footnote{Austin Kennett in his book \textit{Bedouin Justice: Laws and Customs amongst the Egyptian Bedouin}, (CUP 2011) writes that, in Egypt, in the early 20\textsuperscript{th} century, a travelling government official did sit in on tribal hearings. It is unlikely though that they would have been present at all disputes for these travelling peoples.}

\textbf{As such, in terms} of clarity and ease, fixing damages was not easy: if the trader is bound to deliver carpets, it is complicated to work out the damages suffered from the failure to deliver the carpets. A financial calculation of damage is needed. This difficulty is compounded where communities use a system of bartering with no set price for items sold, as was the case in Kuwait. The damages themselves would not be financial but physical, based on yet another different good. This requires many ‘exchange’ rates. Indeed, the legal premise of barter is complicated, even in
sophisticated countries. It is far simpler to compel the trader to deliver the specific carpets, as agreed. Simplicity and clarity have a strong appeal in tribal societies.

Also, given the award is at the judge’s discretion, an award of damages is more controversial and more open to dispute, especially if the ‘judge’ is not an official with the force of national law behind him but simply a respected community member in an ad hoc gathering. Again, compelling the original agreement leads to simpler, more effective trade. As such, there is a strong business argument for specific performance, even in a trading society.

This commercial argument, however, is not the basis of specific performance in French Civil Law: Yves-Marie Laithier writes that “if French law favours specific performance, it is not in the name of the supposedly underlying economic efficiency of this remedy”. Further literature strengthens this point, such as Shavell’s economic comparison of the two remedies and assessment of which is a party’s preferred conclusion, regardless of legal primary.

Instead, the practical argument for specific performance proposed in this research fits well with Supreme Court Judge B’s statement that Kuwaiti contract law was designed to protect existing norms of trade. He highlights that before official laws existed, this was all that people had and they successfully managed their lives based on them. This is true: after all, if trade is the essence of a country’s existence, then the commonly accepted law will reflect that - it would be completely perverse to award remedies that negatively impact trade and do not fit with societal norms. One could take the argument further in saying that the very fact that specific performance is the favoured remedy means that it must, by definition, have suited trade. And this would seem logical, given the carpet example scenario above. However, what is economically suitable in a simple, tribal country may well not be so in a far more sophisticated, international country, as Kuwait is today, and hence

Laithier n 184, 108

the Common Law countries’ approach, with their emphasis on damages, is now generally more commercially successful.\textsuperscript{196} However, despite the Common Law argument of commercial preference, the trading history of Kuwait has a clear bearing on its primary choice of contractual remedy being specific performance.

\textbf{8.3.1.3 Specific Performance: French Jurisprudence}

The importance that Kuwait attributes to specific performance and the integrity of the contract not only has strong roots in the country’s bartering and trading cultural history, as explored above, but is also heavily influenced by the French Civil Code.

Specific performance is a ‘central remedy’ in France.\textsuperscript{197} As a man brought up on French law, Al-Sanhuri’s legal essence is imbued with French law, very much based on the sanctity of the contract, the purity of the promise, and hence the necessity for its performance. Laithier writes that the \textit{“role attributed to specific performance in France is above all the expression of an ideal”} and that specific performance is the \textit{“only remedy that is capable of ‘fulfilling’ both the subjective rights of the creditor and the objective rights created by the contract”}.\textsuperscript{198} This can be seen in the \textit{“near sacrosanct wording”} of the old Article 1134(1) whereby legally formed agreements have the \textit{“full force of the law between the parties…pacta sunt servanda, one must perform that which has been promised”}.\textsuperscript{199} France, therefore, does not see a contract as fundamentally a medium of exchange, as per English Common Law: for a French contract, the exchange is ‘merely one of its roles and not its substance’.\textsuperscript{200} Rather the contract is a meeting of minds, a confirmation of assent by two free wills.

France’s remedy of specific performance can be traced back to the Age of Enlightenment and the French worship of reason. A contract, by its nature, must be

\begin{itemize}
  \item \textsuperscript{196}The World Bank Group n 190
  \item \textsuperscript{197}Solène Rowan, Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance (2nd edn, OUP, Oxford 2013) 40
  \item \textsuperscript{198}Laithier n 184 8, 109
  \item \textsuperscript{199}Rowan n 150, 813
  \item \textsuperscript{200}Laithier n 184, 104
\end{itemize}
performed, therefore it cannot be rescinded and so, “as a matter of logic and law”, it must be enforced. The court must ensure that the integrity of the contract is respected: termination (and hence damages) are a last resort. As Ripert wrote in 1949, the job of the court is ‘to save the contract’.

Kuwait’s respect for the contract itself is founded on the same concept. The defendant can fulfil the obligation, right up until the judgement is final and ‘the trial door is closed’. If not, the contract is not only breached but revoked. Revocation is seen as a punishment (jaza), thus compensation can be added.

Of course, one could argue, as Stephen Smith explains, that the contractual obligation you fulfil at the last moment is never the original obligation but only an “action similar to the original duty”: after all, technically, you can never make right the passage of time. However, this is semantics (as Smith agrees), and the right of both the person and the contract itself means that the “direct enforcement of a contractual right is prima facie appropriate” where those rights are not respected. As such, the contract has a ‘contractual personality’, rather like a company’s separate corporate personality; it exists as an independent being, with its own right to be performed. Kuwait’s respect for the contract’s integrity, which cannot be violated, therefore has Civil Code origins, which reinforce the tribal trading traditions.

8.3.1.4 Specific Performance: Kingdom of the Will

Specific performance is intertwined with obligation. The evolution of the obligation in contract law in Kuwait, from pre-Islam times to current practice, can be seen in

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201 French Civil Code Article 1134, para 1
202 Laithier n 184, 116
204 Nakaas & Abdul Riddah n 14, 179
206 ibid
the clear cultural and religious basis for the concept of “Kingdom of the Will”, as shown by the various historical sources examined in this thesis.

Kuwait in ancient times was formed of tribal regions, and was not a unified country. The Arab people, including the tribal peoples of Kuwait, were renowned slave traders and holders in pre- and early Islamic history. When the Prophet Mohammed began preaching, slavery was very common, and slaves were amongst the first followers of Islam. Whilst the Qur’an does not explicitly contradict slavery, the Prophet is recorded as saying: “To free a slave is to be righteous”. The Prophet also ordered people to treat slaves well, instigated rules against violence against slaves and insisted that prisoners of war were freed once a war was ended, thus removing the primary source of slaves. Thus began the start of a slow change in Islamic jurisprudence, with personal freedom and personal autonomy becoming cherished above all other ideals, so giving rise to the ‘Kingdom of the Will’.

As such, not only is personal freedom a religious belief but also a deeply ingrained cultural one, with the Kingdom of the Will evolving over time to become obligation. By freely entering a contract, a person engages in a contractual relationship, under

207 Qur’an, An Nisa, 4:36: slaves are referred to as: “those whom your right hand possess”
208 William Gervaise Clarence Smith, Islam & the Abolition of Slavery (OUP 2006) 19
210 Qur’an 90:13, Al-Balad. See Yusuf Al-Hajj Ahmed, Slavery in Islam: Encyclopaedia of Islamic Law (Darussalam Publishers, Riyadh, Saudi Arabia), citing Al Bukhari & Muslim on the hadith by Abu Hurayrah. Al-Hajj interprets and translates this Surah to be a ‘Muslim slave’ but that is incorrect.
211 Qur’an: An-Nisa 4:36: ‘Be good to your parents…..and those under your control (including slaves)’
212 ibid, citing Muslim and Ahmed, “The messenger of Allah (PBUH) said, “Whoever slaps his slave or beats him up, the atonement is to set him free””
214 Clarence Smith n 208 (The Druze sect of Isma’ili Islam were the first to renounce slavery, 800AD Sunni scholars forbid criminals, debtors or foundlings to be enslaved, 12th Century Hanafi rulings gave clear rulings for the treatment of slaves)
the “kingdom of the will”.\textsuperscript{215} The 2016 Supreme Court case confirmed that a contract is an expression of the will of the parties, under the heading of the Kingdom of the Will, and that the role of the judge is to determine the truth of the contract, as this maintains the Kingdom of the Will.\textsuperscript{216}

The second Maxim of the Majalla states that, in general, “A matter is determined according to intention...”\textsuperscript{217} This relationship becomes a ‘law’ between the two parties so, just as the law must be respected, so must the actual contract. As Demolombe wrote in 1870, between the two parties the contract itself has the force of law, and therefore its actual performance is the fundamental obligation.\textsuperscript{218} Equally, as below and as discussed in Interpretation,\textsuperscript{219} to a Muslim, God’s will is also relevant and raises the parties’ will to a different, higher plane.

Kuwait’s premise is similar to the French: a different exchange (damages) cannot be inserted in place (of performance) as this is not what the meeting of the minds agreed in their ‘kingdom’. However, it also incorporates the Ottoman Majalla of 1876. This highlights the importance of the binding commitment of a contract, stating that “a contract is what the parties bind themselves and undertake to do with reference to a particular matter”.\textsuperscript{220} This ‘binding’ nature of the agreement in the Majalla can be contrasted with the rules of major schools of Shari’a (as shown below) but it must be remembered that the Ottoman Majalla was the basis for Kuwaiti contract law before 1961 and was used in the Iraqi code, which Sanhuri used for Kuwait.\textsuperscript{221} In current practice, therefore, the contract is a source of law between the parties, based on free will, with roots in Civil Law, but also as a religious source under the Islamic-based principle of ‘Kingdom of the Will’.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{215} Supreme Court of Kuwait, 29/2/12, No. 1064/09, Commercial Court 5
\item \textsuperscript{216} Supreme Court of Kuwait, 16/11/16, No. 685/16, Commercial Court 1
\item \textsuperscript{217} Pasha n 20
\item \textsuperscript{218} Demolombe n 184, 486 & 488
\item \textsuperscript{219} See Interpretation section: Islamic Oaths: Do Not Break What You Intended
\item \textsuperscript{220} Pasha n 20, Book 1 Sale, No. 103
\item \textsuperscript{221} Liebesny, n 45, 109
\end{enumerate}
\end{footnotesize}
8.3.1.5 Specific Performance: Morality – Break Not Your Oath

The concept of the sanctity of the contract as a promise has clear religious and moral roots, whether Islamic, Christian or Humanist. Ripert claims that the French Civil Code is heavily imbued with morality,\(^{222}\) that somebody who freely commits to do something should respect that commitment and that a promise should be kept.\(^{223}\) Ripert makes it clear that he is referring to Christian morality.\(^{224}\)

Yet this is not specific to Christianity: the same belief can be found in Islam. It is a strong *hadith* that states “it is an act of oppression on the part of a person to procrastinate in fulfilling his obligation”.\(^{225}\) Contract and covenants are lifted to a higher plane, as in the Qur’an, (Al-Ma’idah), “O you who have believed, fulfil (all) contracts”.\(^{226}\) Later, verse 89 tells people to “guard their oaths”.\(^{227}\) Equally, “all Muslims will be held to their conditions”.\(^{228}\) A commitment therefore has overriding power, it is central, and that person’s core responsibility.\(^{229}\) Covenants between people, or an individual and the prophet, must be respected. Only overwhelming legal or moral reasons release one from that commitment.

The importance of an oath therefore cannot be overstated. The Common Law argument that specific performance ‘poses a special risk to personal liberty’\(^{230}\) is


\(^{223}\) This can also apply to Common Law countries. Charles Fried, Harvard Professor and former Solicitor General of the US, writes that the “promise principle ... is the moral basis of contract law”. Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, (2\(^{nd}\) ed. OUP, 2015)

\(^{224}\) Ripert, n 222

\(^{225}\) *Hadith* Abu Huraira

\(^{226}\) Qur’an, (Al-Ma’idah), Verse 1

\(^{227}\) See also: An-Nahl, verse 91, “fulfil the covenant (of Allah) and do not break oaths after their confirmation” and Al-Haj, verse 29, ‘fulfil your vows’

\(^{228}\) In one *hadith*, Kathir bin ‘Amr bin ‘Awf Al-Muzani tells that his grandfather told his father that the Messenger of Allah spoke that “all Muslims will be held to their conditions, except the conditions that make the lawful unlawful or the unlawful lawful”

\(^{229}\) See Al-Isra sura, verse 34. See also the Qur’an, in Mohammed, verse 33, ‘do not invalidate your actions’

\(^{230}\) Smith n 205, 155
out of place in Kuwaiti thinking. The argument that forcing people to keep their word is rather feudal, ‘akin to a kind of servitude’,\textsuperscript{231} is morally and legally shocking; the idea that the law would condone it (by allowing damages instead) is even more shocking. For Kuwait, a more appealing Common Law scholarly approach is found in Charles Fried when he writes that the contract is an obligation that is self-imposed, based on ‘ancient’ principle of being faithful to one’s word, and that this moral principle is not open to debate, no matter what the trend is in academic circles: “the validity of a moral, like that of a mathematical truth, does not depend on fashion or favour”.\textsuperscript{232}

In short, for a Kuwaiti lawyer, it is hard to disagree with Laithier when he writes that “is it not ‘obvious’ that keeping one’s word commands, in principle, specific performance of one’s commitments?”\textsuperscript{233}

8.3.1.6 Specific Performance: The Importance of Obligation

In analysing specific performance in terms of the influence of Islamic traditions, culture and law, as balanced against the importance of the French roots, the nature of obligation has to be analysed. The different approach of Roman and Islamic legal philosophies is important.

In current law, the defendant is obliged, after notification, to fulfil his obligation under the contract.\textsuperscript{234} The word ‘obligation’ is key. Obligation theory is essential; it is the very bedrock of Kuwaiti law.\textsuperscript{235} A law student in Kuwait has to be competent in Obligations before progressing to the specialist subject of Contract law. Contract law is thus a subset of Obligations. The nature of specific performance as an obligation of the contract, imposed by the very nature of the contract, is therefore clear and fundamental. Indeed, linguistically, in Arabic, the idea of compensation is

\textsuperscript{231} \textit{ibid}
\textsuperscript{232} Fried \textit{n 223}, 2
\textsuperscript{233} Laithier \textit{n 184}, 110
\textsuperscript{234} Kuwaiti Civil Code 1980, Article 284
\textsuperscript{235} Nakaas & Abdul Riddah \textit{n 14}, 7 (footnotes)
that of a guarantee. The person guarantees the obligation of the debt, rather than compensates the loss of a bargain.

The idea of obligation and the legal bond (vinculum iuris) is fundamental to Roman law. It comes from the Latin obligare which includes the word lig, meaning being bound (one can be bound by ropes as in 'lig-atures' or to God, as in ‘re-lig-ion’). Under the obligation, there is an obligor who is obligated and an obligee who has rights. This dual aspect is essential. But which is more important: the right or the obligation? Indeed, this conflict is at the heart of Kuwaiti law with Roman law emphasising the obligation but Islamic fiqh focusing more not on the oath as a source of obligation but a source of rights, as discussed below.

8.3.1.7 Specific Performance: The Influence of Shari’a

a) Absence of Obligation

This research explores a common confusion between Islam and Islamic Law. Reviewing interesting academic study on both sides, this section highlights how contractual obligation has no basis in Shari’a. As such, the remedy of enforcing the obligation has no roots in Islamic contract law. This distinction between Islam as a religion and Islamic Law is critical. However, there is a similar effect in practice.

Obligation is not a Shari’a contractual principle; indeed, “in Islamic Law, the juridical act (i.e. a contract) in itself transfers ownership”, hence obligation to fulfil and transfer is irrelevant. In short, as soon as the contract is concluded, the contract is fulfilled. There is no obligation to perform on either party, the judge simply serves an administrative purpose to ensure that the actual delivery is affected. This seems radical.

236 Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (2nd Edn, OUP, Oxford 1996), 1 : Justinian defined an obligation (obligatio) in Institutiones, (Book 3, s.13) as "a legal bond, with which we are bound by necessity of performing some act, according to the laws of our State."
237 Al-Sanhuri, cited in Nakaas & Abdul Riddah n 14, 7 (footnote)
238 Amkhan n 148, 331
The seeming contradiction here is that Islam considers oaths as sacrosanct, and Muslims recognise this, hence specific performance as a remedy fits with the country's religion and culture. However, Islamic contract law, as per Hanbali, is quite different, based on the exchange and transfer, rather than the obligation of fulfilling a promise.\textsuperscript{239} In Majalla, this is also present, seen concisely as a "sale consists of exchanging property for property".\textsuperscript{240}

The absence of obligation would seem strange for a moral and religious body of law where Allah proclaims that ‘o ye who believe, fulfil all promises’. However, in the context of contracts, Shari’a is concerned with the nature of the goods, not the nature of the commitment. Chehata writes that in Islamic contract law there is no sense of future obligation arising from the contract - the inner nature of the goods changes the moment the agreement is made, thus transferring ownership without the need for obligation.\textsuperscript{241} The need for physical transfer is, therefore, a separate and new issue, not part of the contract. This is a clear principle in Shari’a countries such as Saudi Arabia.

Indeed, this is the same as in tribal law and is also recognised in Kuwaiti culture: to an average Islamic person, if a sale has been agreed, that object now belongs to the purchaser, it does not also require some obligation to fulfil.\textsuperscript{242}

Some scholars do not interpret Shari’a this way. Ballantyne quotes the legal submissions at the Aminoil arbitration proceedings where Morqos and Hanachy

\begin{itemize}
\item \textsuperscript{239} Hanafi author, Kasani, wrote that a contract is an exchange of one desired article against another, see Allamah Abu Bakr Al-Kasani Al-Hanafi, \textit{Contract Exchange (Bada’i al-Sana’i’ fi Tartib al-Shara’i’)} (1\textsuperscript{st} Edn Dar El Hadith, Cairo, 1910, this edn Turath For Solutions, 2013) 133 (in Arabic)
\item \textsuperscript{240} Pasha n 20, Book 1, Article 105
\item \textsuperscript{242} The Majalla states that a contract is simply an offer and an acceptance; Shari’a Law deems the ownership to have changed automatically the agreement is concluded, without any concept of obligation.
\end{itemize}
claimed that “pacta sunt servanda is a basic rule of Kuwait law” and, moreover, “this is true both of the recent secular legislation contained in the Commercial Code promulgated in 1961 and of the Sacred Muslim Law as formulated in the Majalla”. 243

Equally, Professor Goldman submitted a learned assessment of the laws of England, France, Switzerland, Germany, the USA and Kuwait, concluding that “pacta sunt servanda’ is fundamental principle under the six municipal laws – hence at Common Law, Civil Law and Muslim Law.” 244

However, Professor Goldman’s claim is not correct. The six legal systems he analysed do indeed cover Common Law and Civil Law systems but they do not, contrary to his claim, cover Muslim legal systems because Kuwait is specifically not a Muslim law country. (It should be remembered that Kuwait is a Civil law country and, under Article 2 of the Constitution, Shari’a is a principal source of Kuwaiti law but not the principal source, see chapter 3).

Another problem is that ‘sacred Muslim law’ makes no distinction between different Islamic Shari’a schools. Rather, these are arguments for a Western tribunal, made accessible for Western styled lawyers. The actual net effect of the two sides of this argument is not fundamentally different: in each instance, the contract is respected. It is the root that is different. As such, it probably was not important in the Aminoil arbitration proceedings to make this distinction. However, in terms of the first research aim of this thesis, it is essential.

It is true that there is some evidence that the obligation basis of Shari’a contract law has changed over time and depends on the region. Professor Abu Zahra of Cairo University wrote in 1939 that a contract gives rise to ‘reciprocal obligations’. 245 However, this comes from an Egyptian standpoint where, again, the influence of French law is important and has less overlap with the Shari’a developing in Hanbali schools. As shown below, the Shari’a schools in the past few decades have focused

243 Ballantyne n 2, 159
244 Ballantyne n 2, 157
245 Abu Zahra, Property and Contract in Muslim Law (1939) 218, cited in Ballantyne n 2, 159
more on the need to avoid *riba* (unwarranted gain) and *gharar* (uncertainty), key Shari’a principles, which can be seen to contradict the argument of a future obligation.

Contracts, indeed, were not even recognised under religious law. Saleh writes that “*until the 19th century no definition of a contract as such is to be found in the treatises of Islamic Law*.246 The reason being, he explains, is that *fiqh* is “*casuistic not dogmatic*”,247 that is, intended to solve problems but not to deduce and lay down laws going forward from those problems. This is correct: even today, Shari’a has no overarching theory covering all types of contracts. Instead, religious legal rules deal with different types of contracts separately, as contract for sale, hire, loans etc.

Sanhuri himself provides an excellent middle ground. He writes that contracts do create obligations but the obligation part is less important – a contract is formed when the offer and acceptance changes the actual nature of the contractual object, and therefore no obligation is needed.248 This backs up the contention of this section that the remedy of enforcing the obligation is not primarily Shari’a based. Indeed, this can be seen practically in the Jordanian Civil Code where a contract is fulfilled the moment it is concluded ‘without being dependent on a payment or anything else’.249 Accordingly, the ‘obligation to transfer’ is not a specific part of a contract because in Islam the “*contract does not create an independent obligation to transfer ownership, for the ownership is transferred simultaneously, upon entering into agreement to that effect*”.250

Practical problems, of course, may arise – if the agreement itself actually transfers ownership, but the goods are not to be delivered for several weeks, there is in

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246 Saleh n 241, 101
247 ibid
248 Al-Sanhuri Vol I, 17, cited in n 14, 144
249 Jordanian Civil Code 1976, Article 199(1)
250 Amkhan n 148, 331
theory no obligation to deliver (because they already belong to the new owner). However, as seen in Saudi Arabia, there is now an obligation of ‘possession-er’, while they are under the seller’s care, which is a separate principle.

Shari’a contract law, therefore, is based on the importance of immediate possession, and clarity of identifying the exchange goods. No contract may contain gharar (risk/uncertainty). The Majalla also stresses clarity, providing practical examples: “The sale of a thing not in existence is void. Example:- The sale of the fruit of a tree which has not yet appeared is void.” For how can a vendor have an obligation to provide an item which does not, and may never, exist? Indeed, Article 171 of the Majalla states that if the future tense is used with a promise to buy or sell, the sale is invalid.

Under Islam therefore, it is obvious that recognising the contract as agreed, immediately, is clean cut and certain. Imputing a future obligation creates practical uncertainty: although obligations should be respected, it is obvious that they may not be. Allowing the right to substitute damages gives more serious possibilities of uncertainty, as well as the opportunity for the stronger party to take advantage, by using penal or arbitrary damages calculations. Having to pay extra to compensate for late delivery, say, will also equate to riba (excessive advantage) and therefore be strictly outlawed.

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251 Under Article 463 of Majalla, transfer of ownership occurs upon conclusion of the sale contract and does not require the handover of property or ‘discharge of obligation’. Hanafi fiqh encourages emphasis on material delivery and “constructive” delivery which is said to occur the moment that the seller allows the buyer to take possession of the sale object and ensures there are not obstacles preventing possession.

252 Kuwaiti Civil Code 1980, Article 286 states that the obligation of transferring a right includes the obligation of delivering the item and to take care of it until delivery.

253 For instance, “A fish while in the sea is not of any specific value. When it is caught and taken, it becomes property of some specific value,” see Pasha n 20, Book 1, Article 107

254 ibid, Book 1, Chapter 2, Section II, Article 205

255 Ibid, Article 171
As such, when Ballantyne concludes that the sanctity of the contract ‘assumes even greater relevance under Shari’a Law’ as the contract is sacred and this is ‘stems from the Qur’an’,\textsuperscript{256} it is submitted that this confuses two different ideas: the Qur’an certainly puts great emphasis on the importance of respecting one’s oath; however, this is not the fundamental principle of contractual remedies under Shari’a.

In conclusion, Islam as a religion imposes a moral duty to keep one’s word. But Islamic Law prioritises the need to avoid riba and gharar. Immediate exchange is essential to ‘prevent exploitation of the weak’, rather than to enforce any obligation.\textsuperscript{257} Indeed, Saleh goes so far to say that Islamic scholars ‘overlooked the concept of obligation arising out of the contract’.\textsuperscript{258} This seems counterintuitive at first but it shows how religion and religious law are not necessarily identical, especially given the different schools of Islamic Law.

Tradition, moreover, is also intertwined, even into strict religious law. Despite the goods not being identifiable nor immediately exchangeable, Shari’a does actually recognise both bay salam (payment in advance against future delivery) and istisna’ (manufacturing contracts where goods are not even yet made and payment is only on delivery). Both are accepted under the guise of ‘tradition, attributed to the Prophet himself’ as well as on the grounds of ijma (consensus) and public need. Practical expediency and necessity are therefore prioritised. Importantly, again, no mention is made of obligation.

**b) Rights, Rather Than Obligations**

Not only do obligations not form part of Shari’a Law, despite the traditional view,\textsuperscript{259} but in Islam the focus is always on rights, not obligations. Kuwaiti law, however, maintains the obligation premise, thus again distinguishing itself from Islamic Law.

\textsuperscript{256} Ballantyne n 2, 159
\textsuperscript{257} Saleh n 241, 102
\textsuperscript{258} ibid
\textsuperscript{259} Nakaas & Abdul Riddah n 14, 7
Al-Sanhuri writes that Western jurisprudence considers obligations from a negative viewpoint, as a duty, but Islamic jurisprudence consider it from a positive point of view, as generating a right.\textsuperscript{260} Hence, Civil Law refers to the sources of obligations, whereas the \textit{fiqh} calls it the sources of rights. Sanhuri’s jurisprudential thinking shows the evolution from a more Civil Law basis to a more Islamic one.\textsuperscript{261}

Kuwait’s Civil Code Explanatory Memorandum, however, clearly favours the view that a contract is a source of obligations, and one which has \textit{“an effect recognised in law”}\textsuperscript{262}. Thus, in 1980, Kuwait deliberately chose a broader phrase and did not use the more Shari’a object-based wording which can be seen, for instance, in the Iraqi code, which states that a contract involves an offer and an acceptance that \textit{“marks its effect on the object of the contract”}.\textsuperscript{263} Moreover, in Kuwait, there is a clear obligation of delivery under Article 286 which also contradicts the Islamic contract law principle above.

This research therefore highlights that contractual theory in Shari’a is not based on the idea of obligation and thus the remedy of specific performance does not rest on the contractual obligation. Rather, in Shari’a, the person has a right to the good as the nature of the good has changed.

\textbf{8.3.2 When Specific Performance is Refused}

This section analyses under what conditions specific performance can be replaced with compensation. Refusing specific performance has no root in the original Napoleonic Code but is centred on the Islamic tenet of balancing the harm. Interestingly, an overlap can also be seen with English Common Law.

\begin{footnotesize}
\textsuperscript{260} Al-Sanhuri, cited in Nakaas & Abdul Riddah n 14, 7 (footnote)
\textsuperscript{261} In his early days, Sanhuri clearly saw Islamic contract law as being based on obligations, see: Abd al-Razzaq Ahmad Al-Sanhuri, \textit{Nazariyat al-Aqd} (Theory of contract) (Egypt, 1934) 63
\textsuperscript{262} ibid
\textsuperscript{263} Iraqi Civil Code 1951, Article 73
\end{footnotesize}
Despite being the primary remedy in Kuwait law, the judge may refuse specific performance and award compensation instead when weighing up the harm/benefit, for instance, if performance itself would cause serious harm to either party. This aspect of Kuwaiti law differs to French Law, although is present in Egyptian. On a more commercial level, compensation may also be awarded where the nature of the contract does not allow specific performance, and is particularly relevant to service agreements, where trust is lost between the two parties or where the nature of the goods has fundamentally changed. The wronged party may request faskh, for the contract to be cancelled.

Compensation is a courtesy, not a right. The right to cancel the contract and to receive compensation instead only applies if the claimant is not at fault in fulfilling his part of the contract. This contrasts with English Common Law where specific performance is an equitable remedy and only open ‘to those who come with clean hands’. Kuwait law is the reverse: it is compensation that cannot be claimed if there is any fault on the part of the claimant.

The amount of ‘effort’ needed by the defendant to fulfil the obligation before compensation is allowed is important. Planiol writes that, under French law, “the debtor must devote to the performance of his contractual obligations, ‘the entirety of his work force, at the risk of ruining his health and endangering his life’”. Indeed, “even if the debtor must ruin himself in performing his obligation, there is no force

264 Kuwaiti Civil Code 1980, Article 289: the judgement is enforceable immediately if the nature of the agreement allows it.
265 Kuwaiti Civil Code 1980, Article 209
266 Kuwaiti Civil Code 1980, Article 209(1)
267 Kuwaiti Civil Code 1980, Article 293: if the defendant could not perform the contract or performance is delayed, the defendant has to compensate the claimant for the harm he has suffered unless the defendant can prove that the delay or failure to perform was outside of his control.
268 Marcel de Planiol & George Ripert, Traité Practique du Droit Civil Français, (Obligations) no 382 (Paris, LGDJ, 1931), 582, as cited by Laithier n 184, 103
majeure so long as performance remains physically possible".269 Again, the sanctity of the contract is critical: it must not be violated. There is no consideration of the harm that enforcement may cause.270

This contrasts sharply with the view in cases such as Mineral Park Land v Howard (1916)271 in the US where it was held that a thing is impossible if it is difficult or not practicable i.e. involves unreasonable cost. This will justify excusing that party from performing it. US law has confirmed this approach in the Uniform Commercial Code272. Compared with the French approach, the bar in the USA is set very low: difficult to perform is hardly the same as impossible.

The Kuwaiti approach does not reflect the French approach: the contract should be performed but a Kuwaiti court will not force someone to ‘ruin himself’ in order to respect the contract – it is an essential part of Kuwaiti law that the harm must be weighed and balanced. As below, this has Arab cultural and religious roots, not French.

8.3.2.1 Refusal of Specific Performance: Balancing the Harm – the Scales of Justice

The principle of ‘balancing the harm’ can be seen in many aspects of contractual remedies in Kuwaiti Contract Law. This has a clear Islamic influence. As above, specific performance is only the primary remedy if it does not harm the defendant. If fulfilling the obligation will cause harm (erhaaq - literally ‘to be tiring’) to the defendant, the court can ask the court to award monetary compensation instead.273

269 François Terré, Philippe Simler & Yves Lequette, Droit Civil, Les Obligations (8th edn, Dalloz, Paris, 2002) 582, as cited by Laithier n 184, 104

270 This has now changed in the new 2016 French Civil Code see Article 1221: specific performance should not be ordered where there is a manifest disproportion between its cost to the promisor and the benefit to the promise.

271 Mineral Park Land v Howard (1916) 172 Cal. 289, 156 P. 458, 1916 Cal. 529

272 USA Uniform Commercial Code 1952, Articles 2-613, 615, 616

273 Kuwaiti Civil Code 1980, Article 284(1): The defendant is obliged to fulfil his obligation where possible. (2) However, if this is ‘tiring’ to the defendant, the court can limit the
Importantly, however, this judicial discretion will only be used if this does not, in turn, place a serious burden on the claimant. Thus, the sanctity of the contract can be undermined to prevent undue harm. This law has no French Civil Code basis, although – interestingly – can be seen in English Common Law.\(^{274}\)

Kuwaiti law, therefore, has a clear multi-layered approach: will specific performance impose an undue burden on the wrongdoer? But will allowing him not to perform and to pay compensation instead impose an undue burden on the innocent party? The interpretation of erhaaq is also not obvious – how ‘tiring’ does it have to be? What will be burdensome to one person will not be so to another. The starting point is therefore the enforcement of the contract; but in deciding whether to enforce performance or not, the judge may have a complex task in considering which party will suffer greater harm.

The clause allowing the refusal of specific performance if it causes undue harm is found in both the Egyptian Civil Code\(^ {275}\) and in the Iraqi Code,\(^ {276}\) but did not exist in the original French Civil Code. Interestingly, the French have very recently codified it into their law with the new 2016 French Code now having a near-identical clause,\(^ {277}\) mirroring the Kuwaiti and Egyptian ones. Previously, there were cases in French law with seemingly bizarre outcomes,\(^ {278}\) taking no account of remedy to compensation as long as this, in turn, does not put an extra burden on the claimant.

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\(^{274}\) See _Wedgwood v Adams_ (1843) 6 Beav. 600; _Denne v Light_ (1857) 8 D.M. & G. 774

\(^{275}\) Egyptian Civil Code 1948, Article 203(1) and (2)

\(^{276}\) Iraqi Civil Code 1951, Article 246(1) and (2)

\(^{277}\) French Civil Code 2016, Article 1221

\(^{278}\) _Civ (3) 11 May 2005, RDC 2005.323_, (Cour de Cassation), cited in Rowan n 150, 14: a house was built 13 inches less than the stipulated height in the contract. The regional Court of Appeal held that the house was fit for purpose and height was not an essential term of the contract. The decision was overturned: the house owner had the right to enforce the obligation, exactly as written, and the court ordered the house to be pulled down and rebuilt. Similarly, a swimming pool had to be rebuilt completely because it had been built with three rather than the contractual four steps, even though three steps provided perfect access to the pool. This should be compared to the English case of _Ruxley Electronics and Construction Ltd. v Forsyth_ (1996) AC 344 where cost of cure damages were refused as they
proportionality or reasonableness. The new article now lays down that if there is a ‘manifest disproportion’ between the cost and the benefit of specific performance, this is an abuse of right/law. Rowan writes that this new clause is a “notable innovation” and represents “a significant break from the past”. In this way, it is interesting that French law, aiming to be more modern and effective after the major criticisms, has followed the Arab states’ laws, rather than the other way around.

The ‘balancing the harm’ principle in Kuwait also applies to subsequent events. If exceptional, unforeseen events occur that “make the performance of the contractual obligation onerous on the obligor, threatening him with exorbitant loss”, then the judge can alter the onerous clause and re-set it at a ‘reasonable level’ or suspend the contractual obligations until the contract can be honoured. Alternatively, the judge can add ‘counter-obligations’ so that the party in the right (the ‘creditor’) effectively shares the burden of the party that is in breach of its obligations (the ‘debtor’). Amkhan claims that the basis of this rule is one of equity, to “modify the binding effect of a contract and make it more just”. This is not found in Shari’a Law countries. Equally, this has no basis in the founding French Civil Code. In Kuwait, however, it applies to all contracts, demonstrating Islamic cultural and religious influences, as discussed below, although not those of Islamic Law.

Specific performance can also be deferred. Grace periods are allowed under the Kuwaiti legal principle of the ‘Mercy Vision’: allowing time to fulfil, or allowing fulfilment in instalments, is granted in deserving circumstances. This has clear roots

would have given the claimant the full cost of a new swimming pool, as well as a perfectly functional new actual pool.

279 Rowan n 197  
280 In the mid-2000s, the World Bank ‘Doing Business’ reports ranked France as 44th in the world, criticising it for being inappropriate for modern business, complex, unpredictable and generally unattractive, n 190. As mentioned previously it now ranks 31st.  
281 Kuwaiti Civil Code 1980, Article 198  
282 Amkhan n 148  
283 Kuwaiti Civil Code 1980, Article 410
in the Qur'an. But this also is only on the condition that it does not cause the claimant to suffer too greatly. As the Explanatory Memorandum says: "It does not make sense to try and rescue the defendant if the only way to do this is to do great harm to the claimant."

However, other examples of where specific performance is waived actually enforce, rather than undermine, the sanctity of the contract. Although this sounds circular, if one party stops performance, the other party can also legitimately stop performance. No court approval is necessary, although a 'threatening penalty' (see below) may be imposed to force the original party to perform. Thus, allowing non-performance of one is justified because of the non-performance of the other. This seems logical. The mutual agreement is broken. Every contractual obligation has another obligation tied to it – to you get one, you need to do the other. Anything else would be unjust. This fits balancing the harm twice, once in the code and once in the clause.

In analysing its roots, therefore, the Kuwaiti legal concept of balancing the harm cannot have come from France where the contract itself is sacrosanct. However, it was clearly a principle dear to Sanhuri’s heart as he included it in both the Egyptian and Iraqi codes. This break with his French roots is even more surprising when one

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284 Qur’an, Al-Bacara, verse 280: “And if someone is in hardship, then let there be postponement until a time of ease”.
285 Kuwait Civil Code 1980, Explanatory Memorandum, re Article 410
286 Under the heading of 'Claiming non-performance', Article 219 says that in a bi-lateral contract, if one party stops performing their side, then the other side can also stop performing (as long as nothing different has been agreed and does not disagree with orf).
287 This is based on ‘reasoning’ theory – if someone rents a house and pays the rent regularly but the landlord stops him using it, the tenant can stop paying the rent as there is no ‘reason’ to pay the rent because the ‘reason’ of having access to the house is denied.
288 Ibrahim Aldosoqi, 423 cited in Nakaas & Abdul Riddah n 14, 192
289 This is on condition that the obligation must be due and that the party in the wrong has completed the majority of his obligation, otherwise it is not available as not in good faith, see Nakaas & Abdul Riddah n 14, 193
considers that Al-Sanhuri drafted the original Egyptian code with Lambert, a French Law professor.\(^{290}\)

Interestingly, the idea that specific performance should only be awarded if it does not cause severe hardship to the defendant is also present in English Common Law, and has been since the 19th century.\(^{291}\) This is particularly true if the hardship is not only purely financial but also personal, such as causing a disabled person to lose their home and, therefore also, their support network of friends and helpers.\(^{292}\) As he was a very well-educated and cosmopolitan man, it is possible, therefore, that Sanhuri was aware of this principle, not only from his Islamic background but also from the English Common Law.

### 8.3.2.2 Balancing the Harm: Rooted in Islam

In trying to discern the underlying influence of the principle of balancing the harm, given that it clearly was not French, the importance of religion and cultural tradition are intertwined.

The concept of creating harmony is strongly rooted in Islam. Balance is understood as a fundamental principle of harmony. The Qur'an says that between two people, all matters must be judged ‘properly’ and ‘fairly’, by which it is understood that the proper result is one that create balance between the two parties.\(^{293}\)

The importance of balance is also integral to zakat. Zakat (purity) is the fourth of the five pillars of Islam, “the most cardinal and vital system in an Islamic order”.\(^{294}\) Every Muslim is obliged to give 2.5%\(^{295}\) of their savings (not income) to those in

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\(^{290}\) Saleh n 241, 162

\(^{291}\) Wedgwood v Adams (1843) 6 Beav. 600; Denne v Light (1857) 8 D.M. & G. 774


\(^{293}\) Qur’an, Al-Ma’idah, verse 42


\(^{295}\) Sunna Saheeh
need, as a way of redistributing wealth amongst society and discouraging hoarding of wealth. The aim is to create balance and equality in society, leading to the purity of soul of the giver. Imam Faysal Molawi writes that the principle of zakat is based on the need to achieve a balanced, fair society. The Ministry of Islamic Affairs in Morocco states that zakat has a positive influence on society in terms of social harmony and helps to balance society, both socially and economically.

An underlying principle here is that everything comes from Allah and everything belongs to Allah. All monies earned are given by God, and therefore a portion should be put to use in His name, as He requests, “give them from the wealth of Allah which He has given you.”

Lewis describes wealth and property as “a trust from God (to be used) for the benefit of society.” However, it goes beyond basic redistribution. A person hoarding financial gains each year and paying the compulsory 2.5% zakat would soon deplete their savings. Hence, zakat encourages reinvestment of wealth into business and society, in turn providing employment and stimulating the economy, allowing the poor to rise beyond their poverty, educating their children. Zakat positively influences society, balancing wealth and overall, balancing society.

From this examination, it is clear how the principle of ‘balancing the harm’ was very familiar to Kuwaiti law makers such as Al-Sanhuri and the previous Ottoman law makers, both in their religion and as part of their cultural upbringing. In law,  

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296 Qur’an 9:6 “the poor, the needy, those who collect them, those whose hearts are to be reconciled, to free the captives and the debtors for the cause of Allah and for the travellers...”
299 Qur’an, Nur 33
301 Abdullah & Suhaib n 294, 85 & 210
therefore, it is a natural extension from the principal of zakat, to ensure that both claimant and defendant are left in a financially stable condition once the remedy is finalised.

8.3.3 Compensation

This section considers the legal principles underlying the remedy award of compensation or damages for contractual breach in Kuwaiti law. The fundamental nature of compensation and its justification are analysed with relation to each aspect's origins, considering Islamic religious and customary influences, alongside the Roman Civil Law basis. Liquidated damages (‘agreed’ damages) are considered separately from discretionary damages as the Shari’a influence is quite different. Important heads of damage, in terms of their religious and cultural roots, are also examined. Contractual compensation for moral harm (non-pecuniary damages) is analysed at the end. This is not accepted under Shari’a.

The aim of this section, therefore, is to evaluate the Kuwaiti remedy of damages, both philosophically and in current practice. Again, the distinction between the influences of Islamic Law and Islamic religious beliefs, as part of the country's cultural background, is highlighted.

8.3.3.1 Compensation – Exploitative or Protective?

In analysing the underlying influences, it is clear that compensation has a different justification in Roman law from Islamic Law. Zimmermann highlights that in Roman law the first remedy for breach was to enforce the contract. However, when this failed, the basic response was a need for 'revenge', usually physical, against the defaulter. This right to revenge came to be recognized as traditional customary law. A similar concept is seen in tribal and Islamic Law, where the inconvenience and loss to the tribe is equally exacted upon the tribe of the defaulting member. One could also argue that the desire for revenge is a part of human nature, to seek

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302 Zimmermann n 236
303 Sura Al-Bacara as Al-Qassas (see Section 7.7)
retribution out of anger or shame. Indeed psychologist McCullough believes revenge to be a natural deterrent, present in many species, to discourage future harm.\textsuperscript{304}

But this is not a sophisticated or desirable foundation for justice, nor a practical way to achieve a peaceful society. Realising the danger, the Romans developed a legal system of liability which firstly encouraged people, and later forced them, not to seek revenge but to accept monetary compensation from the malfeasor instead. As such, the law embraced compensation, as a means to discourage and replace vengeance. Again, a tribal version of this is still present in Kuwaiti law in personal harm cases under \textit{Al-diyya}.\textsuperscript{305}

Importantly, however, this does not mean that the wrongdoer actually \textit{owed} monetary compensation to the other party. There was no entitlement to compensation. Rather, compensation was a necessary means to \textit{protect} the wrongdoer from physical harm.\textsuperscript{306}

This contrasts with the Islamic principle where the wrongdoer is protected from harm by generally \textit{banning} compensation. Demanding compensation for late delivery or late payment counts as \textit{ribha} (something gained without justification), allowing potential exploitation, and so is prohibited.

### 8.3.3.2 Compensation: the Different Forms

Although not the primary remedy, damages (monetary compensation for harm suffered as a result of contractual breach) may be granted in Kuwait under certain circumstances. The remedy is cumulative and can be awarded in addition to specific performance.

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\textsuperscript{304} Michael McCullough interviewed in Katherine Harmon, 'Does Revenge Serve an Evolutionary Purpose?', \textit{Scientific American} (4\textsuperscript{th} May 2011), <www.scientificamerican.com/article/revenge-evolution/>, accessed 30\textsuperscript{th} March 2018

\textsuperscript{305} \textit{Al-diyya} is normally translated as 'blood money'

\textsuperscript{306} Zimmermann n 236, 3
The classic understanding in Kuwait is that compensation exists in three forms: ‘agreed compensation’ (agreed between the two parties i.e. liquidated damage); ‘judicial compensation’ (discretionary, as awarded by the judge); and ‘legal compensation’ (set in statute). Both Islamic religious and Islamic legal influences can be seen in all three forms.

This research focuses in detail on liquidated and discretionary damages, including certain heads of damage. Statutory compensation is not covered in this chapter.

Compensation is based on the harm principle: no harm means no compensation. As analysed below, this is based strongly on the Islamic principle of unjust enrichment and backed up in the Civil Code. In this way, the calculation of damages in Kuwaiti law is compensatory, not punitive, the same basis as in English Common Law.

However, linguistically, the justification for allowing compensation in the first place is as punishment: the breach allows the claimant to revoke the contract, which is punishment (jaza) for the breach, for which compensation is owed. As such, the remedy is still rooted in the idea that the contract has a right to be performed, so the Civil Law ideal of the sanctity of contract is still retained.

The idea of balancing the harm is again important and is fundamental in the Islamic religion, as per the Qur’an; interestingly, though, it is not generally recognised by Shari’a Law. In Kuwait, the judge can reduce the pre-agreed, liquidated compensation if the amount is exaggerated or unjustly high. This incorporates the

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307 Ibrahim Abullel, The Compensation for Harmful Action in Civil Law (Kuwait University, Kuwait, 1995)
308 Statutory compensation covers cases of specific damage
309 Kuwaiti Civil Code 1980, Article 293: if the defendant could not perform the contract or performance is delayed, the defendant has to compensate the claimant for the harm he has suffered unless the defendant can prove that the delay or failure to perform was outside of his control.
310 Nakaas & Abdul Riddah n 14, 179. Technically, ‘jaza’ means that which you deserve, your just deserts. So, in the case of breach of contract, it is your punishment.
311 Qur’an: Al-Bacara V110; Al-Ma’idah V55; An-Nur V55; Saba v39
strict Islamic unjust enrichment rule.\textsuperscript{312} Compensation is also reduced if there is contributory blame.\textsuperscript{313} Furthermore, ‘natural justice’ as a concept is incorporated under Article 306.\textsuperscript{314} This takes into account the two harms – the actual harm to the claimant but the potential harm to the defendant in repairing it. Again, an Islamic balancing act is being performed.

\textbf{a) ‘Agreed Compensation’: Liquidated Damages}

‘Agreed’ or liquidated damages fit neatly into Kuwaiti law as they have a solid basis both in French law and Shari’a Law. Importantly, judges also have authority under the Code to amend them. This, too, is present in French law but, in Kuwait, is also very much based on the Shari’a principle (also codified) of no unjust enrichment. As such, Islamic legal influences can be seen in the evolution of the current practice of liquidated damages clauses.

Liquidated damages clauses are specifically recognised under Article 302 whereby the parties can pre-set the compensation amount.\textsuperscript{315} It is based on projected losses. Breach of contract clauses for liquidated (or ‘crystallised’) damages are particularly common in large commercial contracts, particularly construction contracts, as they

\begin{itemize}
\item[312] Kuwaiti Civil Code 1980, Article: if the two parties have both been at fault, of about equal standing (no one party being largely more at fault than the other), then the judge can reduce the compensation due to the claimant to match the level of the claimant’s mistake.
\item[313] Kuwaiti Civil Code 1980, Article 294: if the two parties have both been at fault, of about equal standing (no one party being largely more at fault than the other), then the judge can reduce the compensation due to the claimant to match the level of the claimant’s mistake.
\item[314] Kuwaiti Civil Code 1980, Article 306, if the claim is money, and the defendant does not fulfil his obligation, even after all notifications, and having the capability to fulfil, and the claimant can prove that he has suffered ‘uncommon harm’, the court can ask the defendant to pay compensation that accords with ‘natural general rules of justice’.
\item[315] Kuwaiti Civil Code 1980, Article 302: If the obligation was not a set amount of money, the two contractual parties can set the amount of compensation in the contract or in a separate contract. Kuwaiti Civil Code 1980, Article 303: the agreed compensation is not due if the defendant proves that the claimant did not suffer any harm. The court can reduce the compensation less than the agreed amount if the defendant proves that the amount was excessive or the obligation was partially done and any agreement that goes against this is not recognised.
\end{itemize}
provide motivation to finish on time, certainty, and a means, in theory, to avoid lengthy court disputes.

Shari’a Law happily accepts liquidated damages, as well as penalty clauses, as the one thing that these clauses achieve is certainty and thus any problem of gharar or speculation is avoided. Nabil Saleh states that, for a contract to be valid in Shari’a, the two parties must have “perfect knowledge of the counter-values intended to be exchanged as a result of their transaction.”\(^{316}\) Agreed damages provide this perfectly. However, liquidated damages are not allowed in the Kuwaiti Code if the original obligation is an amount of money. This also is clearly based on Shari’a: if agreed damages for late payment were allowed this would be riba (interest) and forbidden.

**b) Revision of Liquidated Damages - Unjust Enrichment**

Liquidated damages clauses, however, are not set in stone in Kuwait. This is the same as many other Gulf states. The contract is, seemingly, no longer sacrosanct. Different influences can be seen here. The judge has the power to revise downwards the agreed damages if no actual harm has been suffered, or less than predicted. It is true that this is only in the case that the amount due is ‘dramatically exaggerated’ (or if the contract is partially performed),\(^{317}\) but the power to intervene is there.

The general rule of the sanctity of the contract, strongly upheld in the French Civil Code, therefore, does not apply to a compensation clause. This again highlights the Islamic principle of balancing the harm – if you have suffered considerably less harm than the money sum agreed, it would be disproportionately harmful on the party who has to pay that sum.

A clear Islamic basis can also be seen in the legal maxim of ‘no enrichment with no reason’,\(^{318}\) or unjust enrichment. This principle, in the Civil Code, is very much

\(^{316}\) Nabil Saleh, Unlawful Gain and Legitimate Profit in Islamic Law (1st Edn, Cambridge, 1986), 211

\(^{317}\) Kuwaiti Civil Code 1980, Article 303

\(^{318}\) Kuwaiti Civil Code 1980, Article 262 & 263: anyone who is enriched with no legal reason at the expense of another must compensate the other party up to the amount of harm he
Shari’a based and is one of the strongest Islamic principles. In all four major Islamic schools there are clear stories showing that enrichment with no reason is not allowed.\textsuperscript{319} Indeed, it is similar to the outlawing of interest which is considered as something being received with no justification.

Al-Sanhuri also highlights the general principle of unjust enrichment: if somebody gains something without a reason and this has made someone poorer then, according to justice principles, you have to compensate the person who lost the thing or became poorer. Compensation can be either by the value of the enrichment or the value of the loss (impoverishment).\textsuperscript{320} This is Islamic, both in law and in the religion.

Moreover, in Kuwait, the judge even has the power to revise upwards the amount if the harm exceeds the amount and the defendant was proven to have committed a ‘major mistake’ or fraud.\textsuperscript{321} And these clauses cannot be contracted out of: the judge's discretion cannot be fettered. A similar approach is seen in the UAE,\textsuperscript{322} as

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\textsuperscript{319} Islam in Kuwait follows the Maliki school where a classic example given is that if someone reaps the harvest on land they consider to be their own, the owner of the land must pay the reaper to compensate him for his work (otherwise the landowner would be unjustly enriched).

\textsuperscript{320} Hosam al Ahwani, Sources of Obligation (Cairo, 1995) 693 (cited in Al-Sanhuri, Al Wajeez, (1966), 489 (cited in Nakaas & Abdul Riddah n 14, 299)) (In Arabic)

\textsuperscript{321} Kuwaiti Civil Code 1980, Article 304

\textsuperscript{322} See UAE High Federal Court, 01/06/94, Case No. 25/24, Civil Court: the UAE High Federal Court in Abu Dhabi, as regards UAE Civil Code 1985, Article 390(2) Civil Code, stated: delay fines clauses ... are, essentially, simply an agreed estimate of compensation that would be due if contractor fails or delays to perform its contractual obligations. According to Civil Code Article 390, for the amount agreed to become due, it is not sufficient simply to establish the fault. It the element of loss which is suffered by the other party must also be established. In absence of loss, the agreed compensation should be repudiated.

As such, the English Supreme Court’s approach in \textit{Cavendish Square Holding BV v Talal El Makdessi} is relevant in its similarity, in that the clause must not be out of all proportion, with no “\textit{extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach}”.\footnote{\textit{Cavendish Square Holding BV v Talal El Makdessi} [2015] UKSC 67} Contrastingly there is no distinction between primary and secondary obligations, nor the Common Law importance of deciding when an agreed damages clause becomes a ‘penalty’ or not.

As previously discussed, balancing the harm is not a principle seen in French Civil Law. Rather, liquidated damages and penalty clauses are readily recognised in French law and although they are revised in rare cases when they are considered ‘manifestly excessive’, their nature as ‘coercive and punitive’ is clearly recognised.\footnote{Rowan n 197, 197} Kuwaiti law also sees no fundamental difference between a clause for liquidated damages and a penalty clause. This again is linked to the country’s reliance on
specific performance as the primary remedy. Common Law countries dislike the ‘punishment’ aspect of specific performance whereas, as Rowan writes, Civil Law countries tend to embrace them as remedies that force performance have a ‘potentially significant deterrent value’. With Kuwait’s primary remedy being specific performance, the idea of deterrence is therefore already incorporated; penalty clauses do not stand out as an anomaly that shocks but a continuation of the same vein.

This right to amend demonstrates the judge’s role as an enforcer of fairness as opposed to an arbitrator of a bargain or an enforcer of an obligation. The fundamental basis of Kuwaiti remedies is the contract itself but the harm suffered cannot be stripped out and ignored: no previous formulaic agreement can fundamentally alter this.

c) Judicial Compensation

Judicial compensation is discretionary, awarded by the judge, if the amount is not set in the contract or by law, and is one of the main duties of the court. It is normally determined by the lower courts. Compensation covers obvious costs. A specific contract has to respected in kind; if breached, the claimant has the right to replace the specific kind and be reimbursed. The same principle applies to replacement service agreements and costs of repairing the breach.

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327 Ibid, 188
328 Kuwaiti Civil Code 1980, Article 300
329 Nakaas & Abdul Riddah n 14, Kuwaiti Law has set this in Kuwait Civil Code 1980, Article 248
330 Supreme Court of Kuwait, Case No. 20 10, 1995, Commercial Court, see Magazine of Judges and Law, n 12, 15
331 Kuwaiti Civil Code 1980, Article 285: if the obligation was to transfer a right over some specified goods and the defendant did not transfer this specific good, the claimant can obtain the specific goods elsewhere at the defendant’s expense, with the judge’s approval, or without in cases of emergency.
332 This needs court approval unless it counts as urgent.
333 Kuwaiti Civil Code 1980, Article 288(1): if there is a breach of service agreement, then the claimant can engage someone else to provide the said service, as long as this is possible,
However, compensation will also cover all other losses, as assessed by the judge. It is full compensation. It is because of this that moral harm, for instance, is specifically recognised and is a common head of damage in contractual cases. This covers many of the non-pecuniary heads of loss such as inconvenience and disappointment, etc. Similarly, economic loss is compensated in Kuwaiti law. These heads of loss are not based on Islamic legal principles.

8.3.3.3 Head of Damage: Economic Loss

As well as actual harm, loss of profit (economic loss) can be claimed as long as this is ‘natural’ damage directly resulting from the breach. As shown below, this contrasts with Shari’a which requires actual damage. Al Jalal writes that future harm can only be counted as actual harm if there is enough evidence that it will actually occur. It does not cover possible harm. ‘Natural’ damage is therefore the direct damage that could not be prevented by the plaintiff being reasonably diligent, i.e. the natural loss of profit not avoidable by normal actions of normal people. Regardless of the actual level, only the profit foreseeable at the time the contract was agreed is claimable. This ties in with French Civil Code, Article 1150, where a

and the defendant is liable for the cost. (2) no judicial approval is necessary if time is of the essence.

334 Kuwaiti Civil Code 1980, Article 291: if the defendant is bound not to do something and he breaches the contract and does that something, then the claimant can ask for it to be removed and the cost of removing it is at the defendant’s expense. This does not affect the claimant’s right to compensation.

335 Kuwaiti Civil Code 1980, Article 301 states that Articles 231 and 232 apply.

336 Kuwaiti Civil Code 1980, Article 230(1): the plaintiff can claim compensation for both (a) the actual loss, and (b) loss of profit/earnings as long as this is a ‘natural’ consequence of result of illegal action or breach of contract.

337 Mohamed Sanan Al Jallal (Sanna’a University, Yemen), 'The legal compensation for direct and indirect moral harm, as a result from counter-suing', (22nd Annual Conference for the Islamic Fiqh Academy, Kuwait, 22nd – 25th March 2015) 23 (in Arabic)

338 Kuwaiti Civil Code 1980, Article 230(2)

339 Al Jallal n 337, 23; Nabil Saleh, 'Remedies for Breach of Contract under Islamic and Arab Laws’ (1989) 4 Arab Law Quarterly 269, 290. In English Common Law, dialogue is now encouraged between the parties to ensure that potential losses that may arise in ‘the
non-fraudulent debtor is only liable for damages directly caused by the breach and which could have been foreseen at the time of drawing up the contract.\textsuperscript{340} However, in both codes, where fraud or a serious fault has occurred, the perpetrator is liable for all harm and loss, whether foreseeable or not.\textsuperscript{341}

\textbf{a) Head of Damage: Loss of Opportunity}

In Kuwait, compensation can also be claimed for missed opportunity; this is understood under the loss of ‘what could be earned’ in Article 230 (as distinct from loss of profit)\textsuperscript{342}. Again, this has no basis in Islamic Law where certainty is of the essence. The argument is more an acceptance by Kuwait of ‘full’ compensation, the idea that all harm must be compensated.

The example commonly given in Kuwaiti legal books for loss of opportunity is that of wrongly forbidding someone to go into an exam: we do not know if the candidate

\begin{footnotesize}

\textsuperscript{340} Gunter Treitel, ‘Chapter 16: Remedies for Breach of Contract’ in International Encyclopedia of Comparative Law, Volume 7, Ed. Arthur Von Mehren, ‘Contracts in General,’ (1\textsuperscript{st} Edn 1976, Mouton, The Hague, this Edn Brill, Nijhoff, 2008) 59. The source examines how the French Code was referred to in the English Common Law case of \textit{Hadley v Baxendale} (1854) 9 Exch. 341 at 354, where a miller was not granted damages caused through loss of an in-operational mill due to lack of delivery of a part by a carrier. The reasoning was that it was not evident at the time of contracting that the missing part was holding up the operation of the mill. Therefore that the harm was indirect and not ‘in the ordinary course of things’ (Halson n 339). There is some thought (though debated) that although the term ‘foreseeability’ is not present in the later UK 1872 Sale of Goods Act, that the test of foreseeability for remoteness of loss, that damages can only be for direct and naturally occurring (i.e. foreseeable) harm, was influenced by the French Civil Code.\textsuperscript{341}

\textsuperscript{341} Kuwaiti Civil Code 1980, Article 231: \textit{taxaria} (contractual liability or responsibility) is imposed for all harm or loss where fraud or a serious fault has occurred, whether foreseeable or not.


Kuwaiti Civil Code 1980, Article 230

\end{footnotesize}
will pass, but he or she lost the chance to pass, and therefore deserves compensation.\textsuperscript{343}

One must still distinguish between the actual harm and the potential harm - it does not matter if the student is an A grade or an F grade student, both have lost the same opportunity: the fact that one was ten times more likely to pass is not taken into account. In this way, Shari‘a demands of certainty are respected.

From a practical point of view, however, this can be circumvented because if the harm is not ‘stable’ (the candidate misses the exam, and then other consequences flow from it), the claimant can ask the judge to revisit the case to recalculate the harm. Thus, extra compensation can be claimed later.\textsuperscript{344} Again, however, this is another manifestation of the Kuwaiti principle of full compensation.

As above, these remedial principles have no basis in Islamic Law. Shari‘a judges have wide-ranging powers. They can order both compensation and penalties, physical and financial. However, there is one clear limitation. In Shari‘a, one is only entitled to the replacement of quantifiable property. If this is not possible, then payment of damages of an equal value is permitted. There is a clear substitution. However, anticipatory losses, moral prejudice, loss of reputation, goodwill, etc. are intangible and have no market value. They do not qualify within Shari‘a’s description as property (\textit{mal}),\textsuperscript{345} but are considered speculation (\textit{ghara}), which is forbidden in Islamic Law.\textsuperscript{346}

Civil law, as above, does not limit damages in this way. It is possible that this is because in today’s world of data, statistics and financial tools (futures contract etc.), it is much easier to accurately project loss of profits and time caused by lack of

\textsuperscript{343} Mazo, Masso (Paris: 1969), 360 cited in Nakaas & Abdul Riddah n 14, 231
\textsuperscript{344} Abo Al Lail, n 342, 84, cited in Nakaas & Abdul Riddah n 14, 232
\textsuperscript{345} Al Khafeef, \textit{Al-Daman Fi al-Fiqh al-Islami}, (The Law in Islamic Fiqh), (Dar Al Fiker Al Arabi, 2000) 20
\textsuperscript{346} Qur’an, 10:36 – ‘The majority follow nothing but conjecture/assumption. Assuredly, conjecture cannot take the place of truth. God sees what they do’.
performance. From the country's economic and commercial perspective, contractual remedies also need lost profit to be considered: it is a vital part.

Historically, Islamic Law did not have this luxury. What is now easy to calculate would have been speculation previously. The clear difference here, therefore, between Islam and Civil rules may have a practical basis but is also one of principle – Islamic tenets are based on avoidance of all doubt.

b) **Head of Damage: Punitive Damages**

Punitive damages are not allowed in Kuwaiti law, nor under Shari’ a. Compensation is calculated according to the harm. If not, this would amount to unjust enrichment as one party would receive more than the harm suffered. This is forbidden both in Shari’ a and the Civil Code. However, very occasionally, in Shari’ a countries such as Saudi Arabia, if the behaviour of a contractee is so outrageous, punitive damages will be imposed in terms of a fine that is paid to the state. This, however, does not give a remedy to the other contractual party but to society.

Given that contractual compensation already encompasses personal moral harm (non-pecuniary damage), refusing punitive damages has some logic. By defining the harm far more broadly, there is less reason to need punitive damages as an extra, non-specific head of damages. The quantifiable harm is greater, therefore the compensation is greater.

However, Kuwaiti law does have the Arab phrase of *al gharama al tahdidiya*, a ‘threatening penalty’. This is a very French-based concept, *astreinte*, namely, a temporary judgement amount imposed by the judge to pressure the defendant to fulfil the obligation.

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347 The money belongs to the 'home of the money', the 'Bait Al Mal', which is governed by the Ministry of Finance.

348 Kuwait Civil Code, 1980, Article 292(1): if the contract was not possible or not appropriate unless the specific defendant did it himself, then the claimant has the right to force that specific defendant to fulfil his obligation and to pay a penalty (a ‘threatening’ penalty) if he does not.
Moreover, the judge does not even consider the amount of possible harm, but imposes the amount that will force the defendant to fulfil his contract, however exorbitant. Indeed, if still unwilling to perform, the court can increase the amount as much as necessary to force performance. The threatening penalty not only puts financial pressure on the party to perform but legal pressure too because if the party still refuses to fulfil their side of the bargain, showing ‘stubbornness’ (taa’nt), the judge in the future breach of contract case will take an unfavourable view: after all, they have expressly ignored the judge’s order. This assumption of bad faith may cost the party their case. As Nakaas & Abdul Riddah state, this is a ‘great tool to push the other party to fulfil his obligation’. The French root is clear: the French tool of ‘astreinte’ serves the same function as ‘threatening penalty’, with French judges viewing an important aspect of their role as being to deter and punish breach, regardless of fault, the order taking the ‘characteristics of a private punishment’.

If compensation is therefore greater than the harm, this contradicts the no unjust enrichment principle. Hence, one of the key Shari’a principles is overridden. It is true that harm is difficult to quantify in these cases as the clause only applies where that specific defendant is needed to fulfil the contract. Replacing Placido Domingo in a singing contract is not easy to quantify, after all, he is irreplaceable. But what is confirmed is the common thread, showing the importance of fulfilling the contract,

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349 Kuwaiti Civil Code 1980, Article 292(2): the judge can increase the penalty to whatever amount the court thinks is necessary in order to get the defendant to perform. This runs counter to the Common Law general exclusion of any clauses that are primarily there in terrorem: the purpose of the amount in English law must be to compensate for breach, not to deter breach, see Lordsvale Finance Ltd. V Bank of Zambia (1996) QB 752. However, the distinction here is that one is a clause in the private contract designed to deter breach, the other is awarded by the judge.

350 The same applies in France. Solène Rowan writes that, in France, “in assessing the final sum to be paid, the court will take into account the abusive persistence of the defaulting promisor in failing to comply, as well as any bad faith”, Rowan n 197, 202

351 Nakaas & Abdul Riddah n 14

as promised. The legislature favoured the importance of enforcing the contract, rather than the religious principle of balancing the harm, thus making the influence on this particular clause more Civil French rather than Islamic.

c) **Head of Damage: Anticipatory Breach**

In Kuwait, damages cannot be claimed for an anticipatory breach. Again, the contract must be respected: if there is no obligation due, there can be no breach; and if there is no breach, no compensation can be awarded. This is contrary to English Common Law. However, it coincides clearly with French law. Again, it comes back to the primary goal of respecting the contract: better to give the contract a chance, however slight, of being performed than rob it of all possibility. As above, this also coincides with Shari’a as anticipatory losses are uncertain and speculative and therefore are not claimable.

8.3.3.4 **Compensation: Restoration of Original Position or Giving Effect to the Position if the Contract Had Been Performed?**

Another interesting example of the role that the Islamic principle of balancing the harm plays is seen in the remedial action that the original position must be restored. The primary premise is that when a contract is breached, it is revoked, effectively torn up and never existed. This, however, does not prevent the claimant from claiming damages under other headings, or receiving restitution under the principle of unjust enrichment. This was confirmed by a recent Supreme Court decision in 2017. Allowing revocation, and thus compensation, is considered to be monshe-e, i.e. from scratch. This contrasts with the Common Law countries position where the role of damages, as a remedy, is to put the parties in the position they would have been in if the contract had been fulfilled, as agreed.

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353 *Hochster v De La Tour* (1853) 2 E&B 678.
354 French Civil Code 2016, Article 1186
355 Al Khafeef, n 345, 20
356 Kuwait Civil Code, 1980, Article 211(1)
357 Supreme Court of Kuwait, 15/02/17, Case No. 126/13, Commercial Court 1
However, if it is impossible for one of the parties to bring the other back to the original position, the judge can issue a judgement for a ‘balanced value’.\(^\text{358}\) Nakaas & Abdul Riddah explain that in trying to restore the original position, each party has to return anything he has received under the contract. But, practically, sometimes it is impossible to restore the original position, hence the necessity for 211(2), to allow flexibility to decide a ‘balanced’ compensation.\(^\text{359}\) Again, the Islamic idea of ‘balance’ comes to the fore.

Time is also of the essence: ‘if time passes it never comes back’.\(^\text{360}\) This is particularly important in ongoing, continuing contracts. The revocation is only valid from the time it happened: it is not backdated,\(^\text{361}\) as otherwise the previous agreements and transactions would become null and void.\(^\text{362}\) As such, the previous agreements are honoured but the contract is cancelled going forward.

It is obvious, therefore, that there is an important balancing act to be performed by the judge in deciding the correct remedy. Fairness is at the heart.

**8.3.3.5 Islamic Rules for Compensation**

It is essential to this research to provide a thorough understanding of the nature of compensation under Islamic Law. This is not straightforward as there are many different schools of Shari’a and the rules are therefore open to debate. As above, where this research highlighted that contractual theory in Shari’a is not based on the idea of obligation, Shari’a judges are able to use a wide source of references, and there is no single governing code. However, there are clear philosophical tenets that underpin the remedy.

\(\text{358}\) Kuwait Civil Code, 1980, Article 211(2)
\(\text{359}\) Abdul Baaki n 35, 639
\(\text{360}\) Ibid
\(\text{361}\) Kuwait Civil Code 1980, Article 212
\(\text{362}\) Abdul Baaki n 35; technically, in these situations, the contract is not revoked - revocation in continuing contracts is called ‘cancelation’ (el ghaa) not ‘revocation’ (faskh), to distinguish the two concepts.
Firstly, in Shari’a, the word ‘compensation’ is not used but ‘guarantee’:

“In Fiqh, if the harm was affecting something valuable, in effect money, the punishment is the guarantee, which in Islamic fiqh is equal to compensation as it is known today”.363

Harm is the most important part of the Shari’a guarantee and comes first – in short, no harm equals no responsibility equals no compensation (no need to reimburse). Compensation in Islamic Fiqh effectively guarantees both ‘general’ rights and ‘private’ rights, covering both what harms general society and the rights of one particular person.364 The Majalla also recognises the right of substitution (of an equal value) if the original agreement cannot be performed.365 However, under Shari’a, compensation is only paid for actual, quantifiable harm: moral harm, for instance, is not claimable. Equally, loss of salary can be claimed but not loss of profits (one is fixed, the other not).

8.3.3.6 Islam: Should a Rich Man Pay More?

Islam as a religion makes a clear distinction between the duties of the rich man in terms of his obligations and those of the poor. The hadiths are many in saying that “delay in the payment of a debt on the part of a rich man is injustice”.366 Thus, his ‘dishonour’ and punishment’ are allowed. Hence, in theory, it is possible that the ‘rich’ claimant will not have his full rights granted under a breach of contract, if that causes undue harm to the ‘poor’ defendant.

364 An Arab saying says: “La darar and la dirar” which means “do no harm and suffer no harm”.
365 Maxim 53, Pasha n 20
366 Hadith Abu Huraira
This, however, is generally overridden by the principle in the Qur’an that ‘no bearer of burdens will bear the burden of another’. As such, the rich man should not have to bear the burden of the poor man. In Kuwaiti current practice therefore, the amount owed equates to the harm suffered and the wealth of the defendant is immaterial.

Elements of the balancing, however, can be seen in Kuwait’s Civil Code: the personal circumstances of the claimant are valid in terms of the judge deciding whether to award specific performance or compensation.

Sanhuri’s view was that as each person has a different job, the injury for each individual will vary as will its scope, whether family members are affected etc. Thus, the judge must consider all these aspects, but within the bounds of reasonableness.

Unlike the Egyptian code, Article 247 of the Kuwaiti code only refers to the personal circumstances of the claimant. This is controversial. Despite the article, Ahwani claims that judges can take account of the defendant’s personal circumstances to ensure that satisfying the compensation does not financially destroy the defendant. Mustapha Mansour, on the other hand, is resolute that a judge cannot increase the remedy owed, simply because the defendant is rich.

Ahwani’s argument, on the face of it, seems flawed: there is no mention of the defendant’s personal circumstances. However, he is not saying that a rich defendant can be made to pay more, rather than a ‘poor’ defendant may be allowed to pay less.

367 Qur’an, Al Zamir Sura verse 8
368 Kuwait Civil Code, 1980, Articles 230, 231, 247
369 Al-Sanhuri, cited in Nakaas & Abdul Riddah n 14, 287
370 Egyptian Civil Code 1948, Article 170, allows the entire situation to be taken into account.
371 Al Ahwani n 320 (cited in Nakaas & Abdul Riddah n 14, 287)
372 Mansour Mustapha Mansour, cited in Nakaas & Abdul Riddah n 14, 288
This, again, though seems incorrect as it would be imposing the burden of one onto another.

Islam values mercy. In the Qur’an, Al-Bacara, verse 280 says “And if someone is in hardship, then let there be postponement until a time of ease”. Moreover, the hadith tells us that if someone owes an obligation but suffers harm, he should be given charity, and that he should pay what he can pay and no more. This may also occasionally be seen in the judicial awards of compensation. Of course, these have practical advantages too - there is no point trying to enforce a monetary award against someone who is genuinely incapable of paying. Not only is in ineffective but there is knock-on harm to the family, and society. Social harmony is, or should be, an important aspect of any legal system, and indeed moral or religious system.

This Islamic influence can be seen in the Kuwaiti legal principle of allowing grace periods to fulfil one’s obligations in hard times, as per Article 209(2), and Article 410. The Explanatory Memorandum, as mentioned previously (Section 8.3.2.1) even specifically calls this the ‘Mercy Vision’. The judge has broad discretion: he can let the obligation ‘hang’ for a period of time or allow fulfilment by instalments. In keeping with general Islamic principles, and as shown in the previous section on Interpretation, good faith is essential. However, this ‘Mercy Vision’ should not

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373 Hadith Sunan an-Nasa’i

374 Kuwaiti Civil Code 1980, Article 209(2): the judge, at the time he is asked to revoke the contract, can allow the defendant a certain time to perform the contract, if circumstances are such that he thinks it is the right thing to do.

375 Kuwaiti Civil Code 1980, Article 410(1): As soon as the obligation arises, it must be fulfilled, as long as there is nothing to the contrary in the agreement or the law. (2) However, the judge is allowed (as long as permitted by law), to give the defendant a suitable period of time to fulfil it or to allow fulfilment by instalments if the defendant’s situation requires it and the claimant will not suffer a great harm. (Ending the Obligation: 391 – 453).

376 Grace periods will not be granted to those in bad faith or those who were unable fulfil the obligation at the time of contracting, see Kuwaiti Civil Code 1980, Article 410.
make the claimant suffer great harm. "It does not make sense to try and rescue the defendant if the only way to do this is to do great harm to the claimant."\(^{377}\)

In this way, it is true that a poor person may effectively pay 'less', in that time lessens the burden. However, despite Ahwani's claims above, and although the concept is well understood in the general legal idea of “balancing the harm” and a very strong part of Islam, in current practice a person's overall liability does not depend on their ability to pay.

Indeed, the justification for a grace period may not only be mercy but that also it confirms the French law position where, philosophically, it is better for the contract to be performed late than not at all.\(^{378}\) If the contract is sacrosanct, allowing a grace period may save it. Furthermore, for a nation of traders, payment by instalments is a standard practice and easily accepted, even if not stipulated at the outset. Hence, the easy acceptance and common practice of allowing grace periods in remedies show another coming together of the influences of Islam, French and trading traditions.

Interestingly, the concept of natural justice is also incorporated into Kuwaiti law on remedies. Under Article 306,\(^{379}\) if there is a contractual breach and the claimant has suffered ‘uncommon harm’, the court can order the defendant to pay compensation that accords with ‘natural general rules of justice’. This is a wonderfully broad catch-all phrase, as is ‘uncommon harm’, which is left purposely vague, giving judges a lot of scope. It covers the case of very unexpected damages, i.e. if one person defaults on their loan and the lender had first borrowed the money themselves, putting up their house as security and that house is repossessed, the borrower would be liable for the loss on the house, hotel bills, as well as non-

\(^{377}\) As per the Kuwaiti Civil Code 1980, Explanatory Memorandum Article 410
\(^{378}\) French Civil Code 2016, Article 1184 (in Rowan n 197, 91)
\(^{379}\) Kuwaiti Civil Code 1980, Article 306: if the claim is money, and the defendant does not fulfil his obligation, even after all notifications, and having the capability to fulfil, and the claimant can prove that he has suffered ‘uncommon harm’, the court can ask the defendant to pay compensation that accords with ‘natural general rules of justice’. 
pecuniary damages such as depression or loss of standing, that resulted from the repossession. It could be argued, of course, that this makes the law ‘arbitrary’ and contrary to the rule of law but Kuwaiti law recognises the importance of the morality of justice and it is difficult to criticise such a premise.

Therefore, Civil Law reflects Islamic Law in that there is a recognition that the two parties are not necessarily of equal standing. In deciding the remedy, the Kuwaiti judge does not purely look at the rights and wrongs of the actions but also at the position of the parties and, in deciding the appropriate remedy, tries to balance the harm between the two.

8.3.3.7 Riba: The Controversy

Any analysis of remedies under Kuwaiti law has to address the controversial topic of *riba*. The literal translation of *riba* is an ‘increase’ or ‘expansion of growth’. Today it refers mainly to interest on loans but it really means any increase in value that uses someone else’s need as an excuse to demand that something else is paid back at a higher value without specific consideration. Interest (*riba*) is forbidden in Islam. Western commercial practice demands it. The dilemma, therefore, is how should Kuwaiti Law, founded on French Civil Law, but established in a country based largely round Islamic principles, deal with this fundamental modern business norm. An analysis of this area of contract law shows the influence split between the civil and commercial spheres, with a strong Islamic influence on the Civil Code, although tempered by modernity, to the point where the Commercial Code follows a thoroughly modern and secular approach.

Although compensation is allowed, the charging of interest is forbidden in the Civil Code.\(^{380}\) The definition of interest is broad:\(^{381}\) it applies both to loans and to any

\(^{380}\) Kuwaiti Civil Code 1980, Articles 305(1) and 547

\(^{381}\) Kuwaiti Civil Code 1980, Article 305(2): any fee that the claimant imposes will be considered as interest if it can be proved that there is no actual service (consideration) in return for this fee.
contracts where the outstanding obligation is a financial one. However, and importantly, the term used in Article 305(1) is *fawad*, the Arabic for interest, not *riba*, the Islamic term. In this way, Islamic influence can be seen in the law but as modified by a more general Arabic slant.

The Commercial Code, referring to loans, allows interest as agreed, and at the statutory rate of 7% if not previously stipulated. For more general contracts, if money under a contract is paid late, interest can be added because this is compensation for your loss of the use of the money, not interest added at the start. The remedy rate is again currently 7% p.a. Imposing interest for late payments has good reasons of commercial expediency – otherwise why would anyone pay on time? But it has caused a good deal of controversy with religious factions and, despite a challenge in the Cour de Cassation in 1992, has not been overturned.

The Islamic influence on the banning of interest in the Civil Code is indisputable. The Qur’an (Sura 2:275-279) provides clear and strong statements denouncing *riba*:  

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382 Kuwaiti Civil Code 1980, Article 550: no account shall be taken of any change in the value of money, i.e. fluctuation, decrease or increase of money.  
383 Kuwaiti Commercial Code 1961, Article 102: (1) The claimant has the right to take interest on a commercial loan if not agreed on something else. If the price of interest is not set in the contract the interest rate will be the legal interest with is 7% (2) If the interest rate is set in the contract and the defendant delays in repayment, the late interest rate is calculated according to the agreed interest rate.  
384 Kuwaiti Commercial Code 1961, Article 110: If the commercial obligation was a set amount of money, known when the obligation started, and the defendant was late in fulfilling it, he is obliged to pay to the claimant, as a compensation for the delay, the legal interest measured at 7%.  
385 “Those who eat riba do not stand (yaqumun) except as stands one whom Shaytan (The Devil) has thrown by the touch into confusion (yatakhabbatu). That is because they say: "Sale (trade) is like riba". God has permitted sale (trade) and forbidden riba. Those who receive admonition from their Lord and desist (from taking riba) shall have what is past; their case being for God (to judge). But those who repeat (the offence) are companions of the fire. They will abide therein." (2:275)  
“God will destroy riba, but will give increase for deeds of charity. God does not like those ungrateful and wicked.” (2:276)
“God has allowed trade but forbidden riba... those who repeat (the offence of taking riba) are companions of the fire. They will abide therein.” (2:275)

But does it refer to interest as a reasonable amount to be added to the capital, as compensation for providing liquidity or credit risk. Or is it referring to usury, an unbalanced (excessive) additional payment to the lender? After all, if only excessive usury is forbidden this would imply that a reasonable rate of interest is permitted. If this were so, there would be complete harmony between the secular and the religious basis for late payment rates. If not, then ‘the entire present commercial and civil structure is tainted with illegality’.386 The arguments are complex and beyond the scope of this piece;387 however, the presence of interest in contractual remedies is important and must be analysed in terms of the first aim of this work, to identify the influence of Islamic Law and culture.

Although interest is not allowed in Civil Law using fawad (the normal Arabic word) as opposed to riba (the Islamic word) is a deliberate choice, to make it more open to the general public and reflect more general cultural and traditional understandings, rather than making it a strict Islamic code.

The Majalla does not specifically deal with riba, but instead includes a couple of practical examples. If payment for a deal is to be at a future date, it must be clearly and specifically stated. Vagueness of payment will void the sale, as mentioned earlier. This perhaps is more gharar than riba.388 However, more in line with riba, if

“O you who believe! Fear God, and give up what remains (due to you) from riba, if you are believers.” (2:278); O you who believe! Devour not riba, doubled and multiplied; but fear God that you may prosper. (3:130)


387 See Yousri Ahmad Abdel Rahman, ‘Riba, its Economic Rationale and Implications,’ (2002) 19(2) J. Islamic Banking and Finance
388 Pasha n 20, Book 1 Sale, Chapter 3, Section 2, No. 248
a vendor offers an increase in the offered goods after the conclusion of the deal, he can only be held to it if the purchaser accepts the offer whilst still in the ‘place of agreement’. Otherwise, the purchaser gains an unfair advantage. Also, a person loaning an item cannot make any additional charges after the lessee has used it, including for usufruct of the item, thus no additional gains other than the original bargain.

In short, the Civil Code forbids interest, showing a clear Islamic influence, although using a more modern, secular term (fawad). Commercial Law, however, allows it, thus favouring trade and business. Each code represents a different sphere – the commercial sphere and the civil sphere. Each is appropriate. However, importantly, contracts governed by the Civil Code can also use the permission for interest under the Commercial Code. This is because, fundamentally, although Kuwait is an Islamic country and, as Judge B in his interview reminds us, Al-Sanhuri was a Doctor of Islamic Law, thus “obviously Kuwaiti law has a strong foundation of Islamic Law”, Kuwait is not an Islamic Law country. Again, the difference between Islam and Islamic Law is significant.

8.3.3.8 Moral Compensation

This section analyses the important subset of compensation for moral harm (or non-pecuniary damages). The opposition of custom and tradition versus Shari’a Law is explored, as well as the influence of the French Code.

Compensation for moral harm is expressly recognised in Kuwait and in current practice is commonly awarded as a contractual remedy. It is your right, intrinsic to your being, as a human, for the intangible harm to your person. It only applies

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389 ibid, Chapter 4, section 2, No. 254
390 ibid, Book VI, Chapter 3, Section II, 812
391 Judge B, Appendix 2, 303
393 Nakaas & Abdul Riddah n 14, 285
to individuals, not companies. Recent Supreme Court decisions, in contract cases between individuals and companies, confirm moral harm as being a standard head of loss that must be compensated.

The Common Law equivalent would be damages for non-pecuniary loss, which until recently were limited to the tort of negligence, with Lord Steyn stating: "The general principle is that compensation is only awarded for financial loss resulting from the breach of contract". More recently, non-pecuniary loss has become more accepted in English contract law, especially where the contract’s main aim is to provide pleasure or leisure services. However, as in France, the scope in Kuwait is far broader. It is also coloured by Islam. Moral harm, however, is not recognised by the main Shari’a schools.

As before, moral compensation only applies to individuals. Morals come from God’s will, and moral integrity is what one is born with, personal, irreplaceable and non-transferable. In Kuwait, ‘moral compensation’, therefore, covers harm suffered for illegal actions, including breach of contract, where the harm is to the person and intangible (loss of reputation, loss of position in the community, etc). It includes sadness, depression, loss of a loved relation, as well as loss of the

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394 Kuwaiti Commercial Court of Appeal, 27/11/13, Case No.1600 & 1683, Commercial Court 12: The Court of Appeal overturned the court of first instance, holding that statutory interpretation of the code implies that moral compensation covers feelings and dignity and therefore this only applies to humans, not companies.

395 Supreme Court of Kuwait, 21/09/16, No. 1596/14, Commercial Court 1

396 Farley v Skinner [2001] UKHL 49 (Lord Steyn)

397 Finnis also highlights the divine will theory whereby the duty to act properly and morally is because ‘God commands that good (the reasonable) be done and evil (the unreasonable) be avoided’, J. Finnis, Natural Law and Natural Rights (2nd edn., OUP, Oxford, 2011) 342, cited in Anna Taitslin, ‘Chapter 4 The Competing Sources of Aquinas’ Natural Law: Aristotle, Roman law & the Early Christian Fathers’, in The Threads of Natural Law: Unravelling a Philosophical Tradition, (Ed.: Francisco José Contreras, Springer Science & Business Media, 2013) 61

398 Kuwait Civil Code 1980, Article 232

399 Kuwaiti Civil Code 1980, Article 231(2) defines moral harm as including physical and psychological harm to the claimant or harm related to his life, his body, his freedom, his family dignity or ard (the honour of a close female relation (sister, daughter, wife or mother).
breadwinner to the victim’s family or loss of work.\textsuperscript{400} Al Jallal makes no distinction between actual and moral harm: one has an innate right to human dignity and a loss to that is the same as a loss of profit.\textsuperscript{401} Accepting compensation for moral harm is therefore based on the idea of ‘full’ compensation. Just as damages can only be awarded if harm has actually been suffered, so – if harm has been suffered – then all that harm should be covered, not just some.

Moreover, as in France, it is not to cover and ‘repair’ quantifiable harm, rather it is to compensate for the irreparable. As such, the remedy can be monetary or it can be a more appropriate remedy to ‘restore status’, such as a formal letter of apology or a court declaration of ‘good character’.

Al Jallal writes that moral compensation is only granted for great harm, not minor harm, and that this condition is one of the “oldest conditions examined by scholars.”\textsuperscript{402} It refers to harm that cannot be endured. However, this is not true, certainly not in Kuwait. Moral harm claims are common and usually small in size; indeed, as Rowan highlights, this is one of the reasons that claims for non-pecuniary loss are generally undisputed and uncontroversial.\textsuperscript{403}

French law clearly accepts the principle of moral harm, even in contract law, with the same terminology, \textit{dommage moral}. Rowan writes that it is so obvious that it does not even generate academic debate.\textsuperscript{404} It is a broad category and can be awarded for general mental distress, grief and hurt feelings, as well as disappointment in the service provided, loss of amenity, loss of reputation, loss or privacy, etc. As such, its incorporation into Kuwaiti law has a natural legal channel. However, the role of Islam is also interesting.

\textsuperscript{400} Nakaas & Abdul Riddah n 14, 289
\textsuperscript{401} Al Jallal n 337, 23
\textsuperscript{402} ibid
\textsuperscript{403} Rowan n 197, 123
\textsuperscript{404} ibid, 125
8.3.3.9  Fiqh Influence

In analysing the influence of Kuwait's cultural and religious background on moral compensation, as per the first research aim, there is a conflict in the Islamic schools.

In general, moral harm is not compensated under Shari'a. Moral harm is intangible and has no market value: it does not qualify within the Shari'a description of real property (mal). Only quantifiable harm can be compensated. Allowing monetary compensation for damage to ard (moral dignity) would be putting a price on family honour and that is not acceptable as honour is above money. Under Shari'a, compensation has to cancel the harm, and damage to one's moral integrity can never be cancelled. Basal Mohammed writes that the Omani courts therefore declared that, as Islamic fiqh does not recognise moral compensation, the Civil Code should not either. The major Hanbali school (as per Saudi Arabia) also follows this reasoning. Equally, Maliki (the school that Kuwait now follows) does not allow moral compensation.

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406 Basal Mohammed, Comparison of Moral Compensation, (Masters' thesis, Palestine University)


The case saw a Romanian car spare parts company bringing damages against a Saudi party for future loss of profits and moral damages to reputation. The court refused as the profits and damages were not certain; it would therefore constitute Riba and violate Shari'a.

408 See scholar, Al Hatab, Mawaheb al Jalel (The Talents of the Greatest), (Dar al Fikka, 1992) (a book on fiqh)
However, the position under *fiqh* is not completely clear. The Hanafi and Shafie schools of Islam accept it, based on conflicting Islamic interpretation. It must also be remembered that Kuwait used to follow the Hanafi school as this was the school of the Majalla. The justifications are various. Ash-Shuraa, verse 40, says ‘and the retribution for an evil act is an evil act like it’, hence moral compensation is allowed because if an evil act has been suffered then no recourse would be unjust.\(^{409}\)

Equally, in the Prophet Mohammed's farewell speech,\(^{410}\) he specifically said that it is forbidden to harm people's 'blood, money or honour'. Linguistically, using 'or' puts all three on an equal footing. There is also a very well-known *hadith* where Omar paid his barber 40 durums because he frightened the barber by shouting and therefore owed him compensation.\(^{411}\) Following this, it can be argued that even if harm is intangible, *fiqh* will allow it.

The conclusion here is that moral compensation and restoration of status are not recognised in the majority of Shari'a legal schools, including Maliki, the current school in Kuwait. However, as Hanafi was the school that Kuwait followed previously, and especially via the Majalla - this would have been part of the education and cultural background of the senior judiciary, this gives an Islamic legal basis to Kuwait’s acceptance of and very common usage in practice of compensation for moral harm.

\(^{409}\) Ibid

\(^{410}\) *Hadith Bukhari* 4403, *Hadith Muslim* 1218 (agreed *hadith*)

\(^{411}\) This is because the important principle of 'do no harm and suffer no harm' refers in general to all harm, it does not exclude moral harm. Mohammed bin al Hasan writes that because compensation can be paid for an injury that heals with no scar, as pain was suffered even though there was no long term damage, so moral compensation can be claimed. See Zarkali, Al Alam el malaien (The House of Knowledge for Millions), (edn 15, 2002, Dar Al Elm), cited in Mohammed bin al Hasan, cited in Al Beeshi M, Financial Cyber Crimes Between Islamic Fiqh and Modern Laws, (Chapter 4, Section 2, Master's thesis, Imam Mohammed Bin Saud University), <www.ahlaldeeth.com/vb/showthread.php?t=169879>, accessed 12th February 2018 (in Arabic))
Importantly, however, it is also based very much on Islamic custom and culture, emphasising the normal dignity of the person. It may also represent a growing trend: Al Beeshi claims that even countries such as Saudi Arabia now largely accept moral compensation on a practical basis\textsuperscript{412}. This is incorrect, although it might possibly happen in a few specific cases. It has to be remembered that even within each school, Shari’a is not one fixed body of law: individual judges are free to choose which verses and \textit{hadiths} they wish to rely on and to interpret them as they see fit.

It is also useful to consider that the Hanafi Majalla states, in Maxim 39, that it “is an accepted fact that the terms of law vary with the change in the times”\textsuperscript{413}.

What is indisputable, is that in Kuwait, the award of compensation for moral harm is very common. Although largely French based, this can also be linked to both Kuwait’s historical Hanafi Islamic legal school and a cultural and religious belief in the importance of one’s moral integrity.

8.3.4 Conclusion - Remedies

This section has provided a detailed analysis of the Islamic cultural, legal and traditional factors underlying contractual remedies in Kuwaiti law. Their influence can clearly be felt in several important areas of the Kuwaiti Code, as well as in the current practice of the Kuwaiti courts.

Specific performance is the primary remedy under Kuwaiti law and has a clear foundation in French/Roman sources, both from a legal and philosophical perspective. Importantly, specific performance also fits well with \textit{fiqh} and Shari’a. However, the underlying philosophy for each is not the same. French law favours the sanctity of the obligation and the promise – the contract must be enforced. Shari’a contract law, on the other hand, does not accept the concept of future obligation because the agreement itself instantly changes the nature of the goods, with them now automatically belonging to the new owner. Islam as a religion,

\textsuperscript{412} Al Beeshi n 405
\textsuperscript{413} Pasha n 20
moreover, can be seen in the fundamental Kuwaiti legal principle of the ‘Kingdom of the Will’, which also underlies the remedy of specific performance as the will of the parties was the agreement.

Significantly, tribal custom also required specific performance. From a practical standpoint, using a barter system made an award of damages problematic, so specific performance was important for reasons of simplicity and authority, in particular in view of the lack of formal judges.

A clear Islamic influence can also be seen in the legal remedial principle of a ‘balancing of the harm’, as seen in Kuwait’s Civil Code where the choice of remedy has to be made. This directly contradicts the original French code used by Sanhuri, and was not part of French law until very recently; rather it is a fundamental Islamic idea, in order to achieve a fair and harmonious society.

Compensation (or damages) is an important remedy too, based on the harm suffered, as per Civil Law. The very strong Islamic principle prohibiting unjust enrichment is also present, although overridden in favour of the sanctity of the contract in some cases (as in the ‘threatening penalty’).

Importantly, in Kuwait, compensation for moral harm (non-pecuniary damages) is very common in current practice. The influence of the French Code has can clearly be seen but moral compensation is also rooted in fundamental Islamic principles of human dignity. In light of this, it is perhaps surprising that moral harm is not accepted by the main Shari’a legal schools.

8.4 Conclusion

This chapter has analysed each of the two contractual principles of ‘interpretation of contract’ and ‘remedies for breach’ in view of the first research aim of this thesis: namely to provide a detailed analysis of the influence of Islamic traditions, culture and law on in Kuwaiti contract law by considering the historical background in light of current practice.
The extent of Islamic influence on the conception and current practice of these two principles is significant. Although the founding French Code is important, this research shows that the Kuwaiti contractual principles of interpretation and remedies are, in fact, a complex interweaving of different sources. There is a clear French Civil law basis but, less recognised, it is also strongly complemented by both Islamic Law and Kuwaiti tradition, religion and customs. In this way, Supreme Court Judge B’s statement, as quoted at the start, is correct and the value of the law can be seen precisely because of this multi-faceted nature.

The secular laws in the Kuwaiti Civil Code for contractual interpretation lay out rules for clear and unclear statements. Current practice in Kuwaiti courts generally relies on the clear wording, as written, whenever possible. The emphasis upon contractual certainty is seen in Kuwait’s most recent revised Civil Code, influenced by the overriding importance in Shari’a of avoiding gharar. This shows an evolution in Kuwaiti law towards a more Islamic Law approach, linked to a rise in political religious factions.

However, even more recently, a different and conflicting emphasis can be seen in the need for flexibility to ascertain intention and truth. This is Islamic, rather than rooted in Islamic Law (Shari’a). This research has shown that clarity itself is open to interpretation: words need context. This goes against the traditional understanding of many scholars who see the Code’s instruction to rely first and foremost on the clear wording as being overriding. Accepting an ‘outer’ meaning to words, as per Professor Abo Al Lail, incorporates other factors, including the will of the parties. The Supreme Court’s important recent decisions shows that even unambiguous clauses need to be seen in the context of what the parties ‘must’ have meant, given normal business practice. The trading history, custom and cultural identity of the country is therefore highly relevant.

Both Islam and the Majalla recognise that intent is more important than actual words. Again, the recent Supreme Court decisions show the overarching and pervasive nature of Maxim 3 from the Majalla, with the importance of intention
seemingly increasing, not decreasing, as Kuwaiti law evolves. This Maxim, of course, was incorporated directly into the 1961 Code, though not the 1980 one. The older judges in the Supreme Court were educated and trained during the period of the previous code, and would have been very familiar with the Majalla. It is ingrained in their learning and cultural understanding. The increasing willingness to use these Islamic doctrines, however, is also linked to the rise in Shari’a elements within the Kuwaiti political system, making it more acceptable for legal parties to use both Islamic religious and legal principles as part of their argument.

Intent is also linked to truth, the truth of the contract. The Court of Appeal’s statement that the purpose is to find the ‘truth’ of the contract is not centred on literal certainty, as per Shari’a, nor anything in the 1980 Civil Code, but a philosophical leaning towards religious and moral ideals, as shown in Maxim 12 of the Majalla, based on religious beliefs. As such, this work contends that the recent decisions demonstrate an evolution towards a more Islamic approach, but not necessarily a more Shari’a approach.

Similarly, an important coming together of different influences can be seen in the use of the objective, ‘reasonable person’ test in Kuwaiti law. Although the basis of Kuwaiti contractual interpretation for ambiguous clauses is a subjective one, as per French law, the ‘common intent’ is garnered not only from evidence regarding the parties themselves but by looking at the nature of dealing and custom. As shown, custom is a fundamental part of Kuwaiti law, rooted in Kuwaiti tradition, history and culture, and cannot be divorced from the Kuwaiti identity nor its law.

Importantly, this research highlights the importance of the central tenet of good faith and honour in contractual interpretation. Although generally accepted by scholars for ambiguous clauses, as per Article 193(2), this work contends that the overriding requirement of good faith for all clauses is seen by the inclusion of Article 195. This need to interpret contracts in light of good faith is not specifically religious, nor attached to a specific legal system, but an overarching principle of interpretation based on a common belief system based on integrity, honesty and
trust between parties, with roots in Islam, the Roman Civil Code, and general humanity. With its increased importance in the new French Civil Code, and its adoption by a growing number of Common Law countries, as well as its presence in international treaties, Kuwait’s emphasis may well have been ahead of its time. In these ways, the doctrine of contractual interpretation shows very strong roots in Islamic culture and religion, giving judges wide discretionary powers, despite the seemingly strict boundaries under the Code.

The more limited judicial scope is seen in remedies where a clear example of the blending of different sources can be seen in the primary contractual remedy being specific performance. This has a clear root in its French/Roman sources, both legally and philosophically. It is also coherent with Fiqh, Shari’a and tribal customs. But the justification under each source is completely different: whereas French law’s emphasis on enforcing the contract is based on the sanctity of the obligation and promise, Shari’a does not recognise any future obligation, considering the intrinsic nature of the goods as having changed by the very act of entering into the contract. This is an area that is often misunderstood by scholars; it warrants further research and is a topic on which this work has endeavoured to shed some light.

Islam is not the same as Islamic Law: it must be remembered that Shari’a Law is not one body of law but made up of many different schools. Unlike the focus in Shari’a contractual law, Islam as a religion respects the sanctity of oaths. Historically, with the Prophet Mohammed’s dislike of slavery, it also gave rise to the fundamental Kuwaiti legal principle of the ‘Kingdom of the Will’, both of which also underlie specific performance as a remedy.

Although constrained by limited sources, this work suggests that tribal law also favoured specific performance for the sake of simplicity, authority and the problems raised by barter. The trading nature of the country and its impact has previously received very little focus. The common conception is that law in Kuwait is based on Egyptian, French, Islamic and – perhaps – English Common Law. But to ignore
centuries of culture and tradition (both religious and non-religious) is to ignore the essence of the country.

A clear Islamic religious influence can be seen in the legal principle of ‘balancing the harm’, where the choice of remedy has to be made. This does not exist in Shari’a, highlighting the point that Islam as a religion is not the same as Islamic Law. It also directly contradicts its founding French Code, and had no place in French Law. Rather, ‘balancing the harm’ is a fundamental Islamic idea, based on the desire to achieve a fair and harmonious society.

Compensation (or damages) is also an important remedy, based on the harm suffered, as per Civil Law. The very strong Islamic principle of no unjust enrichment is present, although overridden in favour of the enforcing the contract in some cases (as in the ‘threatening penalty’).

It is important to note that the Kuwaiti contractual remedy of moral compensation (non-pecuniary damages) is not accepted by the main Shari’a legal schools. Yet this is very common in current practice in Kuwait. The influence of French Law is clearly seen but moral compensation is also heavily influenced by the Islamic principles of human dignity. Again, the influence of the Islamic religion and Islamic Law are not identical. This is an important, although subtle, distinction.

In examining both contractual principles, this research suggests that a stronger and growing Islamic influence is seen in contractual interpretation where judges, especially in the higher courts, have felt free to employ greater discretion in terms of interpreting the contract, even when the words are clear. This ability to discern intention, very much based on Maxim 3 of the Majalla, and to find the truth, based on Maxim 12, allows a wider scope for the judge to use his own cultural and religious background as a basis for his decisions. These are the essence of the judge him/herself as a person. The recent Supreme Court judgements and the primary research interviews conducted reinforce this contention.
The two principles examined are therefore very different in terms of the discretion that can be exercised by a judge. The same judge, in the same case, will have greater power in interpretation than in remedies, based on the increasing Islamic tendency in interpretation. ‘Interpretation’ is a common word and concept in Islamic culture, it is the Islamic clerics who provide interpretation of the Qur’an and hadith for any Shari’ā issue under discussion. Traditionally, it is deemed perfectly natural that judges have great powers of interpretation, indeed, that is their function.

The same is not true for remedies. In remedies, the courts are more tied to the written rules and the judge has less discretionary power. The main exception here is in the area of balancing the harm, a principle that is not Shari’ā based, nor French based, but based on Islamic principles incorporated by Sanhuri in his first Commercial Code 1961. Balancing the harm allows discretion but in a constrained way, to minimise the harm that specific performance will impose on the other person. Interpretation does not require considering what the other person will suffer but an understanding of the parties’ initial will at the time of the contract: any interpretation of intentions by the judge may well cause one party greater harm than what is actually written, but this is not the judge’s concern.

Maybe this coming together of French Law, Islam, Islamic Law, tradition and culture was simply a happy coincidence, with all feeder streams of the river of the law bringing the same water by different routes. Islamic Law does not stand alone and apart, it is intrinsically intertwined with Islamic culture and society and Kuwait is an Islamic country. Current practice in Kuwait reinforces these principles, successfully blending the various influences in a way that fits with a modern society with a strong religious foundation but a secular law. As Lawrence Rosen says, this is ‘virtually a given for an anthropologist, for it is at the heart of our enterprise to assert that the different domains of a people’s life always have some bearing on one another’. Judge B expresses the overlap well when he says that being a Muslim

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414 Lawrence Rosen, The Justice of Islam: Comparative Perspectives on Islamic Law and Society (OUP, 2000), Introduction
cannot be extracted from one’s essence – a judge’s Islamic heritage and upbringing is part of his being.\textsuperscript{415} By definition, this must influence Kuwaiti law, as it influences all Kuwaiti people.

\textsuperscript{415} Judge B, see Appendix 3, Question 9, 329
Chapter 9  Conclusion

9.1 Introduction

The initial objectives of this thesis were to explore the underlying philosophies and origins out of which the current Kuwaiti legal system was born and to analyse how its evolution and history have influenced the way contract law is codified and practiced in Kuwait today. More specifically, the thesis focuses on how Islamic ideologies and custom have formed its development and to what extent current legal practice, especially as regards the law of contract, is still bound and shaped by those same principles. A further aim was then to propose recommendations, with the hope of developing and enhancing the field of contract law in Kuwait, drawing on any weaknesses identified in this study.

The methodology design followed a traditional literature investigation, gathering secondary sources, but supported by primary field research, namely that of interviewing Supreme Court Judges, to get a unique insight from deep within the system itself.

Through the process of this work, it was discovered that there were other pertinent questions thrown up that should be broached, as detailed later.

The specific questions posed at the start of this work were as follows:

- What are the historical factors that led to the development and evolution of the Kuwaiti Civil and Commercial Codes?
- What is the impact of Kuwaiti custom, as well as Arab custom and Islamic Law, on the current Kuwaiti legal system, with special focus on contract law?
- What is the impact of English law and Kuwait’s status as a British protectorate for over sixty years on Kuwait’s Civil and Commercial Codes?
• How do contemporary Kuwaiti contracts compare and contrast with those of pre-Islamic, Islamic and western contracts?

This chapter shall assess:

• how this study impacts the current understanding in this field
• the findings
• possible implications from the findings and recommendations
• limitations of the study
• future work

9.2 Impact of the Study

Kuwait has a unique position: a Middle Eastern, Arab Gulf country with commercial and contractual laws based on an amalgam of Western, Arab and Islamic principles and custom. It is therefore important to comprehend the historical source and development of these codes and how they influence contract law as it is practised in modern day Kuwait. Whilst literature exists that does assess some of the development of Kuwait’s law, there is no comprehensive work, and none that specifically addresses the development and the resulting effect of the various legacies on the legal system in general and the place of contract law within.

This work has brought a unique insight through its inclusion of the reflections and opinions of those who have served longest in the legal system of Kuwait: the Court of Cassation judges. Some of these learned men were present at the founding of modern Kuwait and have a history of having worked alongside Al-Sanhuri, one of the world’s most prominent legal scholars, who was responsible for drafting and developing said system. This is the first time that Supreme Court judges in Kuwait have been interviewed and had their opinions publicly recorded. Their perceptions allow the reader to gain an appreciation of how those at the upper echelons of legal practice view the system they work within and represent. Their testimonies have provided some interesting accounts, describing how the complexity and layers of
the Kuwaiti system affect the processes for making judgments, where they think the system is efficient and where developments could be made, such as in their assessment of current training of legal practitioners, with practical recommendations for improvement; but also broaching controversial topics that have arisen in Kuwaiti society, such as the amendment of the constitution to enforce Islamic Shari’a as the sole source of law.

This work has looked at how the rich history of Kuwait has not only impacted its legal system, but also directly led to the development of a unique, well respected and functioning amalgamation used as a point of reference in neighbouring countries. Relevant and modern literature has been used throughout this work to explore and draw together academic opinions on how the Kuwaiti legal system has evolved as a result of its history and how it is felt that the unique fusion of Kuwaiti law functions in the modern world of contract law.

9.3 Findings

9.3.1 What Are the Historical Factors That Lead to the Development and Evolution of Kuwaiti Civil and Commercial Codes?

There is no simple answer to this question; this has been a complex course of research, with the major factors covered throughout the early chapters. Kuwait as a state only came into being around the late 17th Century. Prior to this it was influenced and affected by the changing geopolitics surrounding it.

Much of the Western and Arab worlds have been influenced by Roman ideals, where evidence shows that contracts played a vital part, initially being religious in nature and made in the presence of the gods, and later with more control from the state including the regulation of all houses keeping record of their contract details. Concepts of partnership, agency, provision of services, promises and compensation all started to become recognised and enforceable. However even prior to this, around 2250BC, Hamurabi and later the Hebrews laid out instruction for trade, with
fees and rules regarding trade and services being carved into stone and present in major trading areas. Evidence of contracts from this period exists.

As explored in Chapter 4, social mores and etiquette underpinned early contract law. Furthermore, the norms of accepted contractual behaviour, and retribution for failure to deliver on contracts, would have varied greatly between rural and urban communities in the area. Indeed, rural communities, up until very recently, have changed very little in the area that was to become and is now Kuwait. Even today, there are tribal communities that still prescribe to tribal and Bedouin codes; disputes in these communities, as years ago, will be dealt with internally, rather than relying on the outside help of courts with their laws that tribes people may not well understand nor respect. Instead, it is the tribal chief, with the aid of his advisory sheikhs, who will cast judgment on disputes and transgressions. In these cases, tribal law will vary slightly from family to family, with custom and the ideals of each community setting how contract law should stand, and with disputes between tribes mediated by impartial members. Verbal contracts are the norm.

However, over recent decades Kuwait has rapidly become increasingly urbanised and this is changing the current situation: the adoption of more urban practices is thus becoming more commonplace, including the following of state laws and business customs. Along with the increased and centralised education, literacy in Kuwait has risen 39% over the past over the past 30 years; this has undoubtedly changed how business is conducted, not least in the matter of the national and official law being more accessible and business being conducted on a more uniform footing with recorded terms and more transparency.

It can be concluded that there have been three major influences and movements of change in Kuwaiti law: the Islamic evolution, particularly during the time of the Abbasids and shortly after with the formation of the schools of Islamic thought; the discovery of oil and deeper international involvement around the time of the British Protectorate; and the period of independence and the creation of Al-Sanhuri's Commercial and Civil Code with all its modern addendums and amendments. These
eras all brought dramatic changes within Kuwait, but particularly so in how law and contract law were practiced.

The adoption of Islam in the 8th Century in the area that would later become Kuwait, brought with it, in the cities at least, a change from laws that varied from tribe to tribe and from punishments based on retribution. Instead Islam set more standardised rules on behaviour and punishments across the Islamic empire, with the aid of setting up of centralised administration, and with the key ideal that contract terms set out to look after the benefits of both parties equally. Under the current laws of the time it was acceptable practise to establish the sale of an item through a loan where double the value would be paid at the end of the term. Islam on the other hand banned all forms of usury or *riba*, with the ideals that business transactions should be conducted in a way that both parties had equal gain from the relationship, more like a form of bartering.

The formation of the Schools of Law in Islam also had a great impact but in a less direct manner. Each of the schools were prevalent in the areas in which it grew up, but with regard to those in governance and at the level of advisory council's knowledge of their existence would at least demonstrate that Shari’a and its impact on the law of the land was not so clear cut and was open to some level of interpretation. The Ottomans, who ruled over the Kuwait area generally followed Hanafi law, but were flexible in their acceptance of interpretations from other schools if more appropriate to the situation.

Kuwait became an important centre of commerce in the mid-1700s. However, a more dramatic change would come with the introduction of Western interest in the late 18th Century and the establishment of the headquarters of the British East India Company in Kuwait. This built a strong bond between Britain and Kuwait and lessened the influence of the Ottoman governance, culminating in Kuwait becoming a Protectorate in 1899 to strengthen defences against Germany, Turkey and Russia who were interested in Kuwait because of its strategic position. This of course
meant a greater number of foreigners in the country and the need for Capitulation to allow immigrants or visitors to be dealt with under their own laws.

Contract Laws needed to be adjusted to satisfy the needs of both Kuwaiti and non-Kuwaiti international parties to cover business dealings. This, therefore, exposed Kuwait to legal systems beyond pure Shari’a. From this time to the 1950s, there was much global geopolitical change and unrest, particularly at the end of the 19th Century and into the 20th Century, not least world wars and the discovery of oil in Kuwait. The early years of the 20th Century onwards saw much reform in Kuwaiti law as detailed in Chapter 4. Nasser’s revolution in the 1950s was an awakening to many countries in the Arab region and, along with the general weakening of British influence, Kuwait gained independence from being a British Protectorate in 1961. This of course led to the opportunity for a whole new beginning, both politically and legally. There was a big impetus at this time to free the country, at least symbolically, from British influence, which was part of the reasoning behind the change from Shari’a and English Common Law to the new system based on French Civil Law, after the Egyptian legal model. It would have been easier perhaps to form a new system based on the English law ideas with which businessmen and legal practitioners were already familiar. However, this move demonstrated, both symbolically and practically, a complete step-change and a desire for a total break from Britain.

From then on there has been rapid development to global trading, air transport is more affordable for all, internet trading and banking, organisations governing international law, economic development of Asia. Law in general has become much more complex. Since early days of pre-Islamic barter when laws governed amounts of one item for another and simple but potentially severe consequences for lack of compliance to an agreement, to the modern world where contracts and bargaining must also follow international laws, monopoly laws, secure human rights and secure environmental wellbeing and health and safety. All of these factors have revolutionised today’s commercial markets, leading in turn to a corresponding
evolution in Kuwaiti commercial law and of course impacting in turn the Kuwaiti Civil and Commercial codes.

9.3.2 What Is the Impact of Kuwaiti Custom, as Well as Arab Custom and Islamic Law, on the Current Kuwaiti Legal System, With Special Focus on Contract Law?

It must be remembered that the overriding primary source of Kuwaiti law is statute. Yet, traditional practices of custom and religious law do still continue to be influential on modern Kuwaiti Law. As has been examined at length throughout this research, Kuwaiti custom and practice still has a certain unofficial impact on the way that commerce takes place, at least with intra-Kuwaiti business deals and with commerce amongst tribespeople and even with neighbouring countries that may share similar practices, particularly with the Bedouin people who move across country borders. Chapter 4 examines how certain laws such as Al-diyya and Al-shaffa’a have made the transition from Kuwaiti tribal custom to part of the modern legal system of Kuwait. They are also part of Islamic Law, coming jointly from Sura 2, Verse 178 of the Qur’an and Haddith. The analysis of the primary research in Chapter 6 shows that custom has a clear role and an accepted legitimacy in the judicial decision-making of the Court of Cassation judges. Judge A stated that “any judge can issue a judgement and legitimately refer it to custom”. Islamic principles also play a role, although not an overreaching one. Thus, whilst Islamic Law or Shari’a no longer dictates directly the laws of the land, modern Kuwaiti law has its roots firmly planted in both custom and Islam.

It is interesting to debate how much custom is used as source in and of itself and how much judges (as with all persons) are a reflection of their time and upbringing and so incorporate custom into their judgements and legal interpretations, even subconsciously. Exactly the same can be said for the influence of religious law. Indeed, religious law and Arab custom are very much intertwined. Al-Sanhuri was an Islamic scholar, his ideals were steeped in Islamic culture and the teachings of the Qur’an. Judge B told the interviewer:
“Contract Law is based largely on Islamic Law, which aligns with the customs and traditions of the country. It was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the laws’ creation.”

Much of Kuwait’s traditional law and custom is based on Islamic tradition, which is of course intertwined with Shari’a. There is a hair-fine line between what is considered Shari’a and Islamic Principle. In many cases it will be the same. The Constitution dictates, and the Supreme Court Judges interviewed reiterate, that Islam is the religion of the country but that Islamic principles are only ‘a’ principal source of law, not ‘the’ principal source of law: they should be used to guide the application of the law (as per the Civil Code) and the founding of new laws but are not binding in and of themselves. The finely-tuned linguistic differences in this regard are highlighted in Chapter 3. Nor does Islamic Law mean Shari’a per se. As detailed in Chapter 4, Shari’a is an interpretation of the traditions, actions and teachings from the Prophet Mohammed and the Qur’an; they are scholarly interpretations, but interpretations all the same, and from a world many centuries away. Al-Sanhuri was particular that the new legal system he was establishing should be based on over-arching Islamic principles and not on a Shari’a that may potentially be out-dated or inapplicable to modern living and trading.

The law, therefore, has taken steps, not to move away from Shari’a as such, but at least to not be tied unreservedly to it without due consideration. The differences in how usury is dealt with in civil and commercial law is a well examined example, (see Chapter 8, and Judge C, Question 10, in Chapter 6). The judges interviewed have indicated that they indeed believe in this approach and implement the law in this way. In answering Question 6 they describe in detail the process and importance of having experienced judges who can make appropriate and fair interpretations using experience, strong knowledge of the law, custom, Islamic principles and judgement where the law is lacking. They also emphasise how these are peer reviewed. However, they also explained that part of the careful process used to pass new laws includes approval by the High Committee of Islamic rules.
Several of the judges interviewed remind us that whilst Kuwait has the oldest established legal system in the region, it is still relatively new. The culture of the country and its surrounding neighbours, therefore, is bound to have an influence. Judges D and E state ways in which Kuwaiti Law has been heavily influenced by Egyptian Law. This means indirectly through Egyptian custom too. In the same way that Kuwaiti law is influenced by accepted norms of Kuwaiti custom so – as a matter of logic - Kuwaiti law will also be influenced by Egyptian custom insofar as Egyptian custom helped form Egyptian law and that said Egyptian law is a source of Kuwaiti Law. Even without a common law concept of precedent this must follow because Egyptian custom will be imported into Kuwaiti law on the back of Egyptian law.

The judges mentioned how Egyptian jurists and lawyers were hired not only to construct the system but also to occupy positions as jurists. Their familiarity with Egyptian law would undoubtedly lead them to look to familiar cases and judgements, as well as familiar patterns of legal thinking and reasoning, within the Egyptian system in order to find resolutions within Kuwait. If Egyptian precedent and custom influences Egyptian law and judgements, it is clear this will follow through into the Kuwaiti system, both indirectly and directly, with Judge D giving the example of the Appeal and Offence law taken from Egyptian Law.

It is important to consider however that the majority of legal practitioners in Kuwait come from Muslim countries and have been brought up in a Shari‘a-based culture. Therefore, their decisions are likely to be flavoured by Islamic Law, even if applying secular laws in a secular legal system. Judges do not exist in a vacuum but are a product of their environment and upbringing and reflect what they are familiar with and what guides their moral compass. Alan Paterson writes to similar effect regarding English Law Lords, saying that a “number of individuals and groups exist whose notions of acceptable behaviour for a judge .... potentially have an influence on a Law Lord”.¹ It would indeed be unrealistic to expect judges to be

¹ Alan Paterson, The Law Lords (Palgrave 1982), p.9
immune to the political and religious situation of their country. Indeed, following Paterson’s argument, it is likely that the judges would ‘have in mind’ when preparing their judgements not only their own peer group, but those whose criticism bears most weight, which may well be the religious factions.²

This is not to imply that the judges have a definite leaning or bias. Judicial impartiality is expected in Kuwait as in England where, as Professor Griffith writes, “the function of the judiciary is to decide disputes in accordance with the law and with impartiality” and impartiality means “not merely an absence of personal bias or prejudice ... but also the exclusion of ‘irrelevant’ considerations such as his political or religious views”.³ Rather, it is a recognition of John Donne’s remark that “no man is an island, entire of itself”⁴ and that, as such, the judges’ Islamic upbringing in their formative years will have helped mould them into the men they are today.

Although statute is the primary source of law, it is also pertinent to remember that Kuwait has a unique position with regard to culture. It is an Arab culture, with a strong influence from custom and what is considered to be the norm. However, it includes an effect from British culture and its time as a British Protectorate. Additionally, in today’s world with free communication, cross-cultural legal cases are likely to be increasing, with access to international cases for reference, different ideals and simply different types of issues arising that are hard to find examples of within Shari’a, due to the changing nature of culture, community and technology. Therefore, it is necessary to look outside of Shari’a to find a resolution, to use Islamic and ‘natural principles’ to assess the problem presented but then for judges to use their own experience, international precedents and their own judgement to come to a fair conclusion. We have explored how Articles 193 and 194 of the Civil Code ensure that it is underlying tenet of business transactions and contract

² ibid
⁴ John Donne, Devotions upon Emergent Occasions (Meditation XVII, 1624)
agreement that parties uphold 'honourable dealing' and 'be guided by the nature of dealing and current customs'. This comes from the Qur'an in that deals and trade should be fair to both parties, thus it maintains Islamic Principles, yet it also allows for adaption to modern culture and behaviours, or indeed Kuwait’s unique amalgam of Arab-Western custom, in its inclusion of allowing guidance by 'current customs'.

Thus it can be concluded that Islamic Law has been influential but the law is not a static thing, and nor should it be: as Judge C says in response to Question 8 as regards the Civil Act that:

"the main source of Law is Islamic Law, they therefore cannot be interpreted in an absolute way, they must be interpreted within the legal environment and context of the times and situation."

The law should continue to adapt to serve the people in the world in which the people of Kuwait live and conduct business. Islamic Law or Shari’a as it was constructed, back in the 1st century AD, will not always allow for an exact ruling, especially in our modern world of internet trading, international and multi-national trading. Indeed, even the scholars themselves could not agree one hundred per cent of the interpretations or validity of the components that make up Shari’a, leading to the formation of the separate Islamic Schools of Jurisprudence. The Hanafi school has of course been influential and well established having been followed since before the founding of Kuwait, and its teachings can be used to give guidance on what Islamic principles are and how to apply them, but they should be, and are, used in conjunction with human judgement based on the specific situation. The importance of this has been understood and encouraged from early on. Chapter 4 talks of the 8th Century Risāla, compiled by the scholar Muhammed Ibn-Idrīs Ash-Shafi’i, and describes the four sources of the law. In addition to the expected Sunna
and Qur’an are *ijmā* and *qiyyās*, or consensus of the Muslim community and human reasoning, respectively.  

It is also important to remember here that three of the judges specifically cited the importance of Custom. Each mentioned the fact that the Civil Code allows for the inclusion of Custom where codified law fails to address a particular issue. It should be emphasised again that, as Judge C says, the order is to look first at legislation, then Islamic Law then custom. However, many see custom and Islamic Law as overlapping as Kuwait is a Muslim country and so its custom reflects its identity as a religious country. However, custom in itself is also powerful. Judge B even went as far as to say: “there is space for Custom for parties to create their own law, with that space being found in arbitration”.

Thus, the law is flexible with space to be influenced by Islamic Law, Arab or Kuwaiti Custom, as appropriate and as long as it fits the established rules of fair and honourable trading, not hindering the benefit of the Kuwaiti people and aligning with Islamic Principles.

### 9.3.3 What is the Impact of English Law and Kuwait’s Status as a British Protectorate for Over Sixty Years on Kuwait’s Commercial Code?

In terms of direct impact, the simple – and rather surprising – answer to this appears to be none. The break with Britain was abrupt and clean, seemingly allowing a sudden and complete shift from one legal system to a completely new, different one.

In the broader picture, however, it is a more difficult question to answer: Kuwait was a British Protectorate, even if the current system is new. How do we know how Kuwait may have progressed with regard to its legal and commercial development without that part of history? One way to address this issue is to look to its non-

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British Protectorate neighbours to contrast how their Commercial codes and legal structures differ.

As the Supreme Court judges proudly stated, Kuwait has one of the oldest systematic written legal systems in the Arab Gulf. Iraq, Syria, Jordan and Libya also benefited from Al-Sanhuri’s work prior to Kuwait, but in the Gulf Kuwait was the first. The judges have alluded to the fact that Kuwait’s commercial legal system is the most developed in the Gulf and now often referenced by neighbouring countries with regard to its laws and judgments; Qatar even based its Commercial Code on that of Kuwait. In terms of law and culture, Kuwait is considered a more liberal country than many of its neighbours: of the six nations surrounding Kuwait (Iran, Iraq, U.A.E., Saudi Arabia, Oman and Yemen) four have full Shari’a legal systems, applying to civil, family and commercial law. Oman, similarly to Kuwait, has Shari’a that applies only to family matters, whilst the UAE follows a regional variation of Shari’a. Thus, by consigning Shari’a Law largely to purely family law concerns, and thereby taking a more secular, liberal stance, Kuwait certainly differed from its neighbours. But is this due to its position as an ex-protectorate or due to its being an important port and having a large influx of foreigners with their trade and differing laws and cultures generally or, indeed, to other unrelated reasons?

One of the reasons that English law may not have left many traces, despite the length of the Protectorate, may be simply a question of numbers. As shown in Chapter 3, under the period of the British protectorate the Kuwaiti National jurisdiction covered all Kuwaiti nationals, citizens of other independent Arab states, Iran, and other British protectorates in the Gulf. This accounted for approximately 250,000 people. Running in parallel, the British High Commission and English Common Law covered all the remaining people, namely British subjects, subjects of British Commonwealth countries and citizens of all other countries. But this amounted to only roughly 30,000 people. The weight of numbers therefore argues in favour of the British system leaving a relatively small impact. In addition, these 30,000 are, in the main, the people who subsequently left the country when the protectorate came to an end or, at any rate, did not form a core part of the new
Kuwait. It is therefore not surprising that not only in terms of pure numerical weight, but also the profile of the actual people affected, the National jurisdiction, rather than English law, should be the system that would leave a lasting legacy in modern Kuwait.

Furthermore, in many ways, the two systems were polar opposites. The National Jurisdiction had no written or formal procedures, laws or even designated courts. It was, to all extents and purposes, still semi-tribal and operated in a tribal elder fashion. Hijazi, an official working at the British court in Kuwait during this time remarks that "it is true that in theory the Majellah... was the law of the land but in practice the law was the conscience of the official dispensing justice".6

The British system, however, used the English common law system of rules; the courts functioned exactly like English courts (although without juries). Again, as this runs contrary to the traditional Kuwaiti system, it is not surprising that Kuwait was quick to drop the English approach and that there are now very few traces left. Although the British were in Kuwait for over 60 years, this is a very small span of time compared to the centuries of tradition of the tribal nation as a whole. As the English proverb says, old habits die hard.

However, there would of course have been some overlap, in thinking even if not directly in law. It is obvious that both legal practitioners and members of the public, even if not directly affected, would have had some familiarity with both systems: no one can live in their country oblivious to the systems in place. The situation regarding conflicts of law is also interesting and complex. Thus, a familiarity of both legal systems would have been common and a benefit in dealing with expectations and disagreements.

As developed from above, the British were there primarily for the oil trade, thus they needed to find a mutually agreeable law to govern the necessary contracts.

Pure Shari’a would not always be appropriate for non-Muslims, nor be equipped to cover all modern situations, as was seen from Ballantyne’s reference to the Aramco Arbitration (see Chapter 4). In this particular case, custom of world trade deals, along with jurisprudence, were used to complete the concession where legal procedures and principles were not in existence within Shari’a. This case was for a concession within Saudi Arabia, however regardless of the school of Shari’a followed each is bound to have its omissions within modern business transactions. For Kuwait, where such omissions existed, prior to the development of Al-Sanhuri’s code, it is obvious that lawyers and businessmen turned to their closest expertise, namely English Common Law, the accepted law for commercial exchanges of this time, thanks to the influence of the Empire. During the oil boom years of the 1950s, English law reached its peak in Kuwait, with a large increase in the number of cases to come before the British jurisdiction courts. Indeed, it was one of the main attractions of Kuwait. Non-Arabs and Arabs based outside of the Gulf valued Kuwait for doing business due to the clarity of the English law rather than being “left at the tender mercy of the arbitrary National Jurisdiction”.7

However, there is a general feeling that the British system was in many ways a victim of its own success.8 Public sentiment, especially among the young, the nationalists and the religious factions, moved against the ‘imperialists’ and their “daily reminder of protection and semi-colonialism”.9 Again, therefore, it is maybe not surprising that the people wanted a clean break and saw the legal expertise of Sanhuri as the ideal way to do this, reclaiming their cultural and religious traditions without sacrificing their commercial position.

It should be noted too that the official stance of Britain and the other countries that had protectorates was one of non-interference with regard to laws and governance.

7 ibid, 432
9 ibid
Kuwait had its own legal system and British jurisdiction was intended for application only for non-nationals. Perhaps the more surprising point is not that the British Protectorate left no traces on the modern Kuwaiti system but that the two completely different systems existed comfortably side-by-side for so long.

It is possible, however, that there are modes of less direct impact, such as how Britain's presence in Egypt partially instigated the Egyptian uprising of 1952, which in turn encouraged the demise of Britain's influence in that region generally, and conversely the Independence of Kuwait, without which Kuwait may not have thought to revitalise their legal system in the way they did, by adopting the Al-Sanhuri hybrid system. In a very indirect way, the presence of British and other foreigners in Egypt led to the dual law system (Mixed court and National Court), which led to a need for a unified Egyptian system and Al-Sanhuri's clever fusion of French Civil, Napoleonic and Islamic Law, constructed between 1938 and 1948. In a similar vein, it is also possible that from a political point of view, Britain and western forces were more willing to go to Kuwait's aid after the Iraqi invasion because of their shared history. The repelling of Hussein's invading force most certainly had a direct impact on the legal standing and system of Kuwait. However, this is stretching the argument and, as it stands now, the conclusion seems to be that Kuwait's legal system is very much based on the French Civil Law and underpinned by Islamic Principles and that the period of the British Protectorate is consigned to legal history, with no vestiges of any note left in modern Kuwait.

9.3.4 How Do Contemporary Kuwaiti Contracts Compare and Contrast With Those of Pre-Islamic, Islamic and Western Contracts?

Essentially modern Kuwaiti commercial law is based on the same principles as Western Civil law systems of commercial law; more specifically, it is based on the Civil Law following the format of French law. As such, the main difference is seen in contracts that fall under Islamic Law. However, the basic tenets of contract law also show some fundamental differences.
There was no pre-Islamic Kuwait as such. Depending on interpretation, the country of Kuwait was formed between the 17th and 18th Centuries, and of course Islam dates back to the 7th Century AD. We can however look at how Bedouin and tribal families in the area that became Kuwait may have conducted business and drawn up contracts in pre-Islamic times.

As has been examined earlier, Islamic Law stipulates, if agreeing a contract where goods or finances were to be paid at a later date, the deal should be recorded by a scribe, essentially a simple contract. However, this was not, and still is not always the case in actual transactions, particularly in relation to inter- and intra-tribal dealings where it may be considered an insult not to take the business associate at their word. This applies particularly seeing as Islamic dealings include *Huson Alniyah*, the duty of good faith. To insist on a contract would suggest your partner might not follow this duty and might therefore behave contrary to Islamic principles. Additionally, literacy would not have been widespread and a written agreement would have required each nomadic group to have a scribe with them, which would have been impractical.

Looking further back in time, this work explored the origins of contracts, with trade starting with simple bartering and with contracts dating back to around 2250BC in Mesopotamian times. It also explored how even pre-Moses, with his written laws in stone, Humurabi established communal contract laws that were carved in stone in central market locations citing amounts payable for goods, usury and potential punishments for breach of contract. In Hebrew and Roman times, there was less uniformity although a formal promise was recognised, again with compensation due for failure to fulfil the contract. After the fall of the empire this idea of contracts became less rigid, with no formal procedure for contractual drafting, although there were certain expected norms. Examples of these were touched on such as *Mulamasa*: items touched without examination were assumed sold; *Ijara*: hiring and leasing, existed with the ideal of mutual benefit and usufruct: the right for the leasee to gain profit from that leased. *Ijara* and *Huson Alniyah* are very important ideals of Islamic trading; the philosophy that both parties equally benefit from the
transaction and that both parties behave honourably with no deceit. It is because of *Ijara*, that usury is forbidden within strict Islamic contracts as one party will be gaining more than the first item is worth. It has been explored how Islam contains strict rules against ‘uncertainty’, against selling items that do not yet exist in the form in which they are to be purchased or where value cannot be guaranteed, such as the promise of crops yet to be harvested. So Islam protects the buyer or leasee. These do not require specific articles within the agreement or contract; they are implicit where those bound are following Islamic Laws.

This assumption continues into Kuwaiti law today. Articles 193-194 of the Civil Code state that where wording is not explicit, trading should be guided by “**good faith and honourable dealing which must be satisfied by the parties**”. Chapter 8 deals at length with the importance of these traditional concepts in modern Kuwaiti contract law. The differences in contractual rules of privity and Kuwait’s emphasis on common intent in a contract, in particular, are also highlighted: these show that, although fundamentally the legal system governing contracts is similar, as is to be expected in a tool that has to achieve a certain end (namely, commercial certitude), differences in contractual principles have an important effect.

The apparent conflict between religious and secular principles can be seen most clearly in the role of interest for loans of money or equipment, namely *riba* or usury; their inclusion in contemporary Kuwaiti contracts has been discussed throughout this work. It has explored how usury is still forbidden under Article 547 of the Civil Code, to protect the everyday citizen from exploitation; however, for the benefits of international trading, allowances have been made, via Articles 102 and 115 of the Commercial Law:

"**The creditor has the right to interest in a commercial loan unless the contrary is agreed**", although “**interest may not exceed the capital fund, except in cases provided in law**”.

In both religious and secular law, a contract is a binding agreement. But, under Shari’a, it is additionally performed under divine sanction. Shari’a sets inflexible
mandates. It has been seen how this is no longer practical for today's commerce, which has evolved beyond the scope of 10th Century trade and lacks the facility to accommodate the needs of contemporary international and technological businesses. Al-Sanhuri's system allows for Shari’a to run alongside a more flexible and functional construction. Shari’a is a principal source of legislation, but subsidiary articles can exist that are applicable for specific aspects of legislature. These are often then set on Civil law (here read Western law) or custom, either Kuwaiti or worldwide, depending on the situation at hand.

It is probably worth noting that whilst Kuwait has accepted a western-style civil law, its system and contracts strongly protect its own interest. Any foreign investors can only do so through a Kuwaiti agent, they cannot own land, and there are limits placed on non-national banks. As shown, this has impacted Kuwait’s reputation, making it seen as a country that does not facilitate international trade, which could be damaging in the long run. The overwhelming attraction of Kuwait in the 1950s, to businessmen, mentioned above in research question three, because of the advantages of the British legal system, has therefore been wiped out.

9.3.5 Additional Findings

Supplemental to the original questions raised, additional points arose, in particular, as a result of the interviews with the Supreme Court Judges. In general, the judges came across as very proud of the system they worked under. They were proud of its innovative nature, of being the first in the Gulf to have a purpose-designed legal system, proud that whilst upholding the Islamic principles of their country, but not being tied to Shari’a, it was flexible enough to develop with the needs of its users and practical enough to allow commerce in an international arena. They were satisfied with the procedures that did not blindly follow precedent but allowed experienced judges to examine the facts of individual cases and exercise jurisprudence. The judges felt that annual peer reviews of the Supreme Judges’ Consul, built into the law as a required procedure, Clauses 3 and 71 (1990), were sufficient to ensure fair and careful judgements that followed the law and that neutrality was the most important strength for this process and a measure of a good
judge. This process being stringent was seen as the best way to secure quality of the judicial system.

Although this pride may be seen by western eyes as lacking a critical eye, and certainly contrasts with some of the interviews found in Alan Paterson’s seminal work of English Supreme Court judges,\(^\text{10}\) it has to be remembered that Kuwait is a country throwing off a semi-colonial master, establishing itself as a new and independent force. Furthermore, many of the interviewees were directly involved (or at least present) during that process and feel a personal connection. It is not altogether surprising, therefore, that they have a favourable opinion. It would be interesting to see at a later date whether subsequent judges, who were not alive or who were too young in 1961, have the same inherent pride or whether they are more analytically critical of the legal system because they are more removed from its inception.

The role of Islamic Law, a key area of this research, was an interesting theme among the judges themselves. It was agreed to be a source of the system’s strength that it had Islam/Shari’a as a source of law, but not as its sole source, allowing it flexibility to develop alongside the culture and business needs, acknowledging that whilst Al-Sanhuri’s civil law system was well constructed, that it is still relatively new and as with anything that must function in a changing world, it must be updated to remain relevant. The overall consensus was that that not having Shari’a as the sole source, or even the main source, did not make the Kuwaiti Civil and Commercial laws less Islamic: it is already implicit in the law that Islam is the religion of the country and that the country’s laws and judgements must not infringe on the good of the Kuwait people, its land, traditions, custom or its morals and must attain to Islamic principles. However, it is clear that statute is the primary source of law. So, Kuwait is an Islamic country and therefore the laws and its people should follow the essence of Islamic belief and behaviour (although other religions are respected and

\(^{10}\) Paterson, n 1
protected within Kuwaiti law). In a contract law sense, this means trading fairly, following good ethics, not dealing in illicit or morally questionable trade. This is different from following Islamic Law. Shari’a is Islamic Law, Shari’a meaning ‘path to water’, water being that which gives life; thus Islamic Shari’a is the Islamic Path to life and could be translated as the path that should be followed for eternal life. It is important to note that Shari’a is not a fixed set of laws. It varies from country to country based on the school of Islam that that country follows, i.e. not purely the Qu’ran, but also which collection of Sunna (the behaviours and sayings of the Prophet Mohammed) are used and their interpretations, Ijmā (consensus of the Muslim community) and Qiyā (human reasoning).\(^{11}\)

The main area of criticism was directed at the legal practitioners. Whilst it was felt that legal firms were generally experienced, the consensus was that solicitors require further practical training to ensure they are better prepared when they present at court. The judges felt the lawyers display a lack of depth of knowledge regarding the law as applied to the arguments presented, and also a lack of original thinking (see Chapter 6). Thus, the same arguments are put forward repeatedly for different cases. The papers presented are also not well written or organised resulting in a lack of clarity that wastes judges’ time.

9.4 Implications and Recommendations from the Findings

9.4.1 Impact

It is the hope of the author that the perceptions detailed within this document could be important in aiding other Middle Eastern countries should they wish to adapt their own legal system in a world of increasing international trade. Additionally, it could aid with further development of Kuwait’s own legal system.

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\(^{11}\) See sections 4.2.2 and 4.3.5.1. - Kuwait does have its own version of Shari’a, following the Maliki school, however it is limited in application to family law, not contract or civil.
It is believed that through the examination of this subject, by understanding how Kuwaiti Law has evolved into its current form, from exploring the statements and experiences of the Supreme Court Judges, useful insights can be gained. Through these insights, the Kuwaiti Legal Profession can better understand how Kuwaiti law may and should develop in the future; how can it be the most efficient it can be, avoiding any sudden problems, but whilst retaining fairness, being appropriate to represent Kuwait as an Islamic Nation, but remaining flexible enough to function in the modern commercial world with all its future changes.

9.4.2 Recommendations

Although it may seem overly ambitious, and even presumptuous, to seek to make recommendations to the Kuwaiti legal system, following a deep exploration of the issues covered and the first-hand expert opinion of the judges, several issues seem clear. The recommendations listed below, driven by the insights gathered from this study, are in the hope of helping the Kuwaiti legal system be one of the best-established systems in the world.

Following on from the Supreme Court judges’ clear dissatisfaction with the standard of the legal practitioners in Chapter 6, this thesis proposes the following recommendations. However, this thesis also recognises that although the judges were critical of the standard of the lawyers, and relatively satisfied with judicial training, it must be noted that this work did not interview members of the law profession, just judges, and so there is the risk that it is rather one-sided. It is for this reason that recommendations have been made for the judiciary too, although further research is need here.

Improving Education for Law Students

It should be an established policy for all legal schools within Kuwait to offer the option of specialisation to their students. Currently, only a small number of schools provide the opportunity to specialise.
There also needs to be a better inclusion of practical modules within courses to ensure lawyers are prepared for the courtroom. This would act as preparatory work for the new two-year practical training course see below.

**Mandatory Practical Training as part of Formal Qualification Process**

At present, lawyers do not require any practical training after graduation. It is recommended that lawyers undertake a two-year period of practical experience and further education, post-graduation, prior to gaining entry to the Lawyers’ Committee. This would bring the lawyers more into line with the same level of training as the judges and would raise legal standards.

**Chartered Lawyer Qualification – On-going Education and Training for Legal Professionals**

A high standard of training should not cease once a lawyer or legal professional is qualified. Rather, if the level of the initial training is raised, it must also be maintained.

Continual development is important. It should not be left to individuals as to whether they study or not. This was highlighted by the judges themselves in Chapter 6. There should be mandatory further training sessions during a lawyer’s career, to keep up to date with legal and procedural changes. A Chartered lawyer qualification requirement should be introduced prior to admission to the Lawyers’ Committee to ensure a broad knowledge of law, cases and procedure, to offer the best possible service to clients, a more efficient and effective court procedure and faster turn-over of cases. There should then be a continued programme of development.

**Judiciary and Judicial Training**

Although judges receive specific training, their current career path means they have to be Public Prosecutors for approximately seven years first. This covers criminal prosecutions and also administrative and government cases. The risk is therefore
that judges have never been involved in criminal defence work, nor private legal work. In the same way, therefore, that lawyers should receive practical training before qualifying, it is recommended that judges should have a mandatory posting in defence and private law practice.

The Ministry of Justice needs to ensure that enough judges are hired with an expertise in commercial regards. If Kuwait wishes to strengthen its position as a business hub at the crossroads of East and West, it needs a strong team of judges and lawyers, Part of this investment would be building a team of lawyers and judges with strong expertise in diverse specialisms such as e-commerce, banking, real estate, maritime law and insurance law. Additionally, new crimes should not be forgotten, if Kuwait is to stay at the forefront of the legal commerce world it must increase expertise on cyber-crime and fraud.

In short, such programmes of initial training and continued development should be for all levels of the legal profession: judges, public prosecutors, lawyers, legal consultants, legal secretaries and clerks. This should be obligatory for promotion (of judges) and for renewal of license (for legal practitioners) as a measure of their commitment to the advancement of knowledge and the pursuit of excellence. This can only benefit both the profession and the nation as a whole.

**Annual Conferences**

Leading on from the previous suggestions, training institutions should partner with international bodies to host annual legal conferences to encourage development and act as an additional mode for students and developing lawyers to keep abreast of international developments in the area of commercial law. Specifically, it is felt that the Federal Institute of Training & Judicial Studies and the Kuwait Judicial Institute should establish such an initiative in Kuwait.
Multi-National Law Firms

These companies have the resources and influence to have a major impact on the industry and should take responsibility to drive the way forward. Law firms should initiate professional development, establishing it as a norm, using their international resources to help set up conferences, share international developments, arranging for employees to attend conferences abroad, encouraging participation as speakers and delegates. This would enrich their own knowledge and enable them to share knowledge with colleagues upon their return. An international exchange should be considered, allowing staff to gain relevant experience in countries of interest to Kuwait. This way, lawyers can share ideas and understanding which benefits both sides. By doing this, the industry would be taking a big step forward in setting the standards, core values and principles of the profession.

It may well, of course, be difficult to force private firms to implement such measures as they are largely subjective and difficult to quantify. In keeping with modern trends, therefore, self-regulation might be more appropriate, rather than direct Ministry rules and intervention. Establishing a self-regulatory body would have the established benefits of drawing on the technical expertise of those directly in the field and using the ‘commitment, pride and loyalty’ of the industry in question in order to implement, and to be seen to implement, high standards across their profession. This could be as a stand-alone body or, for the more sceptical, as part of a government programme, along the lines of ‘co-regulation’. As Ogus says in the Oxford Journal of Legal Studies, self-regulation “when combined with some measure of external constraint” has the power “to meet the traditional criticisms and to generate outcomes which may be superior to those emanating from conventional

public regulatory reforms”. In a small country like Kuwait, it would be particularly suitable as pressure can be applied and reputation is key.

Gender Representation

Although this thesis did not specifically have gender as one of its research questions, the issue came up in many forms and is particularly relevant at this time. Chapter 8 explored some of the very recent developments. It has to be questioned how impartial, correct or efficient the system is when the law is so patriarchally governed. There are risks for women of being faced with a particularly conservative male judge. Whilst certainly the judges questioned seemed fair and impartial, they represent a small number of those holding the position. It would be beneficial for Kuwait, both for men and women, if the whole of its society were equally (or at least, substantially) represented in the upper echelons of law and government.

The huge steps forward should, of course, be noted. Women are now allowed to stand for Parliament and have, indeed, been elected. And even more recently, women can now enter the judicial career path and we will see women on the bench in the not too distant future.

However, anti-discrimination laws in general, and the question of positive discrimination laws, should be considered.

9.5 Limitations and Further Work

The limitations of the primary research have been discussed in detail in Chapter 5.

The first and most obvious limitation, as highlighted in Chapter 5, is the small sample size. However, as discussed, there are very few Supreme Court judges, therefore the sample pool is not large. Furthermore, the detailed qualitative approach hopefully allowed for in-depth interviews, with quality over quantity. A

more and less quantifiable limitation is how restricted the judges may have felt. Despite the confidentially agreement in place, the judges may have felt limited in what they could say due to their position and responsibility and potential consequences of negative comments. The assurance of anonymity may not be convincing in a small, elite group where individuals may be easily identifiable, at least by their peers, purely on their opinions with names not being necessary.

The judges also did not always stay on point or give direct answers. Due to the position of those being interviewed it was difficult to interrupt. This added extra complexity to the analysis of the testimonies and separating the accounts into topics. In contrast, whilst this is listed here as a limitation, this was an anticipated result of using this method of questioning and did allow for some interesting points to arise that otherwise would not have been highlighted. Also, it should be taken as a positive that the judges were different in the manner of their responses and, indeed, in the substance. As Lord Reid said, “judges never will nor should all think alike”\textsuperscript{14}

To extend this study further it would be interesting to widen the sampling to include other areas of legal practitioners; lawyers, trainees, external lawyers dealing with the Kuwaiti system. It would also be useful to take testimonies from the point of view of the legal user, in other words the businessmen and women (internal and international) whose livelihood relies on the Commercial law and its acts and functionality. They would be best placed to provide a business perspective on conflicts between oral and written traditions, for instance, and general commercial and contractual issues,

It would also be interesting and enlightening to research women’s experience specifically. The research question of role of Shari’a Law has a direct knock-on impact on women. Although that role seems clear, from a legal and constitutional

\textsuperscript{14} Lord Reid, 'The Judge as Lawmaker' (1972) \textit{Journal of the Society of Public Teachers of Law} 12, 22
point of view, it is still a large political issue. Direct research evidence would be useful to establish exactly where the problems lie, if any, so that suggestions to improve the legal system to better serve women could be established.

9.6 Overall Conclusion

This work has examined the history of contract law in Kuwait, from its beginnings as tribal or Bedouin customs and law, through the gradual spread and development of Islamic Law, the growth of international trade with Kuwait becoming a British Protectorate, to Kuwait establishing its Independence with an Egyptian scholar, Al-Sanhuri, developing an individual civil law system based on French and Egyptian Law with an underlying Islamic moral compass. We have examined how each of these influences has affected its development, right up to an in-depth analysis of the law today, and what of their legacies remain. We have challenged those at the highest levels of Kuwait's legal profession to question the system, talk of its strengths and how it could be improved.

Overall it is the opinion of the author that the Kuwaiti legal system has functioned reasonably well for the purposes it was drawn up at the time of its conception by Al-Sanhuri and his colleague. However, the adoption of a French-based code was maybe over-hasty and not in the best interests of the country in terms of economic development and financial success. Equally, the attempt to bypass a separate Civil Code and incorporate obligations in the Commercial Code, to appease the religious elite, was rather short-sighted and not a long-term solution. The 1980 Civil Code, of course, rectified this.

On the contrary, it is interesting to see that certain Kuwaiti principles, based on custom and Islamic understanding, are thriving and even now being accepted by the English common law. The doctrine of good faith may not be established in English law, as detailed in Chapter 8 and reiterated by Lord Justice Jackson as recently as
2013, but it should be. Following the various financial crashes and scandals of the last fifteen years or so, the clampdown on unethical business practices, the increase in consumer protection laws and the more and more stringent compliance rules that governments are demanding of banks and big businesses show that both public and governmental sentiment agrees: contractual freedom cannot be the overriding philosophy if it means the fundamental elements of good faith and fair dealing are to be ignored. The British judiciary seem to be moving over to this way of thinking.

It is, indeed, pleasing to note that those who have worked within the system the longest, the Supreme Court Judges, after many years’ experience, rather than becoming jaded and cynical, have still retained a strong respect and appreciation for the Kuwaiti Legal System. They politely acknowledge some of its faults but feel that there are appropriate procedures in place to identify and rectify these faults and that there is enough flexibility within the system to adapt.

And, indeed, it must adapt. Businesses are now global businesses. With international communication, world patents, international companies that must have unified principles and codes of conduct, we are fast moving towards one business world. It is likely that there will be international contracts for each type of business, applicable to all countries where that business type is practised. It becomes harder and harder to have certain terms that are only applicable in one or two countries when the rest of the world follow a set format.

Kuwait can be proud of its own system. So far it has led the way in the Arab Gulf, being the first country to draw up its own codes, providing a forward thinking, well-designed and established system that functions in a changing, multi-cultural world.

Understanding Al-Sanhuri’s intention to quickly establish a civil law that functions in the modern world and remains flexible enough to change with the times and

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15 Jackson LJ stated: “I start by reminding myself that there is no general doctrine of "good faith" in English contract law”, in *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd* (trading as Medirest) [2013] EWCA Civ 200
needs of its country, whilst still upholding the principles of its nation’s religion of Islam, is important. Al-Sanhuri, along with many scholars, came to the conclusion that since Shari’a was an interpretation of Mohammed’s words and deeds, compiled more than a hundred years after the event, and interpreted in that context, that it can be re-interpreted for the times in which we live. There are many schools of Islam all with their own interpretations of Shari’a. Therefore, it is only logical to take the sense of the laws and apply them in a practical way for the times in which they are being used. Modern interpretations of these principles will be required as our present world is very diverse: compromises must be made. Having a well-established legal system that is well understood by its practitioners, who are well-trained both in book-learning and practice, across the board of the legal disciplines, allows those practitioners to apply the underlying meaning of the law to new modern day situations that may arise.
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• *Sunna* Saheeh
APPENDICES: THE INTERVIEWS

Appendix 1– The Questions

These are the questions as posed to the Supreme Court Judges.

They have been colour coded to enable information in the Judges’ testaments to be more simply extracted and analysed according to subject matter. The responses are provided in the following appendices.

Question 1: What are your views in relation to the current commercial legal environment in Kuwait, with particular reference to contract law?

Question 2: What are your views in relation to the application of contract law in Kuwait?

Question 3: What, if any, problems, do you believe exist in relation to contract law statutes and their application?

Question 4: If there were areas, which you believe were in need of review, what would you suggest by way of remedial action? Can you be as specific as possible?

Question 5: What is your opinion in relation to the current practice of common law in Kuwait?

Question 6: With respect to legal practitioners in the field of commercial law, what are your views as to their approach, knowledge, and general levels of competence?

Question 7: What changes, if any, would you wish to see implemented?

Question 8: With respect to the judiciary themselves, what changes, if any, would you like to see implemented in relation to the administration of contract law?

Question 9: Do you think Islamic Law, customs and practices still exercise some influence on the administration and application of contract law? Can you be specific?
Question 10: Do you think the application of contract law in the courts is at odds with or conflicts with the everyday administration of commercial affairs? If so, where? Please provide instances of such conflict and why you believe this to be the case.
Appendix 2 – Judges’ Transcripts arranged per Judge

The testaments of the five Supreme Court Judges used have been transcribed from Arabic into English. The transcripts are provided here, arranged individually for each judge; each of whom has been designated a letter to protect their identity, ensuring that the author adheres to agreed confidentiality. Sections of the transcripts have been ascribed a colour; each colour relates that section of the conversation to the appropriately coloured question, given in Appendix 1. This has been done to simplify analysis as, as is natural during this type of interview, responses did not strictly keep to question.

Text in brackets has generally been added by the author to aid clarity or provide context. In one or two instances text has been omitted to protect the identity and maintain anonymity of the Judge speaking; where this has occurred it is noted in brackets within the text.

**JUDGE A**

I think personally Kuwait has adopted the best legal system in the area, especially as it has adopted a very fresh constitution that has only been in existence since 1992. All the rest of the laws, if we are talking about private law or public law are considered quite new and modern, compared to the legal systems of the whole world, but if you compare them to the area, it is the oldest. What is interesting to mention is that the judicial system in Kuwait is fully independent and doesn’t follow any governmental roof; the ministry of justice solely manages the procedures, not the laws themselves. The judges are free to pose their own legal interpretations of the laws. So they are fully independent and free, although they should be following the Supreme Court, which ensures that all judges are following the constitution and not interfering with the freedoms of its people and the economic stability of the country.

The application of law demonstrates the level to which the Ministries are engaged in applying the law and the level of care they apply to social goals and social economic goals. Even if there are errors or disadvantages, there can be appeals made to the Ministry or a case can be filed against that same ministry.

From my personal experience, I think there are a lot of problems, which is why we
have made a whole library in the Justice Palace, full of volumes of publications and books which account and discuss these problems we believe ought to be fixed and the problems we face in our day-to-day life. There is a magazine published by the Ministry of Justice, containing all of these articles, discussing these issues. These are freely available to all judges, lawyers, students and legal professional to look at. What is worth mentioning is that there is an investigation office to examine all levels of judges to ensure that no judge can get away with a false judgement. Although the judges of Kuwait are free to make their own rulings, they are peer-reviewed by a team of experienced judges to ensure there is no corruption or severe error.

From a personal point of view, any legal system needs to be developed, always. Examples of laws that have been developed and improved are the Civil Service Law, the Procedure Code, Investment Law and the Electronic Laws. This is in terms of the actual legal codification of laws.

But if we talk about Custom, which is the civil law system for Commercial transactions, the Kuwaiti Law states that if there was no written code which covers the case between two parties, then Custom is applied. I’m very happy with the (high) level that Kuwaiti judges are achieving, especially with new judges. If I talk about law firms, I feel they have lots of experience, regardless of whether they are from Kuwait or not, but it is quite impressive.

Personally I think that some laws need to be developed, reviewed and rewritten, especially the Lawyers Practice Law. Lawyers shouldn’t join the Lawyers Committee unless they have two years’ practical experience. However, at the moment, they just graduate and join. I believe the number of judges in Kuwait is sufficient, although it is increasing all the time; I feel there are enough judges to handle to number of cases being submitted to court.

It is worth mentioning that the second clause of the constitution states that the country's religion is Islam and that Islam is one of the main sources of its law, but not the main source. Also Clause 18 of the constitution mentions that Inheritance Law should be according to Islamic Law. What is very important, and what Kuwait and Kuwaitis should be very proud of, is Clause 35 which states the country protects the freedom of all other religions, respects all other religions and that all other religions can practice their religion freely; anyone that interferes with this will be arrested. This is a very unique clause and not a common inclusion in the surrounding countries. This is secured in the constitution. In all my legal experience, which is 50 years, I never had any conflict of law. If this were to occur there is a set
procedure, where the new law cancels the previous law, and where private law limits Public Law and the last thing would be to apply Custom Law.

**JUDGE B**

From my 40 years’ personal experience in the judicial system, the Kuwaiti system started to develop earlier than other countries in the Arabian Peninsula. That was because Kuwait was hiring highly qualified experts from other countries. Personally I think that the judicial department in Kuwait is very experienced, because of the exchanging treaties enabling the exchange of judges with other countries. It is the same for legal firms; legal firms in Kuwait are adopting very experienced international lawyers, and this will lead to a very high standard of notes submitted to the courts which in turn make the whole legal process and field more developed. The Kuwaiti judicial system has already built enough of a rich heritage having experience of a wide range of court cases. It is proudly referenced by neighbouring countries that look to the rulings of Kuwait for cases in their own countries. The Kuwaiti judicial system has successfully established very good principles in many areas of law and has successfully adopted many areas of law from the Egyptian legal system.

It is quite important to mention that there were cases handed to the Constitutional Court and the Supreme Court regarding conflicts of Law, or in the application of laws, that have built good ground for appeals to judicial judgements in the future. My personal opinion about the current laws and to be specific, the current code of civil law, is that it is good and stable, which is more important, as a legal system that is constantly changing doesn’t provide stability or induce respect. It is not an amendment unless it has been reviewed by a number of experts and has gone through a set number of procedures.

Again speaking about Contract Laws I think the formation and application of these laws is good, Contract Law is based largely on Islamic Law, which aligns with the customs and traditions of the country. It was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the laws’ creation. I think also the judicial system, from researching, has now managed to form enough judgements to be referenced in future cases.

Current problems? The problem with the current application of the law is that people are not complying to or respecting contracts after their signing or exchange. Or maybe do not have the full understanding of the contract’s terms and conditions at the time of making them. It is this that leads to the cases being brought before the courts. In the courts themselves the most common problem is the delay, mainly
there are few judges and so many cases. Also the procedures and processes can be lengthy.

Of course there is a need to amend a reasonable number of laws. I think the best way to do this is to look at other, Western, legal systems, especially codes and clauses, and see what best fits the needs of the country. The Ministry of Justice is working hard on this and has established a committee to address this and assess the importance of each amendment. These amendments should be passed to parliament for approval. Examples are the Judiciary Act, the Procedure Act and the Civil Procedure Act.

Regarding Custom, no doubt it is one of the primary sources of law, and before even forming the laws, there was only Custom, which were managing peoples’ lives and was the legal system. And because now we have written law, the custom became a secondary source of law, as we already have written laws but we can see how important Custom is in arbitration. Arbitration gives a good space for the two parties to create their own customs and rules in the contract.

I don’t think the standard of notes that the lawyers put forward to the courts is good enough and I think that the lawyers need to be better trained and have more experience prior to joining the legal field. Mostly all the notes submitted to us as judges are repeated or based on the same reasoning. Lawyers should go and search for new reasoning and provide us with new case reasoning as reference. Regarding the trials, most are repeated; this is because trials need a very experienced lawyer, with enough confidence to handle a successful trial. What makes the lawyer’s job repetitive is that there is no proper legal school to train them to be successful lawyers, just their undergraduate study. Whereas judges must attend a school to give them the proper learning to enable them to become a judge; lawyers are dependent on their own independent studies to educate themselves in the cases and procedures without any academic support or encouragement. There should be a method of learning for lawyers after graduation to help them have better experience, develop better quality notes and to handle more successful trials. I cannot see why this is not happening; there are a lot of notes on the table to amend the judiciary act. There are continual amendments to the procedures affecting judges but this same process does not seem to be applied to lawyers and the systems that they must follow. The law itself is always amendable, there are no laws that are forever fixed, for example what used to be the Islamic world has changed and has developed, so I do not understand why these have not changed also.

I think judges have discretion with rulings but their allowed interpretation is limited; it has to be backed up by interpretation and explanation and must fit in
with the overall legal goals and principles of the country. There are different judgements that clearly state that there are some holes in the law that need addressing and give clear reasoning and judgements with full interpretation to fill these gaps. It can be found in different publications where judges discuss the gaps and loops and how to address them, however not many people pay attention to these and if they look to amending the issues they start from scratch which takes more time.

From a personal point of view, I don’t see a difference between the written laws and Islamic Laws as generally the written laws follow Islamic principles. And whilst there are some differences, these differences are minor, not major. This idea gives more stability to the legal system overall, as most people have an idea of what the Islamic Laws and principals are without having to read them. This is not to downplay the written laws, just that people already have an idea of what the laws are as we basically follow an Islamic Law system.

Speaking of Al-Sanhuri, he ... (removed by author to protect Judge’s anonymity) has a PhD in Islamic Law, is one of the founders of Islamic Law, so obviously Kuwaiti law has a strong foundation in Islamic Law seeing as its founder was an Islamic Law graduate.

**JUDGE C**

I think the Kuwaiti Judicial System is well developed compared to its neighbours. Why is this? Because Kuwait was hiring experts from all over the world in terms of very experienced judges and lawyers.

It is interesting to mention in application of the law, ..., (removed by author to protect Judge’s anonymity), I don’t see it fixed or absolute, as it is adaptable to the context of the circumstances, as long as the judge keeps in mind the intent with which the specific law was formed and adheres to this original intent. And it is the same case when there is a loophole or gap in the law, the judge should again keep in mind the original intent in the relevant law. All can be found in the legal Act 23 1990.

Clause 71 states that the Supreme Council of Judges must document annually, the problems that occur in the legal practice over the past year, detailing any conflicts in the law. It is the Minister of Justice’s responsibility to hand this to the Minister’s council and to the Prime Minister. This is the legal reference behind the statement that I have just made.

I think most of the legal principles came together well with Islamic Law, a very
important example is the Limitation of Interest, the main reason for this custom is that it is based on Islamic Law and the customs that pre-existed in Kuwait before the formation of the written law. In this way those forming Kuwaiti law kept in mind the principles of Islamic Law to incorporate them into the new system. Another example of keeping Islamic Law in mind whilst forming the law was the rules and regulations for the ‘diyya’ and ‘shaffa’a’, but the greatest example is still the limiting of interest on the banks.

As a legal system based on Islamic Law, I am reassured that this will last a long time as it has already lasted 1400 years, however it always needs to be updated to keep up with evolution of life and society in the modern world.

From my personal point of view I think the laws and clauses are really clear with little conflict between them. If there is any conflict I think the judge should look at up-holding the overall goal. The judge shouldn’t interpret every legal conflict separately but should try to integrate it to the overall goal of the case. For example, the special clauses of the announcement of the judgement according to the Procedure Act, where there wasn’t a specific clause and each judge had to interpret and determine their own ruling. Another example is Clause 5 and all subsequent clauses from the Procedure Act. As I mentioned it is rare that there is a conflict and where it does occur it should be resolved in the way I have described above. I think that Kuwaiti Civil Law was formed in an excellent way, as Al-Sanhuri was one of the best scholars of the time. I think the civil law is developing, for example they have developed a chapter about commercial and residential rentals.

If we go back to the Civil Act we can see the main source of Law is Islamic Law, they therefore cannot be interpreted in an absolute way, they must be interpreted within the legal environment and context of the times and situation.

It says in Clause 2, Act 1, that if there exists a gap in the law, the judge should apply Islamic Law, which should match the goal of the law and legal society. If there is not a match, the judge should apply custom. The custom became third in the order; if there was no written law, they should look to Islamic Law, and if this still does not fulfil the situation, he or she should look to Custom.

Of course there is a different number of legal firms in Kuwait and their level is quite good, but still the lawyers need to be trained more. The same applies to judges; I believe they need to be trained more. That is why I am encouraging the young people to follow traditional methods of training, but in my opinion, judges receive more training than lawyers. I am a member of the committee in charge of studying amendments of new laws and we are always open to suggestions from scholars,
judges and lawyers.

Examples of laws that have been amended; the Procedure Act and the Companies Law No. 25 for 2012, amended again in 2013 and also a new law issued called the Protection of Legal Competition Act. Going back to Islamic Principles gives the whole of society more stability, although it is developing because there are new communications that never existed before in the Islamic World. So we need to develop new laws to develop the complete legal system that we are working towards.

I believe that the judges are the most responsible judicial members in the judicial system. If a country has a good judicial system, the country has no trouble applying the laws. Therefore, the most important person in the judicial system is the judge. There were complaints that it takes too long to complete a judgement, so that is why the Minister of Justice has established two different committees. The first is to make the procedures simpler and is managed by the Deputy minister, and another committee to use the electronic system to manage the procedures and make them faster.

As a legal system based on Islamic Law, I am reassured that this will last a long time as it has already lasted 1400 years, however it always needs to be updated to keep up with evolution of life and society in the modern world.

The judge in the application of the law should not be limited to the written words of the clause; he should go far beyond to seek the intention of those originally forming the Clause and the law. A great example to compare the UK and Kuwaiti legal systems is that in England the judicial records are enforced, previous rulings are obligatory to follow; in Kuwait this is not the case. In Kuwait each judge is considered a peer and equal, therefore whilst the previous rulings for a similar case should be considered, the ruling does not have to be the same as the previous judge’s ruling. Each may consider different aspects or consider the case differently. Each case is considered independently and therefore can have an independent ruling.

A great example of the flexibility of Kuwaiti law is that it has limited (the application of) interest for banks in civil law, however in commercial communications different circumstances must be considered as commercial dealings and banks will often deal with international businesses and banks. So Clause 110-115 allows greater interest in commercial law in these circumstances. There is a copy of the legal act.
JUDGE D

There are a lot of similarities between Kuwaiti and Egyptian law and a lot of legal cases in Egypt that have referenced Kuwaiti law, particularly in judicial law. This is because Kuwait hired the best Egyptian lawyers and judges to found Kuwaiti law, so when the Egyptian judges went back to Egypt they then used these law and cases. This has helped the Kuwaiti legal system develop a great amount of heritage in legal cases.

An example of a custom that was founded in Kuwait and later copied and used in Egypt is the appeal and the offence laws. This wasn’t something in existence before and after its development it was copied by the Egyptian legal system. Another example is Appearance in the court, it is sufficient for just the defendant to be present without the presence of the prosecutor. The judge’s experience is the most important thing if interpretation is required where there may be a gap. The judge will also keep in mind any judgements from the annual review where each judge’s rulings are reviewed for compliance and good practice.

Sometimes the law can be difficult and cause conflicts; here we need a judge with good experience, where they should first apply the law, then Islamic principles, and then Custom.

The current situation is that the amendments are applied up to date; they used to be very complicated. There are different ways to improve the law; amendments that go through committees, or law draft suggestions put forward by parliament. Each draft should be studied individually and submitted at the end of the year to a committee that specialized in this type of law with feedback being given to the Ministry of Justice. This committee then either approves or disapproves the amendment. If it is approved, it is submitted to parliament for their endorsement.

What is interesting to mention is that Custom is recognized in commercial/legal transactions and the civil act itself has a clause that recognizes Custom. This is Clause Number 1, paragraph 1, which states that if there is no written law that covers the legal obligation, Custom might be considered. Recognizing Custom occurred first in Commercial Law, prior to civil Law. Commercial law was first issued in 1961, whilst Civil Law was not drafted until 1980. Even before Commercial Law and the Civil Law Act, Custom was recognized in Commercial situations and society. Legal Custom is also recognized in judgements, so any judge can issue a judgment and legitimately refer it to Custom.

Personally what I expect from the lawyers (removed to protect the anonymity of the Judge) is that any appeal submitted to the Supreme Court should include purely the
fault of the case argument. The lawyers report should present the argument detailing in which way the Court of Appeal has incorrectly applied the law with respect to the case; there should be no inclusion of the case details and circumstance. As a judge of the Supreme Court, we would not expect any oral trials unless it is a criminal law case. Oral trial cases do not apply to commercial or civil law; in these cases, they submit their appeal and schedule a date for the hearing. The appeal sheet should contain all the legal aspects and clarify the defendant’s point of view as to why the law was not applied in the correct way. It is not allowed to add new reasoning for the case circumstances. I will not prejudge the trial, and if any such additional reasoning or new defence is added, they will be ignored. A really good quality lawyer can be easily recognized in these situations, when a lawyer carefully finds loopholes or errors in the arguments of a senior judge and can find legal arguments to counter this.

So the Supreme Court is a court to correct the application of the law by the judges. It is not a court for discussing legal or social circumstances; it is purely for discussing the legal applications of the law.

It is worth noting here that this is the very final stage of the legal system in Kuwait, you cannot appeal higher than this. If your appeal is not accepted here, there is no further appeal.

Currently I am working in the primary committee responsible for developing the laws and I participate regularly in drafting new laws submitted by parliament members and I cannot give you further details about this.

Personally I think that neutrality is the most important thing in the annual judges’ review. With neutrality you can really divide the good judges from the bad and good judgements from bad, and through this process build a good reference for the future to give examples of good and bad judgements. I think that the stricter the review is the better the quality of judgements, and therefore law, in Kuwait that we will have.

This is what judges are for, to provide excellent judgements and to provide good references for scholars and researchers.

It is worth mentioning the (existence of the) High Committee of Islamic Rules, which ensures all issued laws do not conflict with Islamic Law. If this occurs, they write a draft of law for the Emir’s council for review. The chair of this committee is a religious figure, not a legal expert. This committee is charged with reviewing the laws to ensure no laws conflict. It is not the role of the committee to match the laws to Islam, purely to highlight laws that directly conflict.
The Supreme Court accepts all cases, no matter if it is commercial, labour, civil, or criminal. It is enough reason to go before the Supreme Court if the Court of Appeal issues a judgement that is completely contradictory to a previous Court of Appeal judgement.

**Judge E**

Kuwaiti has had good jump in advancements in the legal system, particularly in the 1980’s when civil, commercial and judges’ law was issued. There were also improvements in the 70’s when criminal law was amended and in the early 80’s when crimes against the government were recognized.

I was one of the first people who took the legal volumes available for hire in the Egyptian library to be an official and professional reference. In any healthy legal environment, problems arise from the application of the law; it is a common occurrence, one which most of the judges are used to. This is why there are always committees to review the laws and amend them.

Without application of the law we would never know that a specific law needs amendment and review. In Kuwait exists the law of the judges, Clause No 3, 1990 and Clause number 71, which states that it is the job of the Supreme Judges Consul to issue a yearly report or whenever it is important, that highlights the problems in application in the law or judgements; or if there are any problems or gaps in the law that the judges themselves notice the fact. This report is presented before the Minister of Justice to decide whether he wishes to submit it to the Minister’s Consul to take the relevant action.

I personally think that Kuwaiti Civil Law is perfect and complete. It has its main route from French Civil Law and the Napoleonic Code, and also from Islamic Law. The people responsible for blending these systems were the best legal scholars available at that time, including Al-Sanhuri, who participated in forming different legal systems for various different countries.

The Kuwaiti Legal System had a very high standard of members as many of its legal founders became the first practitioners in Kuwaiti Law, or stayed on to become legal advisors for different ministers and parliament members.

In this way Kuwait had very unique judgements in many areas of law. Kuwait has a unique democratic system, making it different from its neighbouring countries. The annual report relates the yearly problems that appear with the application of the laws by the judiciary system and attorney. I think this is one of the most important clauses in the Judges Law, as you can secure the quality of the judicial system in this
In addition to this excellent clause, the Ministry of Justice has established a new committee in charge of improving new laws and reviewing the legal language in them. This committee is made up of a number of very senior judges and ex-judges who now serve as legal consultants.

There is another way of reviewing the laws and changing them other than that just explained which is via suggestion from the Ministry in Charge or from a parliament member. After the legal suggestion is made they should be reviewed by the Transparency Consul and submitted to the Minister’s Consul. If approved by the Minister’s Consul, they forward it to the Minister of Justice to finalize. It is then returned to the Minister’s Consul who passes it onto the Emir for official approval and then onto Parliament. Parliament is divided up into different committees according to different aspects of the law, thus the laws and amendments are passed on to the appropriate committee. After voting, if approved, parliament submits it back to the Emir to pass the amendment and issue the change in the daily newspaper.

Amendments should be regular to remain current and fit the current situations as society is constantly changing.

The legal act number 24, of the formation of the Anti-Corruption Committee in 2012, is currently on the table for amendment for improvement. There are a different number of customs and the legal systems in Kuwait based on French and Napoleonic code, which is based on a much divided legal system. Civil law only deals with civic communications, with separate entities for criminal, labour etc. I think it is this that makes the judge’s job easy as each judge is then specialized in his area.

I think that the judiciary system has improved as they have introduced the system of hiring judges. This allows the legal system to hire very experienced judges from abroad for a period of time, which improves the legal system overall. Also the lawyers’ personal experience is improving, and I think that this is because the Kuwaiti Legal System ensures that the lawyers work within the legal standards that are set.

What is interesting to mention is that the government has the ability to hire highly experienced lawyers to act as judges, however this has not yet occurred. The Kuwaiti legal system has its roots in two systems, French and Islamic. For the Islamic root, there is the High Committee of Islamic Rules which ensures all of the laws do not conflict with Islamic Laws.

I think there is good organization in the Kuwaiti Legal System overall and an expectation for judges to have a good knowledge of laws outside of his specialty. He
therefore should be confident that his judgements do not conflict with any of the other legal areas. All judges should maintain good legal standards and follow the overall social goal with their judgements.
Appendix 3 – Judges’ testament arranged by question

Each question (Appendix 1) has been attributed a colour for ease of recognition.

The testament of each judge was translated from Arabic to English and transcribed by the author. As seen in Appendix 2, the transcripts were analysed to colour code sections of the dialogue to correspond to the question it related to.

Here the transcribed responses for all five judges have been collated, making it simpler for both author and reader to analyse the full responses to each question, allowing for a better overview, and for comparison and contrast between the views. Because of the flowing nature of the discourse it was not always clear cut which segments of dialogue should be placed with which questions. Where there is overlap, the text colour may appear out of place, to indicate that it also responds to another question.

Text in brackets has generally been added by the author to aid clarity or provide context. In one or two instances text has been omitted to protect the identity and maintain anonymity of the Judge speaking; where this has occurred it is noted in brackets within the text.

**Question 1: What are your views in relation to the current commercial legal environment in Kuwait, with particular reference to contract law?**

**Judge A**

I think personally Kuwait has adopted the best legal system in the area, especially as it has adopted a very fresh constitution that has only been in existence since 1992. All the rest of the laws, if we are talking about private law or public law are considered quite new and modern, compared to the legal systems of the whole world, but if you compare them to the area, it is the oldest. What is interesting to mention is that the judicial system in Kuwait is fully independent and doesn’t follow any governmental roof; the ministry of justice solely manages the procedures, not
the laws themselves. The judges are free to pose their own legal interpretations of the laws. So they are fully independent and free, although they should be following the Supreme Court, which ensures that all judges are following the constitution and not interfering with the freedoms of its people and the economic stability of the country.

JUDGE B

From my 40 years’ personal experience in the judicial system, the Kuwaiti system started to develop earlier than other countries in the Arabian Peninsula. That was because Kuwait was hiring highly qualified experts from other countries. Personally I think that the judicial department in Kuwait is very experienced, because of the exchanging treaties enabling the exchange of judges with other countries. It is the same for legal firms; legal firms in Kuwait are adopting very experienced international lawyers, and this will lead to a very high standard of notes submitted to the courts which in turn make the whole legal process and field more developed. The Kuwaiti judicial system has already built enough of a rich heritage having experience of a wide range of court cases. It is proudly referenced by neighbouring countries that look to the rulings of Kuwait for cases in their own countries. The Kuwaiti judicial system has successfully established very good principles in many areas of law and has successfully adopted many areas of law from the Egyptian legal system.

JUDGE C

I think the Kuwaiti Judicial System is well developed compared to its neighbours. Why is this? Because Kuwait was hiring experts from all over the world in terms of very experienced judges and lawyers.

JUDGE D

There are a lot of similarities between Kuwaiti and Egyptian law and a lot of legal cases in Egypt that have referenced Kuwaiti law, particularly in judicial law. This is because Kuwait hired the best Egyptian lawyers and judges to found Kuwaiti law, so
when the Egyptian judges went back to Egypt they then used these law and cases. This has helped the Kuwaiti legal system develop a great amount of heritage in legal cases.

(Repeated from Q4) An example of Custom that was founded in Kuwait and later copied and used in Egypt is the appeal and the offence. This wasn’t something in existence before and after it was developed it was copied by the Egyptian legal system.

**JUDGE E**

Kuwaiti has had good jump in advancements in the legal system, particularly in the 1980’s when civil, commercial and judges’ law was issued. There were also improvements in the 70’s when criminal law was amended and in the early 80’s when crimes against the government were recognized.

I was one of the first people who took the legal volumes available for hire in the Egyptian library to be an official and professional reference. In any healthy legal environment, problems arise from the application of the law; it is a common occurrence, one which most of the judges are used to. This is why there are always committees to review the laws and amend them.

(Repeated from Q3) I personally think that Kuwaiti Civil Law is perfect and complete. It has its main route from French Civil Law and the Napoleonic Code, and also from Islamic Law. The people responsible for blending these systems were the best legal scholars available at that time, including Al-Sanhuri, who participated in forming different legal systems for various different countries.

(Repeated from Q6) The Kuwaiti Legal System had a very high standard of members as many of its legal founders also became the first practitioners in Kuwaiti Law, or stayed on to become legal advisors for different ministers and parliament members.
**Question 2: What are your views in relation to the application of contract law in Kuwait?**

The application of law demonstrates the level to which the Ministries are engaged in applying the law and the level of care they apply to social goals and social economic goals. Even if there are errors or disadvantages, there can be appeals made to the Ministry or a case can be filed against that same ministry.

**Judge B**

It is quite important to mention that there were cases handed to the Constitutional Court and the Supreme Court regarding conflicts of Law, or in the application of laws, that have built good ground for appeals to judicial judgements in the future. My personal opinion about the current laws and to be specific, the current code of civil law, is that it is good and stable, which is more important, as a legal system that is constantly changing doesn’t provide stability or induce respect. It is not an amendment unless it has been reviewed by a number of experts and has gone through a set number of procedures.

Again speaking about Contract Laws I think the formation and application of these laws is good, Contract Law is based largely on Islamic Law, which aligns with the customs and traditions of the country. It was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the laws’ creation. I think also the judicial system, from researching, has now managed to form enough judgements to be referenced in future cases.

**Judge C**

It is interesting to mention in application of the law, ... (removed to protect anonymity of the Judge), I don’t see it fixed or absolute, as it is adaptable to the context of the circumstances, as long as the judge keeps in mind the intent with which the specific law was formed and adheres to this original intent. And it is the same case when there is a loophole or gap in the law, the judge should again keep in mind the original intent in the relevant law. All can be found in the legal Act 23
The judge in the application of the law should not be limited to the written words of the clause; he should go far beyond to seek the intention of those originally forming the Clause and the law. A great example to compare the UK and Kuwaiti legal systems is that in England the judicial records are enforced, previous rulings are obligatory to follow; in Kuwait this is not the case. In Kuwait each judge is considered a peer and equal, therefore whilst the previous rulings for a similar case should be considered, the ruling does not have to be the same as the previous judge’s ruling. Each may consider different aspects or consider the case differently. Each case is considered independently and therefore can have an independent ruling.

JUDGE E

Without application of the law we would never know that a specific law needs amendment and review. In Kuwait exists the law of the judges, Clause No 3, 1990 and Clause number 71, which states that it is the job of the Supreme Judges Consul to issue a yearly report or whenever it is important, that highlights the problems in application in the law or judgements; or if there are any problems or gaps in the law that the judges themselves notice the fact. This report is presented before the Minister of Justice to decide whether he wishes to submit it to the Minister’s Consul to take the relevant action.

QUESTION 3: WHAT, IF ANY PROBLEMS, DO YOU BELIEVEEXIST IN RELATION TO CONTRACT LAW STATUTES AND THEIR APPLICATION?

JUDGE A

From my personal experience, I think there are a lot of problems, which is why we have made a whole library in the Justice Palace, full of volumes of publications and books which account and discuss these problems we believe ought to be fixed and the problems we face in our day-to-day life. There is a magazine published by the Ministry of Justice, containing all of these articles, discussing these issues. These are
freely available to all judges, lawyers, students and legal professional to look at. What is worth mentioning is that there is an investigation office to examine all levels of judges to ensure that no judge can get away with a false judgement. Although the judges of Kuwait are free to make their own rulings, they are peer-reviewed by a team of experienced judges to ensure there is no corruption or severe error.

From a personal point of view, any legal system needs to be developed, always. Examples of laws that have been developed and improved are the Civil Service Law, the Procedure Code, Investment Law and the Electronic Laws. This is in terms of the actual legal codation of laws.

**JUDGE B**

Current problems? The problem with the current application of the law is that people are not complying to or respecting contracts after their signing or exchange. Or maybe do not have the full understanding of the contract’s terms and conditions at the time of making them. It is this that leads to the cases being brought before the courts. In the courts themselves the most common problem is the delay, mainly there are few judges and so many cases. Also the procedures and processes can be lengthy.

(Repeated from Q2) Again speaking about Contract Laws, I think the formation and application of these laws is good, Contract Law is based largely on Islamic Law, which aligns with the customs and traditions of the country. It was written to match and co-exist with the existing customs and relations of trade that were already established in the country at the time of the laws’ creation. I think also the judicial system, from researching, has now managed to form enough judgments to be referenced in future cases.

**JUDGE C**

Clause 71 states that the Supreme Council of Judges must document annually, the problems that occur in the legal practice over the past year, detailing any conflicts in
the law. It is the Minister of Justice’s responsibility to hand this to the Minister’s council and to the Prime Minister. This is the legal reference behind the statement that I have just made.

**JUDGE E**

(Repeated from Q2) Without application of the law we would never know that a specific law needs amendment and review. In Kuwait exists the law of the judges, Clause No 3, 1990 and Clause number 71, which states that it is the job of the Supreme Judges Consul to issue a yearly report or whenever it is important, that highlights the problems in application in the law or judgements; or if there are any problems or gaps in the law that the judges themselves notice the fact. This report is presented before the Minister of Justice to decide whether he wishes to submit it to the Minister’s Consul to take the relevant action.

I personally think that Kuwaiti Civil Law is perfect and complete. It has its main route from French Civil Law and the Napoleonic Code, and also from Islamic Law. The people responsible for blending these systems were the best legal scholars available at that time, including Al-Sanhuri, who participated in forming different legal systems for various different countries.

**QUESTION 4: IF THERE WERE AREAS, WHICH YOU BELIEVE WERE IN NEED OF REVIEW, WHAT WOULD YOU SUGGEST BY WAY OF REMEDIAL ACTION? CAN YOU BE AS SPECIFIC AS POSSIBLE?**

**JUDGE B**

Of course there is a need to amend a reasonable number of laws. I think the best way to do this is to look at other, Western, legal systems, especially codes and clauses, and see what best fits the needs of the country. The Ministry of Justice is working hard on this and has established a committee to address this and assess the importance of each amendment. These amendments should be passed to parliament for approval. Examples are the Judiciary Act, the Procedure Act and the Civil Procedure Act.
JUDGE D

An example of a custom that was founded in Kuwait and later copied and used in Egypt is the appeal and the offence laws. This wasn’t something in existence before and after its development it was copied by the Egyptian legal system. Another example is Appearance in the court, it is sufficient for just the defendant to be present without the presence of the prosecutor. The judge’s experience is the most important thing if interpretation is required where there may be a gap. The judge will also keep in mind any judgements from the annual review where each judge’s rulings are reviewed for compliance and good practice.

The current situation is that the amendments are applied up to date; they used to be very complicated. There are different ways to improve the law; amendments that go through committees, or law draft suggestions put forward by parliament. Each draft should be studied individually and submitted at the end of the year to a committee that specialized in this type of law with feedback being given to the Ministry of Justice. This committee then either approves or disapproves the amendment. If it is approved, it is submitted to parliament for their endorsement.

QUESTION 5: WHAT IS YOUR OPINION IN RELATION TO THE CURRENT PRACTICE OF COMMON LAW IN KUWAIT?

JUDGE A

But if we talk about Custom, which is the civil law system for Commercial transactions, the Kuwaiti Law states that if there was no written code which covers the case between two parties, then Custom is applied.

JUDGE B

It is quite important to mention that there were cases handed to the Constitutional Court and the Supreme Court regarding conflicts of Law or in the application of laws that have built good ground for appeals to judicial judgements for the future. My personal opinion about the current laws, and to be specific the current code of civil
law, is (that it is) good and is stable, which is more important as a legal system that is constantly changing doesn’t provide stability or induce respect. It is not amended unless it has been reviewed by a number of experts, and has gone through a set number of procedures.

Regarding Custom, no doubt it is one of the primary sources of law, and before even forming the laws, there was only Custom, which were managing peoples’ lives and was the legal system. And because now we have written law, the custom became a secondary source of law, as we already have written laws but we can see how important Custom is in arbitration. Arbitration gives a good space for the two parties to create their own customs and rules in the contract.

**JUDGE C**

It says in Clause 2, Act 1, that if there exists a gap in the law, the judge should apply Islamic Law, which should match the goal of the law and legal society. If there is not a match, the judge should apply custom. The custom became third in the order; if there was no written law, they should look to Islamic Law, and if this still does not fulfil the situation, he or she should look to Custom.

**JUDGE D**

What is interesting to mention is that Custom is recognized in commercial/legal transactions and the civil act itself has a clause that recognizes Custom. This is Clause Number 1, paragraph 1, which states that if there is no written law that covers the legal obligation, Custom might be considered. Recognizing Custom occurred first in Commercial Law, prior to civil Law. Commercial law was first issued in 1961, whilst Civil Law was not drafted until 1980. Even before Commercial Law and the Civil Law Act, Custom was recognized in Commercial situations and society. Legal Custom is also recognized in judgements, so any judge can issue a judgment and legitimately refer it to Custom.
**QUESTION 6: WITH RESPECT TO LEGAL PRACTITIONERS IN THE FIELD OF COMMERCIAL LAW, WHAT ARE YOUR VIEWS AS TO THEIR APPROACH, KNOWLEDGE, AND GENERAL LEVELS OF COMPETENCE?**

**JUDGE A**

I’m very happy with the (high) level that Kuwaiti judges are achieving, especially with new judges. If I talk about law firms, I feel they have lots of experience, regardless of whether they are from Kuwait or not, but it is quite impressive.

 Personally I think that some laws need to be developed, reviewed and rewritten, especially the Lawyers Practice Law. Lawyers shouldn’t join the Lawyers Committee unless they have two years’ practical experience. However, at the moment, they just graduate and join. I believe the number of judges in Kuwait is sufficient, although it is increasing all the time; I feel there are enough judges to handle to number of cases being submitted to court.

**JUDGE B**

I don’t think the standard of notes that the lawyers put forward to the courts is good enough and I think that the lawyers need to be better trained and have more experience prior to joining the legal field. Mostly all the notes submitted to us as judges are repeated or based on the same reasoning. Lawyers should go and search for new reasoning and provide us with new case reasoning as reference. Regarding the trials, most are repeated; this is because trials need a very experienced lawyer, with enough confidence to handle a successful trial. What makes the lawyer’s job repetitive is that there is no proper legal school to train them to be successful lawyers, just their undergraduate study. Whereas judges must attend a school to give them the proper learning to enable them to become a judge; lawyers are dependent on their own independent studies to educate themselves in the cases and procedures without any academic support or encouragement. There should be a method of learning for lawyers after graduation to help them have better experience, develop better quality notes and to handle more successful trials. I
cannot see why this is not happening; there are a lot of notes on the table to amend the judiciary act. There are continual amendments to the procedures affecting judges but this same process does not seem to be applied to lawyers and the systems that they must follow. The law itself is always amendable, there are no laws that are forever fixed, for example what used to be the Islamic world has changed and has developed, so I do not understand why these have not changed also.

**JUDGE C**

Of course there is a different number of legal firms in Kuwait and their level is quite good, but still the lawyers need to be trained more. The same applies to judges; I believe they need to be trained more. That is why I am encouraging the young people to follow traditional methods of training, but in my opinion, judges receive more training than lawyers. I am a member of the committee in charge of studying amendments of new laws and we are always open to suggestions from scholars, judges and lawyers.

**JUDGE E**

The Kuwaiti Legal System had a very high standard of members as many of its legal founders became the first practitioners in Kuwaiti Law, or stayed on to become legal advisors for different ministers and parliament members.

**QUESTION 7: WHAT CHANGES, IF ANY, WOULD YOU WISH TO SEE IMPLEMENTED?**

**JUDGE A**

I’m very happy with the (...high) level that Kuwaiti judges are achieving, especially with new judges. If I talk about law firms, I feel they have lots of experience, regardless of whether they are from Kuwait or not, but it is quite impressive.

Personally I think that some laws need to be developed, reviewed and rewritten, especially the Lawyers Practice Law. Lawyers shouldn’t join the Lawyers Committee unless they have two years’ practical experience. However, at the moment, they just graduate and join. I believe the number of judges in Kuwait is sufficient, although it
is increasing all the time; I feel there are enough judges to handle to number of cases being submitted to court.

**Judge B** (see Q6)

**Judge C** (see Q6)

**Judge E**

In this way Kuwait had very unique judgements in many areas of law. Kuwait has a unique democratic system, making it different from its neighbouring countries. The annual report relates the yearly problems that appear with the application of the laws by the judiciary system and attorney. I think this is one of the most important clauses in the Judges Law, as you can secure the quality of the judicial system in this clause. In addition to this excellent clause, the Ministry of Justice has established a new committee in charge of improving new laws and reviewing the legal language in them. This committee is made up of a number of very senior judges and ex-judges who now serve as legal consultants.

**Question 8:** With respect to the judiciary themselves, what changes, if any, would you like to see implemented in relation to the administration of contract law?

**Judge A** (Throughout interview)

**Judge B**

I think judges have discretion with rulings but their allowed interpretation is limited and it has to be backed up by interpretation and explanation and must fit in with the overall legal goals and principles of the country. There are different judgements that clearly state that there are some holes in the law that need addressing and give clear reasoning and judgements with full interpretation to fill these gaps. These (... can be) found in different publications and with current judges discussing the gaps and loops and how to address them, however not many people
pay attention to these and if they look to amending the issues they start from scratch which takes more time.

**JUDGE C**

I think that Kuwaiti Civil Law was formed in an excellent way, as Al-Sanhuri was one of the best scholars of the time. I think the civil law is developing, for example they have developed a chapter about commercial and residential rentals.

If we go back to the Civil Act we can see the main source of Law is Islamic Law, they therefore cannot be interpreted in an absolute way, they must be interpreted within the legal environment and context of the times and situation.

Examples of laws that have been amended; the Procedure Act and the Companies Law No. 25 for 2012, amended again in 2013 and also a new law issued called the Protection of Legal Competition Act. Going back to Islamic Principles gives the whole of society more stability, although it is developing because there are new communications that never existed before in the Islamic World. So we need to develop new laws to develop the complete legal system that we are working towards.

I believe that the judges are the most responsible judicial members in the judicial system. If a country has a good judicial system, the country has no trouble applying the laws. Therefore, the most important person in the judicial system is the judge. There were complaints that it takes too long to complete a judgement, so that is why the Minister of Justice has established two different committees. The first is to make the procedures simpler and is managed by the Deputy minister, and another committee to use the electronic system to manage the procedures and make them faster.

**JUDGE C**

(Repeat from Q2) The judge in the application of the law should not be limited to the written words of the clause; he should go far beyond to seek the intention of
those originally forming the Clause and the law. A great example to compare between the UK and Kuwaiti legal systems is that in England the judicial records are enforced, previous rulings are obligatory to follow; in Kuwait this is not the case. In Kuwait each judge is considered a peer and equal, therefore whilst the previous rulings for a similar case should be considered, the ruling does not have to be the same as the previous judge’s ruling. Each may consider different aspects or consider the case differently. Each case is considered independently and therefore can have an independent ruling.)

**JUDGE D**

Personally what I expect from the lawyers (removed for anonymity) is that any appeal submitted to the Supreme Court should include purely the fault of the case argument. The lawyers report should present the argument detailing in which way the Court of Appeal has incorrectly applied the law with respect to the case; there should be no inclusion of the case details and circumstance. As a judge of the Supreme Court, we would not expect any oral trials unless it is a criminal law case. Oral trial cases do not apply to commercial or civil law; in these cases, they submit their appeal and schedule a date for the hearing. The appeal sheet should contain all the legal aspects and clarify the defendant’s point of view as to why the law was not applied in the correct way. It is not allowed to add new reasoning for the case circumstances. I will not prejudge the trial, and if any such additional reasoning or new defence is added, they will be ignored. A really good quality lawyer can be easily recognized in these situations, when a lawyer carefully finds loopholes or errors in the arguments of a senior judge and can find legal arguments to counter this.

So the Supreme Court is a court to correct the application of the law by the judges. It is not a court for discussing legal or social circumstances; it is purely for discussing the legal applications of the law.

It is worth noting here that this is the very final stage of the legal system in Kuwait, you cannot appeal higher than this. If your appeal is not accepted here, there is no
further appeal.

Currently I am working in the primary committee responsible for developing the laws and I participate regularly in drafting new laws submitted by parliament members and I cannot give you further details about this.

Personally I think that neutrality is the most important thing in the annual judges’ review. With neutrality you can really divide the good judges from the bad and good judgements from bad, and through this process build a good reference for the future to give examples of good and bad judgements. I think that the stricter the review is the better the quality of judgements, and therefore law, in Kuwait that we will have.

This is what judges are for, to provide excellent judgements and to provide good references for scholars and researchers.

**JUDGE E**

(Repeated from Q7) In this way Kuwait had very unique judgements in many areas of law. Kuwait has a unique democratic system, making it different from its neighbouring countries. The annual report relates the yearly problems that appear with the application of the laws by the judiciary system and attorney. I think this is one of the most important clauses in the Judges Law, as you can secure the quality of the judicial system in this clause. In addition to this excellent clause, the Ministry of Justice has established a new committee in charge of improving new laws and reviewing the legal language in them. This committee is made up of a number of very senior judges and ex-judges who now serve as legal consultants.

There is another way of reviewing the laws and changing them other than that just explained which is via suggestion from the Ministry in Charge or from a parliament member. After the legal suggestion is made they should be reviewed by the Transparency Consul and submitted to the Minister’s Consul. If approved by the Minister’s Consul, they forward it to the Minister of Justice to finalize. It is then returned to the Minister’s Consul who passes it onto the Emir for official approval and then onto Parliament. Parliament is divided up into different committees
according to different aspects of the law, thus the laws and amendments are passed on to the appropriate committee. After voting, if approved, parliament submits it back to the Emir to pass the amendment and issue the change in the daily newspaper.

Amendments should be regular to remain current and fit the current situations as society is constantly changing.

The legal act number 24, of the formation of the Anti-Corruption Committee in 2012, is currently on the table for amendment for improvement. There are a different number of customs and the legal systems in Kuwait based on French and Napoleonic code, which is based on a much divided legal system. Civil law only deals with civic communications, with separate entities for criminal, labour etc. I think it is this that makes the judge’s job easy as each judge is then specialized in his area.

I think that the judiciary system has improved as they have introduced the system of hiring judges. This allows the legal system to hire very experienced judges from abroad for a period of time, which improves the legal system overall. Also the lawyers’ personal experience is improving, and I think that this is because the Kuwaiti Legal System ensures that the lawyers work within the legal standards that are set.

**QUESTION 9: DO YOU THINK ISLAMIC LAW, CUSTOMS AND PRACTICES STILL EXERCISE SOME INFLUENCE ON THE ADMINISTRATION AND APPLICATION OF CONTRACT LAW? CAN YOU BE SPECIFIC?**

**JUDGE A**

It is worth mentioning that the second clause of the constitution states that the country’s religion is Islam and that Islam is one of the main sources of its law, but not the main source. Also Clause 18 of the constitution mentions that Inheritance Law should be according to Islamic Law. What is very important, and what Kuwait and Kuwaitis should be very proud of, is Clause 35 which states the country protects the freedom of all other religions, respects all other religions and that all
other religions can practice their religion freely; anyone that interferes with this will be arrested. This is a very unique clause and not a common inclusion in the surrounding countries. This is secured in the constitution.

**JUDGE B**

I think judges have discretion with rulings but their allowed interpretation is limited; it has to be backed up by interpretation and explanation and must fit in with the overall legal goals and principles of the country. There are different judgements that clearly state that there are some holes in the law that need addressing and give clear reasoning and judgements with full interpretation to fill these gaps. It can be found in different publications where judges discuss the gaps and loops and how to address them, however not many people pay attention to these and if they look to amending the issues they start from scratch which takes more time.

**JUDGE C**

I think most of the legal principles came together well with Islamic Law, a very important example is the Limitation of Interest, the main reason for this custom is that it is based on Islamic Law and the customs that pre-existed in Kuwait before the formation of the written law. In this way those forming Kuwaiti law kept in mind the principles of Islamic Law to incorporate them into the new system. Another example of keeping Islamic Law in mind whilst forming the law was the rules and regulations for the ‘diyya’ and ‘shaffa’a, but the greatest example is still the limiting of interest on the banks.

As a legal system based on Islamic Law, I am reassured that this will last a long time as it has already lasted 1400 years, however it always needs to be updated to keep up with evolution of life and society in the modern world.

**JUDGE D**

It is worth mentioning the (existence of the) High Committee of Islamic Rules, which
ensures all issued laws do not conflict with Islamic Law. If this occurs they write a draft of law for the Emir’s council for review. The chair of this committee is a religious figure, not a legal expert. This committee is charged with reviewing the laws to ensure no laws conflict. It is not the role of the committee to match the laws to Islam, purely to highlight laws that directly conflict.

**JUDGE E**

What is interesting to mention is that the government has the ability to hire highly experienced lawyers to act as judges, however this has not yet occurred. The Kuwaiti legal system has its roots in two systems, French and Islamic. For the Islamic root, there is the High Committee of Islamic Rules, which ensures all of the laws do not conflict with Islamic Laws.

**QUESTION 10: DO YOU THINK THE APPLICATION OF CONTRACT LAW IN THE COURTS IS AT ODDS WITH OR CONFLICTS WITH THE EVERYDAY ADMINISTRATION OF COMMERCIAL AFFAIRS? IF SO, WHERE? PLEASE PROVIDE INSTANCES OF SUCH CONFLICT AND WHY YOU BELIEVE THIS TO BE THE CASE**

**JUDGE A**

In all my legal experience, which is 50 years, I never had any conflict of law. If this were to occur there is a set procedure, where the new law cancels the previous law, and where private law limits Public Law and the last thing would be to apply Custom Law.

**JUDGE B**

From a personal point of view, I don’t see a difference between the written laws and Islamic Laws as generally the written laws follow Islamic principles. And whilst there are some differences, these differences are minor, not major. This idea gives more stability to the legal system overall, as most people have an idea of what the Islamic Laws and principals are without having to read them. This is not to downplay the written laws, just that people already have an idea of what the laws
are as we basically follow an Islamic Law system.

Speaking of Al-Sanhuri, he ... (removed by the author to protect anonymity of the Judge) has a PhD in Islamic Law, is one of the founders of Islamic Law, so obviously Kuwaiti law has a strong foundation in Islamic Law seeing as its founder was an Islamic Law graduate.

**JUDGE C**

From my personal point of view I think the laws and clauses are really clear with little conflict between them. If there is any conflict I think the judge should look at up-holding the overall goal. The judge shouldn’t interpret every legal conflict separately but should try to integrate it to the overall goal of the case. For example, the special clauses of the announcement of the judgement according to the Procedure Act, where there wasn’t a specific clause and each judge had to interpret and determine their own ruling. Another example is Clause 5 and all subsequent clauses from the Procedure Act. As I mentioned it is rare that there is a conflict and where it does occur it should be resolved in the way I have described above.

A great example of the flexibility of Kuwaiti law is that it has limited (the application of) interest for banks in civil law, however in commercial communications different circumstances must be considered as commercial dealings and banks will often deal with international businesses and banks. So Clause 110-115 allows greater interest in commercial law in these circumstances. **There is a copy of the legal act.**

**JUDGE D**

Sometimes the law can be difficult and cause conflicts; here we need a judge with good experience, where they should first apply the law, then Islamic principles, and then Custom.

This committee is charged with reviewing the laws to ensure no laws conflict. It is not the role of the committee to match the laws to Islam, purely to highlight laws that directly conflict.
The Supreme Court accepts all cases, no matter if it is commercial, labour, civil, or criminal. It is enough reason to go before the Supreme Court if the Court of Appeal issues a judgement that is completely contradictory to a previous Court of Appeal judgement.

**JUDGE E**

I think there is good organization in the Kuwaiti Legal System overall and an expectation for judges to have a good knowledge of laws outside of his specialty. He therefore should be confident that his judgements do not conflict with any of the other legal areas. All judges should maintain good legal standards and follow the overall social goal with their judgements.