

Constitutionalising the Executive Powers in Kuwait with Reference to the UK's Law and Experience

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Submitted in accordance with the requirements for the degree of

Doctor of Philosophy

University of Leeds

School of Law

March 2017

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Acknowledgement

Foremost, I give thanks to God for giving me the opportunity and ability to undertake this study.

I would also like to express my sincere gratitude to my supervisors, Professor Clive Walker and Dr Amrita Mukherjee for the continuous support of my PhD study and research, for their guidance and assistance, and in sharing with me their immense knowledge. I owe special gratitude to Professor Walker, who made this academic project joyful and productive, I cannot imagine having a better adviser and mentor for my PhD studies.

I owe a special appreciation to the honorable participants in my fieldwork project for their time, support and valuable knowledge. They have provided me with vital data which enriched my research.

I express my appreciation to everyone who supported me whilst undertaking my field studies, you also made this paper possible. My thanks to my friends for accepting nothing short of excellence from me.

Last but not least, I am deeply thankful to my mother, my wife and my children for their unfailing support and patience with me during the long days and nights away from them. This study would not have been possible without their continuous encouragement, prayers and unwavering support.

Thank you all.

Mohammad Menwer

Abstract

According to Article 6 of the Kuwaiti Constitution, ‘The System of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers’. However, the domination of the Executive’s powers is a remarkable feature in Kuwait’s political system. Such uncontrolled powers contradict the basic values of constitutionalism.

The main objective of this thesis is to promote a soft-transformation toward constitutionalising the Executive’s powers in Kuwait so as to reflect, more faithfully, the desired ethical values of democracy, the rule of law, human rights and the separation of powers.

Parliament and the judiciary have been identified as the most competent mechanisms to undertake the control of executive power in Kuwait. Yet, the constitutional structure of the executive power system and its controlling mechanisms lack the necessary features to apply this control effectively.

The hypothesis outlined above was explored by three different methodologies; firstly, by analysing the constitutional structure of the Executive’s power system and measuring it against the ethical values of constitutionalism; secondly, supporting this theoretical approach with fieldwork by interviewing experts; and thirdly, by comparing the control of executive power with the UK’s law and experience in order to utilise a ‘transfer policy’ method.

The main findings of the research indicate that the Executive has obtained arbitrary powers that weaken its accountability system. Thus, the study suggests policies to be adopted by Kuwait in order to empower parliament and the judiciary to exercise an effective control over the Executive’s powers.

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List of Abbreviations

CAQDAS	Computer Assisted Qualitative Data Analysis System
CEC	Committee to Examine Challenges
COM	Council of Ministers
EMC	Explanatory Memorandum of the Constitution
ER	Electoral Register
EU	European Union
FOIA	Freedom of Information Act
FTPA	Fixed Term Parliaments Act
GCC	Gulf Cooperation Council
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ISIS	Islamic State in Iraq and Syria
ISMS	Information Security Management System
JAC	Judicial Appointments Commission
KD	Kuwaiti Dinar
KLA	Kuwait Lawyers' Association
MOI	Ministry of Interior
MOJ	Ministry of Justice
MP	Member of Parliament
NA	National Assembly
NGO	Non-governmental Organisation
PBAH	Peace be upon him
PCA	Parliamentary Commissioner for Administration

PM	Prime Minister
PQ	Parliamentary Question
PVSCA	Parliamentary Voting System and Constituencies Act
UKSC	Supreme Court of the UK
SJC	Supreme Judicial Council
SNP	Scottish National Party
UK	United Kingdom
UKIP	United Kingdom Independence Party
UNDHR	United Nations' Universal Declaration of Human Rights
WJP	World Justice Project

Chapter One

Introduction

1.1 The Prologue

On 17 December 2010, a young Tunisian called Mohammad Abou-Azizi committed self-immolation to express his anger against a corrupt policeman. After this incident, millions of Arabs in different countries made a stand against corruption, like Abou-Azizi, raising their famous slogan: ‘the people want to overthrow the regime’,¹ (الشعب يريد اسقاط النظام), through which they came to overthrow four dictatorships within one year.

Under the powerful influence of the Tunisian precedent in the aftermath of Bin Ali’s downfall, the ‘Arab Spring’² carried the wind of change to most Arab countries.³ This has epitomised a cross-national diffusion of regime opposition.⁴ However, the absence of a rational choice and an organisational leadership was similar to the waves of contest and democratisation that the Western world experienced in the revolutionary wildfire of 1848, after the overthrow of King Louis Philip in Paris,⁵ ‘dramatic and rapid waves of regime contention that evoke great excitement end up yielding disappointing results and can cause considerable human cost.’⁶ As a result, a few of the Arab countries managed to become democracies with some loss of lives. Other countries, however, where circumstances were much less propitious, were exposed to a destructive storm of attempted change.⁷

The case of Kuwait is not modelled directly on the events of the Arab Spring. There are differences between Kuwait and the regimes that experienced the events of the Arab Spring, such as Tunisia, Egypt, Libya, or even Bahrain, the closest country to Kuwait which experienced bloody clashes. The latter’s experience was influenced by ethnic factors and was energised by the regional geopolitical power conflict.⁸ Egypt and Libya were under military

¹ Al-Rasheed M, ‘Sectarianism as Counter-Revolution: Saudi Responses to the Arab Spring’ (2011) 11(3) *Studies in Ethnicity and Nationalism* 513–526.

² The Arab Spring refers to a series of pro-democracy protests, upheavals and armed encounters in which people challenged the existing authoritarian regimes in the Middle East and North Africa beginning in 2010.

³ Lynch M, *The Arab Uprising: The Unfinished Revolutions of the New Middle East* (Public Affairs 2012).

⁴ Etel S, ‘Of Dominoes and Firewalls: The Domestic, Regional, and Global Politics of International Diffusion’ (2012) 56(4) *International Studies Quarterly* 631–644.

⁵ Kurt W, ‘The Arab Spring: Why the surprising similarities with the revolutionary wave of 1848?’ (2012) 10(4) *Perspectives on Politics* 917–934.

⁶ Kurt W, *Making Waves: Democratic Contention in Europe and Latin America Since the Revolutions of 1848* (Cambridge University Press 2014) 257.

⁷ *ibid* Kurt (n 5).

⁸ Bradley JR, *After The Arab Spring: How Islamists Hijacked the Middle East Revolts* (Palgrave Press 2012) 134.

dictatorships, and Tunisia was suffering the repressive regime of Bin Ali. The Kuwaiti position is less extreme than these.

The idea of democratisation in Kuwait has been developing over a much longer period, preceding the events of the Arab Spring. In fact, despite all the criticism of the Amir (the ruler) and the Executive in relation to the practice of democracy in Kuwait, there was more openness and democracy in the political sphere here than in those other countries. The differences included the fact that the governing system of Kuwait, although not entirely democratic, was not entirely repressive either, as was the case with the Arab Spring countries. Some observers conclude that Kuwait, among a few other Arab countries, ‘represents an interesting set of cases in which incremental political change may, to some degree, be facilitated by the coexistence of pluralism, monarchical institutions, and some tradition of constitutionalism’.⁹ Thus, Kuwait has mostly avoided violent demonstrations in the wake of the Arab Spring. As a wealthy state which has been keen to use its fortune to stabilise its political system,¹⁰ and with a relatively more robust democratic parliament than its neighbours, the Emirate has benefitted from the activation of these safety valves.¹¹ However, the Arab Spring that inspired people to demand reform, highlighted the tensions between conservatism and radicalism which had been seen in the Arab world in countries like Egypt, Bahrain, Tunisia, and Jordan, and raises concerns in Kuwaiti society. After the defeat of Nasser in the 1967 war, it has been suggested that, ‘an era of political Islamism replaced the era of pan-Arab nationalism’.¹²

The demands for reforms in Kuwait are mostly related to the design of the Constitution itself, which has led to the domination of the Executive. Despite relatively democratic practices, the people’s demands for change have, ‘become particularly pressing following the Arab Spring of 2011 and the pro-democracy revolutions that have swept the region; most acute is the strengthening opposition to the monarchy’s routine reliance on censorship and their perceived lack of accountability’.¹³ As a result, ‘The Arab Spring uprisings have worsened relations

⁹ Brynen R and others, ‘Trends, Trajectories or Interesting Possibilities? Some Conclusions on Arab Democratization and its Study’ in Brynen C (ed), *Political Liberalization and Democratization in the Arab World, v 1: Theoretical Perspectives* (Lynne Rienner Publishers 1995).

¹⁰ Davidson C (ed), *Powers and Politics in the Persian Gulf Monarchy* (Hurst & Company 2011) 4.

¹¹ Davidson C, *After The Sheiks, the Coming Collapse of the Gulf Monarchies* (Hurst & Company 2012) 216.

¹² Patel D, ‘Identity and Politics’ in Angrist M (ed), *Politics & Society in the Contemporary Middle East* (Lynne Rienner Publishers 2010) 153.

¹³ Davidson op cit (n 10) 4.

between Kuwait's ruling family and the elected parliament',¹⁴ thus creating an alarming path of confrontation between the people of Kuwait and their government.¹⁵

The research aims to explore whether Kuwait's political and constitutional reform and transfer to a better practice of democracy may be completed peacefully and avoiding the path of violence, as is currently happening in neighbouring countries. Rather, can it possibly be achieved through a 'soft transformation' agenda towards a more constitutionalised state. The idea of a 'soft transformation' reform programme is driven by three characteristics; it is a non-violent transformation method, obtained incrementally, and achieved largely through the use of, and resulting in the retention of, the existing mechanisms. This study seeks to assess this choice.

1.2 Statement of Thesis

In the fifty years since Kuwait's Constitution was issued in 1962 the local practice of democracy has witnessed many difficulties. Since the first election in 1963 following the country's independence, the Amir has dissolved parliament twenty times and suspended the constitutional provisions twice.¹⁶ The constitutional structure of the parliamentary system has struggled to function in a democratic atmosphere. The principle of the separation of powers did not prevent the Executive from playing critical roles in the parliamentary process. From the election of parliament to the function of the legislature, and through to the prerogative of dissolution, the Executive has held a dominant role.

There are benefits to granting the government critical powers in order to discharge their responsibilities in democratic systems. One explanation of the broad powers of the Executive in the UK is that the Prime Minister is one of the elected members of Parliament whose performance will continue to be under the scrutiny of the British electorate. However, such critical powers do not always reflect beneficial outcomes if performed by an appointed government without an effective democratic control system, as is the practice in Kuwait. In an unbalanced political system, which grants to the Executive dominant powers over the elected parliament, it is often difficult to sustain the principles of democracy and other desired ethical

¹⁴ Cheney C, 'Kuwait's Opposition Crosses the Government's Red Lines' (2011) World Politics Review <<http://www.worldpoliticsreview.com/trend-lines/12468/kuwaits-opposition-crosses-the-governments-red-lines>> accessed 12 November 2016.

¹⁵ See chapter 5 section 5.2.3.

¹⁶ From 1976 to 1981, and from 1986 to 1992.

values. Hence, ‘the existence of restrictions and limitations on governmental powers is a fundamental attribute of democratic regimes’.¹⁷

The continuing crisis between parliament and the Executive in Kuwait has revealed the significance of examining the constitutional structure. According to Article 6 of the Constitution, ‘The System of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution’. However, the people are neither able to practically perform such sovereignty nor are their representatives in parliament.

In this way, there is a failure to observe constitutionalism. ‘Constitutionalism is the set of principles, manners, and institutional arrangements that were used traditionally to limit government.’¹⁸ However, within the constitutional construction of Kuwait’s democratic system, the domination of the Executive’s powers is a remarkable feature of the political system. Consequently, it has been claimed that, ‘the most powerful institution in Kuwait remains the Al-Sabah ruling family’.¹⁹

This thesis argues that, currently, the design of Kuwait’s Constitution, and the de facto government system, lack the necessary features to control executive power according to democracy and the desired ethical values of the rule of law, human rights, and the separation of powers. Thus, the thesis proposition is that the constitutional structure of the democratic system of Kuwait provides the Executive and the Amir with powers that undermine democracy, the rule of law, human rights, and the separation of powers principle, and consequently a revision of the constitutional framework needs to be considered. It is noteworthy that these global ethical values, which the study elaborates in chapter three, hold a wide range of meanings and points of interest. However, this thesis is concerned with how these values can serve the research’s main objective of constitutionalising control of the Executive’s powers in Kuwait.

Thus, in respect of democracy, as a political concept related to the means of popular control and political equality,²⁰ constitutionalism can be understood as requiring, ‘laws as a formal

¹⁷ Gross O and Aolain F, *Law in Times of Crises: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 9.

¹⁸ Sajó A, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press 1999).

¹⁹ Roberts D, ‘Kuwait’ in C Davidson op cit (n 10) 92.

²⁰ Beetham D, *Defining and Measuring Democracy* (Sage Publishing 1994) 31.

way in which a democratic society expresses its consent to the way it is governed'.²¹ In addition, democracy, which is 'concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders',²² has been regarded as an essential factor in controlling the powers of the decision-makers and empowering people in this respect.

The rule of law in its general terms has been, 'understood as a doctrine of political morality which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free and civilised societies'.²³ However, this research will concentrate specifically on the practical implementation of constitutional and legal rules, and will explore the potential role of the rule of law for ensuring limited governmental powers, rather than addressing all the potential wide interpretations that have been given to the principle of the rule of law.²⁴ While the rule of law concept is potentially broad, separate consideration will be given to the ethical value of human rights. As a global concept of rights, human rights, '[deal] with the protection of individuals and groups against violation of their internationally guaranteed rights by the state'.²⁵ Political rights and liberties, in particular, which are essential for the effectiveness of the democratic practices that characterise democracy from other political orders,²⁶ should lie deep at the heart of democracy.²⁷

The doctrine of the separation of powers, which is fundamental to the concept of constitutionalism, organises the allocation of powers of a state and sets their limits.²⁸ The role of this principle is to maintain a balanced relationship between the three main functions of government (the executive, the legislature and the judiciary), and to control how these separate institutions can work independently and effectively without dominating each other.²⁹

Both fundamental and detailed reforms are required in Kuwait's constitutional system in order to achieve these objectives. Thus, through a soft transformation reforming agenda, this research aims to analyse the defective existing arrangements and to suggest reforms that are more

²¹ Loveland I, *Constitutional Law, Administration Law and Human Rights* (6th edn, Oxford University Press 2012) 21.

²² Dahl R, *A Preface to Democratic Theory* (University of Chicago Press 2006) 3.

²³ Carroll A, *Constitutional and Administrative Law* (7th edn, Pearson 2013) 48.

²⁴ Barnett H, *Constitutional and Administrative Law* (9th edn, Routledge 2011) 48.

²⁵ Savic O (ed), *The Politics of Human Rights* (Verso 1999) 6.

²⁶ *ibid*; Dahl R, 'Democracy and Human Rights under Different Conditions of Development' in *op cit* Savic (n 25) 166.

²⁷ Beetham D, *Democracy and Human Rights* (Polity Press 1999) 92.

²⁸ *op cit* Barnett (n 24) 72.

²⁹ *op cit* Carroll (n 23) 40.

compatible with the aforementioned values, and that will be acceptable in Kuwaiti society without resorting to violence or force.

1.3 Research Aims and Objectives

The main objective of this study is to analyse the Executive's domination over the constitutional system in Kuwait. The study seeks to examine whether the levels of democracy and other aspects of constitutionalism in this system are limited by its inherent structure or due to the malpractices of the state officials in applying the Constitution's doctrines. By identifying the essential powers of the Amir and the Executive that need to be controlled, and explaining how these powers are exercised and by which mechanisms they can be controlled, the research explores whether the system of control currently applied over the Executive can be better constitutionalised so as to reflect more faithfully the values of democracy, the rule of law, human rights, and the separation of powers in a way which is workable within the culture and political reality of Kuwait. The detailed research aims are defined as follows.

Firstly, this research aims to set out the constitutional history of Kuwait in order to distil the culture that influenced and shaped constitutional law and constitutional practice. There are issues about the way the Constitution of Kuwait is shaped, and how it functioned and developed in specific historical perspectives that continue to be present in Kuwait today. The Islamic identity of the country and its tribal and family ruling traditions have paved the way for a high level of public allegiance.³⁰ Moreover, 'Oil and international protection together explain the persistence of Peninsula monarchies in the twentieth century'.³¹ Consequently, the influence of the world's great powers in the region, after the emergence of oil, have played a key role in influencing the type of governing systems.³²

By analysing the historical development of the political system of Kuwait in the second chapter, the study aims to analyse the relationship of Britain, the colonial power, with the ruling family Al-Sabah, in effecting the limited development of democracy in Kuwait. On the other hand, the Arab movement led by Nasser,³³ and Iraq at an earlier stage, had inspired the people of Kuwait to call for more political reforms. Along with the impact of regional powers, the

³⁰ Al-Hajeri A, 'Citizenship and Political Participation in the State of Kuwait, The Case of the National Assembly 1963-1996' (PhD thesis, University of Durham 2004) 17.

³¹ Gause F, 'The Persistence of Monarchy in the Arabian Peninsula: A Comparative Analysis' in Kostiner J (ed) *Middle East Monarchies: The Challenge of Modernity* (Lynne Rienner Publishers 2000) 182.

³² *ibid.*

³³ Jamal Abdul Nasser was the Egyptian leader who served from 1954 to 1970 after a military coup.

political system of Kuwait has long been under various influences. The research aims to demonstrate the impacts of these influences on the constitutional structure and on the version of democracy applied. The objective of this approach is to consider whether this Constitution receives popular acclaim and whether it can function now as a democratic ruling system. The research, therefore, attempts to address whether the Constitution of Kuwait has been designed as a conservative structure that is contrary to democracy and the related desirable ethical values.

Secondly, the study aims to identify and explore the desired constitutional values relevant to Kuwait. Democracy, the rule of law, human rights and the separation of power principles are the ideological tools of measurement on which this study is based and guide the researcher's investigation and proposed solutions. In order to examine the constitutional structure of the democratic system, this study draws on these universal ethical values and thereby evaluates the applied democratic system in the context of Kuwait. These values will be addressed in chapter three.

Thirdly, the research aims to examine the role of the Amir and the Executive's powers within the parliamentary system, in order to define its problems and limitations in terms of these desired values. The study attempts, by this approach, to assess whether such powers are in contrast with democracy and the desired values. However, further to the aims and objectives of this research that have been explained above, the study focuses upon the constitutional powers of the Amir and the Executive in relation to parliament and, to some extent the judiciary, which affect the practice of democracy. As such, this research does not discuss the remaining powers of the Amir and the Executive as these are outside the remit of this study. Although the Constitution of Kuwait has adopted a parliamentary system in which the head of state does not rule alone but through his ministers, who are under the scrutiny of parliament, the Amir still holds a number of residual powers that are related both to the governing system and to his own and the ruling family's affairs.³⁴ For example, the Amir's right to choose his successor and to head the armed forces are some of the crucial powers which relate to the affairs of the governing system. Appointing an agent to be a representative by law in the courts, for instance, is another type of power that relates to his own affairs. Such powers do not relate to the everyday democratic processes with which this study is concerned. The fifth chapter will address these powers.

³⁴ Al-Mouqatei M, 'The Constitutional Perspective of the Royal Family of Kuwait' (2012) 3(36) Kuwait Law Journal 62.

Fourthly, another major objective of this study is to explore the control of executive powers by efficient mechanisms. Parliament is considered to be the main mechanism by which this could be achieved, therefore, ‘overseeing the Executive branch is one of the most important contributions that parliaments can make to democracy building’.³⁵ However, it should be noted that this study will not analyse the whole parliamentary system in Kuwait. Rather, the aim is to discuss improving parliament’s ability to exercise control of the Executive more effectively. Furthermore, controlling the Executive’s powers by law is seen as another main mechanism by which to contribute effectively to controlling the Executive. Thus, this study also concentrates on the judiciary, as a separate power, which may control the Executive by use of the law, and in particular, the role of the Constitutional Court. The scope of this study focuses on the relationship between the two and how to improve this mechanism with regard to controlling the Executive’s powers.

The study aims to analyse how the legislature and the judiciary have been operating under the Constitution in terms of controlling the Executive’s powers and how far they have delivered the desired values. The objective is to define the defective aspects that prevent these powers from playing their desired roles in controlling the Executive. The research then explores how to improve these powers to control the Executive more effectively. The aim of this approach is to improve the efficient functioning of the principle of checks and balances. Chapters six and seven will contain these analyses.

Fifthly, the research aims to understand and discover, not only the written Constitution and the laws and rules applied, but also actual constitutional practices. Therefore, the study seeks to examine the reality in practice through fieldwork. The fourth chapter explains the fieldwork strategies, while its findings will be reflected in chapters five, six, seven and eight.

Sixthly and finally, the study attempts to draw on the UK’s laws and experiences in order to apply the method of policy transfer to import ideas and draw lessons from the more advanced experience of the UK’s democratic and political practice. The aim of such comparative political and constitutional analysis is to understand how this experience led to constitutionalising the monarchy and executive powers in the UK. The study asserts that it does not aim to analyse the UK’s constitutional and political system. Rather, the objective is to focus on specific policies which have been observed to be successful in controlling executive powers.

³⁵ Baaklini A and others, *Legislative Politics in the Arab World; The Resurgence of Democratic Institutions*, (Lynne Rienner Publishers 1999) 56.

Ultimately, the research aims to discuss the ability to constitutionalise the applied system of the Amir and the Executive powers in Kuwait so as to reflect, more faithfully, the desired ethical values. The process of constitutionalising executive power will be referenced not only to the existing model of the Constitution, but also to the Constitution with reference to the values that should be more prominent within it. With regard to this latter objective, the rigid nature of the Constitution in terms of its review system imposes a further problem that potentially may limit any proposed solutions.³⁶ Under Article 174 of the Constitution, any proposed review of the Constitution must be accepted and sanctioned by the Amir, the head of the Executive. Such constitutional requirement may affect any fundamental political reforms.

Despite these constitutional restraints:

The rivalry between Islamist and liberal values over dominance in Kuwaiti society, and between the National Assembly and the Government over power, is far from terminating. The ruling Al-Sabah family has thereby become more accustomed to scrutiny, and the National Assembly has grown used to the Al-Sabahs' endurance in power.³⁷

Some warn, 'Will Islamist parties feign adherence to democratic values, disingenuously participate in pluralistic politics and, where they manage to secure an electoral majority, suspend democracy and institute an Islamic State?'³⁸ While others conclude that, 'the Al-Sabah want democratization, but they do not want Islamists or democratic forces to push their agendas too far, and have been willing to suspend democratic practices when necessary'.³⁹ The question arises: is not democracy what the people decide? Indeed, 'Democracy is an important means to that end, but it is critical to limit state power before deciding who gets to exercise that authority'.⁴⁰ However, 'the question of the extent to which the regime's interest in democratic practices is fuelled more by adherence to democratic principles or by its survival and power-maintenance interests'⁴¹ is still an open question. Equally, it is the question which will affect the prospects for a soft transformation which would be accepted by both the regime and the society of Kuwait.

³⁶ Al-Saleh O, *The Constitutional System and Political Institutions in Kuwait* (Pt one, 2nd edn, Dar Alkotob Press 2003) 187.

³⁷ Rabi U, 'The Kuwaiti Royal Family in the Postliberation Period: Re-institutionalizing the First among Equals System in Kuwait' in Kostiner J (n 31).

³⁸ Quilliam N, 'Modern History and Politics: Faith in Moderation: Islamist Parties in Jordan and Yemen' (2007) 61 *Middle East Journal* 3.

³⁹ Yetiv S, 'Kuwait's Democratic Experiment in its Broader International Context' (2002) 56 *Middle East Journal* 2.

⁴⁰ Bandow D, 'Whither Kuwait: Illiberal Democracy or Enlightened Autocracy' (2013) 63(1) *The Freeman* 15.

⁴¹ *op cit* Yetiv (n 39).

The essential task of this research is to examine and to explore the non-violent space for political reforms in Kuwait, in order to define the predominant powers of the Executive, and determine whether they can be controlled, and by whom. However, the rigid nature of the Constitution of Kuwait, as mentioned earlier, might hinder any attempt at reform in the event of rejection by the Amir. In this way, the political crisis might take a violent turn if the demand for change becomes acute. The main aim of this study is to promote a soft transformation towards constitutional reform. Therefore, this study attempts to explore rational solutions, that are deliberative and long lasting, which would be progressive, accepted and workable within the current culture and political reality of Kuwait.

1.4 Background of the Study

The political history of Kuwait shows that the people of Kuwait have made several attempts to restrain the ruling powers of the Al-Sabah family and participate in running their own affairs. The formation of the first popular body, which allowed people to participate in the ruling system, was observed nearly a century ago. In 1921, after the Kuwaitis declared allegiance to Sheik Ahmad Al Jabir Al-Sabah, as the tenth ruler of the Emirate, he accepted their strong demands to form a Consultative Council.⁴² Under this appointed body, *Majlis Al-Shura*, (مجلس الشورى) the Consultative Council, which contained prominent male figures and merchants, Kuwait had its first popular governing system.⁴³ However, it lasted for only two months as it was regarded as an inappropriate institution.

In 1932, the country witnessed another form of popular participation when the Kuwaitis elected, for the first time, their representatives to the Municipal Council.⁴⁴ Six years later, with the support of internal and external circumstances, demands for political reforms had escalated among Kuwaitis. Under the influence of the rising movements for political reform in the Arab world, a group of twelve members of wealthy Kuwaiti families formed a secret organisation called *Al-Kottlah Al-Wataniya*, the National Bloc, (الكتلة الوطنية) which worked by educating people regarding their democratic rights.⁴⁵ This group continued to call for reforms until it gained considerable public support. In 1938, Sheik Ahmad Al-Jabir signed the first Constitution of Kuwait which acknowledged the formation of an elected parliament. The

⁴² Al-Tuwaijri H, 'Political Power and Rule in Kuwait' (PhD thesis, University of Glasgow 1996).

⁴³ op cit Al-Saleh (n 36) 18.

⁴⁴ Al-Jasim N, *Fifty Years on Municipality of Kuwait* (Municipality of Kuwait Press 1980).

⁴⁵ op cit Al-Saleh (n 36) 101.

election was held in the same year, yet this Assembly (المجلس التشريعي) *Al-Majlis Al-Tashre'ee*, lasted for only six months, as it was ended by an armed conflict between members of *Al-Majlis* and the Amir's troops.⁴⁶

The people's demands to share the powers of the ruling family were a recurrent feature of Kuwait's political history. However, the Al-Sabah family managed to rule absolutely until the country's independence. It has been argued that:

[T]he lack of internal development in Kuwait was partly due to the historical nature of the protection relationship between Britain and Kuwait, and this tie had given the Al-Sabah family a high degree of political autonomy because they had not needed to rely on internal political alliances for their position.⁴⁷

The nature of this relationship, 'has gone through several phases, each distinguished by strong personalities: from the 1899 Treaty of Friendship, through over 40 years of formal protection for Kuwait as an independent Sheikdom, to an informal alliance between modern states'.⁴⁸

Due to the huge political developments, which were driven by Nasser after the Suez crisis of 1956, Arab rulers witnessed strong pressure from their citizens to adopt political reforms.⁴⁹ As a result, one year after Kuwait's independence in 1961, the Amir of Kuwait, Sheik Abdullah Al-Salem Al-Sabah, signed the country's first Constitution, which acknowledged the people's right to participate in the government by adopting a special form of parliamentary system.

In 1962, the Constitution of Kuwait displayed the adoption of a mixed parliamentary formula that combines presidential and parliamentary systems in a way that depends upon the ministries' dual responsibility before parliament and the Amir. Under this system, the Amir, who practises his powers through his ministers, remains entitled to influential and critical powers which affect the course of the governing system. Such a mixed system has explicit influence on the way in which the ministries put their powers into practice, curtailing the Kuwaiti democratic system and directly infringing the principle of the separation of powers, even though, under Article 50 of the Kuwait Constitution:

The system of government is based on the principle of the separation of powers functioning in co-operation with each other in accordance with the

⁴⁶ *ibid.*

⁴⁷ Tétreault MA, 'Autonomy, Necessity and Small States: Ruling Kuwait in the Twentieth Century' (1991) 45 *International Organization* 565, 591, cited in Stables R 'Relation between Britain and Kuwait, 1957-1963' (PhD thesis, University of Warwick 1996) 102.

⁴⁸ Muir R, 'Britain and Kuwait' in Tempest P (ed) *An Enduring Friendship: 400 Years of Anglo-Gulf Relations* (Stacey International Publishers 2006) 25.

⁴⁹ *ibid* 100.

provisions of the Constitution. None of these powers may relinquish all or part of its competence specified in this Constitution.

This parliamentary system enables the people to vote for fifty MPs to be their representatives in the National Assembly (NA). Along with these elected members, the Amir has the right to appoint his ministers who will also be Members of Parliament. The Kuwaiti constitutional system permits a number of the ministers to participate in membership of the NA. The total number participating should not exceed one third of the whole fifty parliamentary members. As stated in Article 80 of the Kuwait Constitution:

- (1) The NA is composed of fifty members elected directly by universal suffrage and secret ballot in accordance with the provisions prescribed by the electoral law.
- (2) Ministers who are not elected members of the NA are considered ex-officio members thereof.

However, practical experience has revealed the government's ability, with the support of a parliamentary minority, to dominate parliamentary decision-making, and to disrupt any attempt to be called to account, in spite of parliament's elected majority opposition. This has created an abnormal situation in which parliamentary decisions can be issued contrary to the wishes of the majority of the elected parliament's members. Therefore, the parliamentary majority has lacked the ability to solve major conflicts, or to practise an effective control over the Executive, even though it should reflect the people's will, which is the source of all powers as stated by the Kuwaiti Constitution.⁵⁰

As a result, the way to resolve any political conflict, according to the Amir's point of view in most cases, has been to use his power to dissolve parliament and to call another public election requesting the electors to select new deputies. Most often, the same deputies are re-elected with the same agendas and targets, thus the same problems are brought back to the table. In this way, the crisis continues to revolve in a vicious circle without a radical solution. This has led to an absence of stability in the relationship between the Executive and parliament. This pattern has had a deep impact on the country's stability and its development.

The political events that occurred at the end of 2011 in Kuwait highlighted the gap between actual democratic practice and the people's demands for a better version of democracy.⁵¹

⁵⁰ Article 6 of the Constitution of Kuwait: 'The system of government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution'.

⁵¹ Chronology: 'Kuwait' (2012) 66 Middle East Journal 4.

Hundreds of citizens broke into the NA headquarters on 16 November to express their resentment of parliamentary decisions which did not reflect the people's will, as stated in the Constitution. They criticised the grip the government had over parliament and its suspicious financial transactions with some of the Members of Parliament.

The background to this unrest was that the 2009 Parliament's members were considered by many observers as the most corrupt parliamentarians in Kuwait's political history. They were termed *Khabida*, (القبیضة), an Arabic term that refers to someone who receives bribes, as most of them had been accused of accepting bribes from senior officials. This scandal rocked the country.⁵² In December 2011, thousands of demonstrators rallied in public squares, asking the Amir, for the first time, to dissolve parliament, call an early election and depose the Prime Minister (PM). Consequently, the Amir dissolved parliament and called for new elections. Following these political events, public voting showed the people's determination to introduce change. They supported the formation of a strong opposition in parliament: Islamists, liberals, independents and candidates representing tribal groups dominated the elections in February 2012 and won thirty-four of the fifty seats.⁵³

Yet, this anti-government parliament lasted only four months. The Constitutional Court dissolved it, unexpectedly, after investigating an electoral petition from a candidate who had lost.⁵⁴ The Constitutional Court concluded that the Amir's decree, which dissolved the 2009 Parliament, was unconstitutional because a procedural shortcoming had impaired the government's request to dissolve the former parliament. The Court explained that the request to dissolve the previous parliament was presented to the Amir by a revoked government. As a result of the resignation of Sheik Nasser Al Mohammad Al-Sabah, the PM, on 28 November 2011, the Amir appointed a replacement. According to Article 129 of the Constitution, if the PM resigns, all cabinet members should also leave office. Whilst in office, they must continue to attend to urgent business until new ministers are appointed. Sheik Jabber Al-Sabah, the new PM, held a meeting with the old cabinet before appointing new ministers. The new cabinet then requested the dissolution of the 2012 Parliament. The Constitutional Court deemed that such a request for dissolution was unconstitutional as they considered the cabinet had been formed illegally and, therefore, did not have the right to call for the dissolution of parliament.⁵⁵ The

⁵² Olimat M, 'Arab Spring and Women in Kuwait' (2012) 13 Journal of International Women's Studies 5.

⁵³ *op cit* Bandow (n 40).

⁵⁴ Constitutional Court verdict no 6/2012.

⁵⁵ *ibid*.

Court went on to state that as a result of its ruling, the election based on the unconstitutional decree of dissolution was deemed to have never taken place and the dissolved 2009 Parliament should return to power under the terms of the Constitution. Under Article 107 of the Constitution of Kuwait:

In the event of dissolution, elections for the new Assembly are held within a period not exceeding two months from the date of dissolution. If the elections are not held within the said period, the dissolved Assembly is restored to its full constitutional authority and meets immediately as if the dissolution had not taken place. The Assembly then continues to function until the new Assembly is elected.

Following these developments, the Amir again dissolved parliament. But, before calling for a new election, he amended the electoral law by an Amiri decree.⁵⁶ According to Article 71 of the Constitution:

Should necessity arise for urgent measures to be taken while the National Assembly is not in session or is dissolved, the Amir may issue decrees in respect thereof which have the force of law, provided that they are not contrary to the Constitution or to the appropriations included in the budget law.

Under this constitutional authority to issue emergency decrees, the Amir, for the purpose of protecting the interests of the country as stated in the Amiri decree, amended the electoral law by reducing the right to vote to one vote per person. The former system allowed each voter to have four votes. Under this amendment, voters could only choose one candidate out of ten in each constituency. Such action by the Amir heightened the political and legal tensions. The majority of political groups, Islamists, tribes, liberals, social institutions and a large range of individuals, considered this amendment to be a breach of the principles of the Constitution and a threat to democracy. Therefore, a majority of Kuwaitis refused to vote.⁵⁷ Although mass protests were organised, the elections went ahead but with the lowest public turnout of 40% since the first election in 1963.⁵⁸

After the elections, many individuals, politicians and civil activists submitted petitions to the Constitutional Court challenging the Amir's decree on the basis that it violated the Constitution and interfered with the public's will. The Constitutional Court ruled in favour of the Amir's

⁵⁶ Amiri decree no 20/2012 With Regard to Amending the Electoral Law.

⁵⁷ Westall S, 'Kuwait holds divisive vote after mass protest' *Reuters World News* (New York, 1 December 2012) <<http://www.reuters.com/article/us-kuwait-election-idUSBRE8B00EY20121201>> accessed 16 November 2016.

⁵⁸ Chronology: 'Kuwait' (2013) 67 *Middle East Journal* 2.

decree, and the political scene became more complicated.⁵⁹ While the majority of the revoked parliamentarians deemed this judgment to be against democracy and public choice, others demanded adherence to the decision of the Court.

In 2012, the Constitutional Court of Kuwait, following significant political events,⁶⁰ issued important verdicts related to its jurisdiction on examining electoral petitions. Constitutional Court verdicts numbers 6/2012 and 15/2012 referred to the dissolution of parliament and an acknowledgement of the Executive's ability to amend the electoral law as necessary during parliament's absence. These judgments have had a significant impact on the Kuwaiti parliamentary system.

This thesis seeks to examine, in a critical and analytical approach, the recent decisions of the Constitutional Court with reference to the principles of the Constitution of Kuwait and the international experience of democracy.⁶¹ The objectives of this approach are to explore whether these verdicts are compatible with the doctrines of the Constitution, and to discover the extent to which these verdicts have affected the development of democracy in Kuwait. Thus, the thesis offers a critical overview of Constitutional Court verdict no 16/2012, which resulted in the dissolution of parliament, to examine how this judgment affected the practice of democracy. In addition, this study aims to analyse verdict no 15/2012 which sought to legitimise the government's amendment of electoral law. The purpose of this approach is to discuss the reasons used by the Constitutional Court to support its critical judgment to allow the government dominance in formulating electoral law, and to show how this new privilege given to the Executive has affected the parliamentary elections and the democratic process.

The issuance of legislation is an absolute right for the NA under the constitutional doctrines. According to the Explanatory Memorandum of the Constitution, which is as obligatory as the constitutional texts according to most academics,⁶² 'The assignment of legislation to the Executive touches the essence of populism in its most particular features, which is the core of sovereignty'.⁶³ However, in this verdict, the Court argued against the supremacy of the legislature in terms of national security. Setting, by this judgment, a new era in which the sovereignty of state would overcome, when necessary, supremacy of parliament. These critical

⁵⁹ Constitutional Court verdict no 15/2012.

⁶⁰ Diwan KS, *Foreign Policy Magazine* (Washington, November 2011).

⁶¹ Constitutional Court verdicts nos 6/2012 and 15/2012.

⁶² Al-Tabtabaie A, *The Constitutional System of Kuwait* (3rd edn, University of Kuwait Press 1998) 360.

⁶³ Explanatory Memorandum of the Constitution.

verdicts require further discussion. Such recent events have highlighted the powers practised by the Amir and the Executive that affect, critically, the democratic system of Kuwait. These events illustrate that the Executive has never been controlled by an effective mechanism in the practice of its powers in the way required in a democratic system.

The Constitution of Kuwait does not recognise a distinction between the ‘dignified’ and the ‘efficient’ parts of the Constitution, unlike the case in the UK system.⁶⁴ It has been argued by Bagehot that the dignified parts of the Constitution are those that bring it formality. The Queen is at the head of these parts, while the prime minister heads the efficient parts, which employ that power. For example, the monarch who holds the prerogative to dissolve parliament cannot perform such a power without the advice of the prime minister. This division of powers in the UK’s Constitution aims to set a line between the crucial powers that the prime minister performs and the ceremonial powers that the monarch conducts. The former powers are the spring of business while the latter are simply a fountain of honour.⁶⁵

The critical powers of autocratic rulers in the Arabic and Islamic countries have been accepted, and have been embodied in the context of their societies, although Islamic and Arabic values and traditions contain, theoretically, most of the values that can lead to democratic rule.⁶⁶ However, in practice, the rulers have managed, historically, to sustain their domination depending on personal or family power, rather than implementing Islamic values.⁶⁷ Observers believe that, ‘most rulers rely on Islamic values to strengthen their legitimacy even if few genuinely applied religious norms and interpretations’.⁶⁸ Even though religion and politics have been bonded to each other in the Arabic and Islamic political world, most conflicts were, in reality, based on power control. Ironically, when political groups across the region are seeking to engage peacefully to perform their political activities, ‘it is these states claiming their legitimacy on Islamic terms who frequently and violently repress them’.⁶⁹ Therefore, it

⁶⁴ Bagehot W, *The English Constitution* (Paul Smith ed, Cambridge University Press 2001) 5.

⁶⁵ *ibid* 9.

⁶⁶ Al-Kawari A, *The Arabian Gulf and Democracy, A Vision Towards the Future of Supporting Democratic Reforms* (Centre of Arabic Unification Studies Press 2005) 66.

⁶⁷ *ibid*.

⁶⁸ Kechichian J, *Power and Succession in Arab Monarchies; A Reference Guide* (Lynne Rienner Publishers 2008) 27.

⁶⁹ Schwederler J, ‘Religion and Politics’ in Angrist M *Politics & Society in the Contemporary Middle East*, (Lynne Rienner Publishers 2010) 131.

could be argued that the ruling systems in the Arabic and Islamic world, in general, might not have developed sufficiently yet to accept a shift towards an effective populist democracy.⁷⁰

It is difficult to deny that there are credible arguments against promoting Western secular democracy in some Arabic and Islamic cultures.⁷¹ In fact, even, ‘the words for “secular” and “secularism” in the modern Islamic language are either loanwords or neologisms’.⁷² The question is whether these Western constitutionalist values are inappropriate to the nature of Kuwaiti society and are obstacles to rapid democratic development. However, the Constitution of Kuwait, although it has been affected by Arabic and Islamic influences, embodies a democratic socio-political ideology that is also rooted in Islamic laws and *shari'a*, (الشريعة), values. These are relatively compatible, and acknowledge the global values of democracy and international human rights principles.⁷³ As Filali-Ansari suggested, ‘Islam welcomes both modernization and liberal reform politics and economics, and is no less compatible with democracy than Christianity or Judaism.’⁷⁴ Ansari contends that democracy and the ethical values of the rule of law can flourish in the Middle East if certain specific prerequisites are met.

Such arguments reveal challenges as to how to constitutionalise the powers of the Amir and the Executive so as to be more compatible with democracy and the desired ethical values. They disclose, therefore, the importance of exploring the potential impacts of these values on Kuwait’s democratic political experience. Undoubtedly, the ethical values of democracy, rule of law, human rights and separation of powers are essential elements for any democratic practice. Thus, as the aim of chapter three, the study attempts to engage in such arguments for and against constitutionalism in Kuwait.

This study aims, further, to elaborate on the relevant powers of the Amir and the Executive in the fifth chapter of this research, and to explore in chapters six and seven how to constitutionalise the control of these powers by parliamentary and legal mechanisms. It will also consider how to utilise the comparison with the UK constitutional system, in order to distil

⁷⁰ op cit Al-Kawari (n 66) 66.

⁷¹ Deegan H, *The Middle East and Problems of Democracy; Issues in Third World Politics* (Open University Press 1993) 14.

⁷² Davenport J, *Democracy in The Middle East* (InfoBase Publishing 2007) 79.

⁷³ op cit Al-Saleh (n 36) 239.

⁷⁴ op cit Davenport J, cited in Al-Saleh (n 36) 81.

and apply suitable restraints to what are considered excessive efficient powers in the hands of the Amir and the Executive.

1.5 Research Design and Methodology

This section answers the questions of why and how the methods of this research project have been applied to achieve its aims and objectives. The questions, it is argued, ‘surrounding the design and the conduct of the research are crucial to assessing reliability, validity and generalizability, and need to be asked throughout the research process’.⁷⁵ The study argues that the constitutional structure of Kuwait grants the Amir and the Executive dominant powers that affect the system of government accountability. Under these critical powers, parliament and the judiciary face several challenges to the exercise of their role to hold the Executive to account. Such powers contradict the idea of constitutionalism and its related ethical values. Thus, this research is a constitutional investigation aided by legal, political, philosophical and international law sources.

To examine this hypothesis, the study applied a socio-legal research method in order to help to understand the function of law within society by viewing its related historical and social context.⁷⁶ The relevant mixed research methods involved primarily applying a doctrinal analysis and a qualitative research method through fieldwork interviews which empirically examined and theorised the interaction between law and practice.⁷⁷ Also, in order to deliver a reform framework, the research applied a method of policy transfer to draw lessons from the UK’s law and experience in controlling the Executive’s powers.

1.5.1 Socio-Legal Research Method

In order to better understand the function of the constitutional system of executive power in Kuwait, it was considered important to comprehend the origin of its formation.⁷⁸ In fact, ‘focusing the reflexive lenses of sociological analysis on the practice-based features of the law, can potentially enable us to uncover the institutional limits of the legal practice, in a way that

⁷⁵ Lewis J and others, ‘Generalising from Qualitative Research’ in Ritchie J and others (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2nd edn, Sage Publishing 2013) 362.

⁷⁶ Chynoweth P, ‘Legal Research’ in Knight and Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30.

⁷⁷ Banakar R and Travers M, *Theory and Method in Socio-Legal Research* (Hart Publishing 2005).

⁷⁸ Garraghan G, *A Guide to Historical Method* (Delanglez J ed, Fordham University Press 1946) 40.

traditional forms of legal studies cannot do'.⁷⁹ This has entailed exploring the development of the political and constitutional system of Kuwait prior to the promulgation of the Constitution of Kuwait in 1962. Therefore, such an historical approach, as a part of the study's socio-legal method, has been used to recognise the roots of the present phenomena with regard to the dominance of the Executive's powers in Kuwait in order to capture the notion of law in context.⁸⁰ For a better understanding of this phenomena, the study explains how law is working in the wider context of the political history and culture of Kuwait. This investigation required a search for trusted and accurate sources of data and documents.⁸¹

1.5.1.1 Documentary Research and Literature Approach

The study primarily drew on doctrinal legal research as a basic theoretical approach.⁸² This method, which concerns the legal materials of court cases and statutes, is normally described as black letter law study.⁸³ The examination was conducted by analysing the constitutional and legal framework of the Executive's powers. It also examined the legal framework of the function of parliament and the judiciary in regard to the system of controlling the Executive's powers. By using this method, the study measured the adherence of the current constitutional structure to constitutionalism and its related ethical values. To conduct such a measurement, the study has investigated, in particular, the legal outline of the relationship between the Executive, parliament and the judiciary in the Kuwaiti constitutional system. Therefore, the separation of powers principle was examined in order to measure the efficiency of 'checks and balances' between the state powers. This investigation was measured against the values and criteria which are embedded and acceptable in the Kuwaiti society and recognised in advanced democracies. Four major criteria were employed: the ethical values of democracy, the rule of law, human rights and the separation of powers principle. In order to achieve such a measurement, the study drew on philosophy, political science, and constitutional and

⁷⁹ Banakar R and Travers M, 'Law, Sociology and Methods' in Banakar R and Travers M (eds), *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing 2005).

⁸⁰ *op cit* Garraghan (n 78).

⁸¹ Melton BF Jr, 'Clio at a Bar: A Guide to Historical Method for Legists and Jurists' (1998) 83 *Minnesota Law Review* 377.

⁸² Hutchinson T, 'Doctrinal Research' in Watkins D and Burton M (eds), *Research Methods in Law* (Routledge 2013) 28.

⁸³ McConville M and Chui W, 'Introduction and Overview' in McConville M and Chui W (eds), *Research Methods for Law* (Edinburgh University Press 2007).

international law literature to examine, based on those values, the efficiency of the applied system, and has proposed the possible solutions for reforms.

The research has drawn on several different sources. Firstly, prime sources gained from institutions in Britain and Kuwait. Unpublished British documents and records held at the Public Records Office archives represented a valuable source of information about Kuwait's political history in relation to Britain as a colonial power. The minutes of the Constituent Assembly, which contained the discussions of the ministers and the elected representatives on formulating the Constitution of Kuwait were therefore considered as a prime source for this study. Moreover, the National Assembly records and proceedings were examined to provide practical evidence for the study's arguments. The government records were an important prime source, although it was difficult to access some Kuwaiti government archives due to security claims. Other prime sources were the published verdicts of the Constitutional Court of Kuwait, related laws, Amiri decrees, the Constitution Law and its Explanatory Memorandum. United Nations documents were also searched and cited in this study to outline the related global ethical values of human rights and international standards of democracy.

These primary sources contained different views and arguments that support the balance of this study to avoid reliance on a single point of view. However, it is highlighted that the extent of visibility of the research resources in Kuwait was limited. Law does not allow access to National Assembly committees' works⁸⁴ and most of the government's documentation is restricted for official use. Further, such documents and governmental reports might lack credible political findings that could be used in a scientific research as they are usually built on an anti-democracy policy. However, the researcher, as a lawyer member of the Kuwait Lawyers Association, obtained access to the Association's commercial website which contains various law cases and court verdicts, as well Acts and different regulations and research.

Next, the research consulted numerous secondary sources to build on its examination of the primary sources. Such literature comprised books, articles, published PhDs and various research papers in English and Arabic. These sources were tracked from the libraries of Leeds University, Kuwait University, the School of Law library, the library of the National Assembly of Kuwait, the Library of the Kuwait Institute for Judicial & Legal Studies, the Library of the Ministry of Justice, as well as the British Library and the Congress Library. Some of these

⁸⁴ Article 54 of Standing Orders of National Assembly.

sources were available in hard copies and others were digital versions, which the researcher collected from online databases such as Westlaw, Lexis, Questia, Heinonline and Ethos.

Khalid Al-Adsani's unpublished memoirs registered important events which contributed to shaping the features of Kuwait's political system. Al-Adsani, who worked as the secretary of the Legislative Council *Al Majlis Al-Tashreee*, (المجلس التشريعي), documented all the important events of that period in his book, although its publication and distribution has been prohibited by the Kuwaiti authorities.⁸⁵ Other unpublished documents referred to include documentation held at the University of Kuwait archive on the legal memorandums of Othman Khalil, one of the famous Egyptian jurists who were appointed to advise on formulating the Constitution of Kuwait. Finally, newspapers and media sources were considered secondary sources to cite important events and statements.

1.5.1.2 Fieldwork Approach

In order to test the analytical outcomes of its historical and doctrinal legal research methods, the study has supported its theoretical examination by underpinning it with socio-legal research. This approach involved fieldwork interviews. The adoption of such a method was due to the fact that in political and democratic practices there are problems that cannot be defined by depending on a theoretical analytical approach alone, using legal texts and doctrinal legal research methods. There will always be some facts that can only be extracted from the actors in relevant fields.

The empirical method is appropriate in this case because it allows the collection of data related to the practical aspects of the democratic process and adds a further human evaluation aspect. Such generated data is believed to provide deeper insights to better understand the phenomena under examination than either empirical or theoretical research methods in isolation.⁸⁶ A full description of this methodology in terms of its design, structure and strategies is undertaken in more detail in the fourth chapter of this research.

1.5.2 Comparative Methodology and Policy Transfer

This study also adopted a comparative approach to refer to the constitutional and political practices of the United Kingdom when applicable, as potentially instructive for ideas for

⁸⁵ Al-Adsani K, 'Half Year of Parliamentary Rule in Kuwait' quoted in op cit Al-Saleh (n 36) 98.

⁸⁶ McCartan K and Robson C, *Real World Research* (4th edn, John Wiley & Sons 2016) 5.

controlling the Executive's powers in Kuwait. Eberle commented that, 'a deeper comparative focus on constitutional orders might lead us to question and re-examine the core principles of the constitutional order...or structural matters like the separation of powers'.⁸⁷ Accordingly, this research sought to illuminate the inner workings of the UK's legal and political experience in order to gather useful knowledge and understanding about how to achieve the objectives of the research.

Although the UK lacks a codified constitutional document that contains a legal framework for the governing system,⁸⁸ the distinction of the British Constitution is that it is 'a product of historical developments rather than a deliberate design'.⁸⁹ As many writers believe, 'such developments positioned the supremacy of Parliament in the heart of the evolutionary British Constitution'.⁹⁰ Hence, the need for securing effective democratic mechanisms has developed over time the doctrine of the separation of powers.⁹¹

The British deep-rooted practices of democracy and parliamentary work provided rich experiences on which this study has drawn. Valuable lessons were learnt from comparison with the UK example. The governing system of the UK shares common features with the Kuwaiti system in that both have monarchies as head of state. However, the system in the UK has developed over centuries to become a constitutional one. 'In modern government, the Executive power is still vested in the Crown; however, it is the Prime Minister and other ministers who rule.'⁹² The historical developments that led to the relative success of this political system provided valuable experiences which this study discusses. In Kuwait, however, the effective executive powers are vested in the Amir who still plays a key role, which affects the democratic system.

However, even the practice of advanced democracies, such as the UK, can lead to a form of 'elective dictatorship'. In governments, through parliament, a simple result of a democratic vote in elections every five years can provide great powers to the Executive. Therefore, it has been argued that, 'there is a systematic imbalance within the political process in the UK, and although Executive Power is vested in Parliament's members, there was much authority and

⁸⁷ Eberle E, 'The Method and Role of Comparative Law' (2009) 8(3) *Global Studies Law Review* 3.

⁸⁸ Blackburn R, 'Enacting a Written Constitution for the United Kingdom' (2015) 36(1) *Statute Law Rev* 1–27.

⁸⁹ Dicey AV, *Unpublished Lectures on the Comparative Study of Constitutions* (Codrington Library, All Souls College Oxford) MS 323 LR 6 b 13.

⁹⁰ Bogdanor V, *The New British Constitution* (Hart Publishing 2009) 12.

⁹¹ Bradley AW and Ewing KD, *Constitutional & Administrative Law* (5th edn, Pearson Press 2011) 80.

⁹² *ibid.*

not enough accountability'.⁹³ Such concentration of powers has led Lord Hailsham to once describe Britain's system as an 'elective dictatorship'.⁹⁴ Nevertheless, as Bagehot once declared:

The dangers arising from a party spirit in Parliament exceeding that of the nation, and of a selfishness in Parliament contradicting the true interest of the nation, are not great dangers in a country where the mind of the nation is steadily political, and where its control over its representatives is constant.⁹⁵

Such an advanced experience of democratic practice in the UK, and how it has solved these problematic issues, provides various lessons for underdeveloped democracies such as Kuwait, enabling them to avoid the repetition of others' errors. There is a need to deal with the powers of the Amir and the Executive that have restricted the ability of parliament to operate properly but equally, this study does not aim to promote an elective dictatorship where a simple majority of parliament can rule Kuwait. Rather, the aim is to control the use of powers and to strengthen the balance of the governing system by improving the efficiency of the separation of powers principle.

From various angles, 'The gathering of knowledge obtained through the comparative approach can be a vital portal to a foreign culture.'⁹⁶ There is no doubt that the examination of advanced UK experiences grants the research a critical overview to consider the points of deficiency and the reasons for success. In fact, drawing on other past experiences of political systems can save time and effort.⁹⁷ However, this study does not aim to conduct a full comparison study of the legal and political systems between the UK and Kuwait. In the expectation that, 'studying familiar problems in an unfamiliar setting can expand ideas and inspire fresh thinking about what is possible at home',⁹⁸ the more limited aim of this comparative approach was to 'transfer policy', from the British experience to Kuwait. The study of policy transfer 'has emerged gradually as a sub-set of comparative politics literature'.⁹⁹ Policy transfer is commonly known as 'a process by which the knowledge of policies, administrative arrangements, institutions and

⁹³ Wright A, *The British Political Process: An Introduction* (Routledge 2000).

⁹⁴ 'Elective dictatorship' is a phrase popularised by the former Lord Chancellor Hailsham, cited in *ibid*.

⁹⁵ Bagehot W, *The English Constitution* (1867) e-book <<http://www.gutenberg.org/ebooks/4351>> accessed 28 November 2016.

⁹⁶ Eberle E, 'The Method and Role of Comparative Law' (2009) 8(3) *Global Studies Law Review* 1.

⁹⁷ Dolowitz D and Marsh D, 'Who Learns from Whom: a Review of the Policy Transfer Literature' (1996) 44(2) *Political Studies Association* 352.

⁹⁸ Rose R, 'What is Lesson-Drawing' (1991) 11 *Journal of Public Policy* 22.

⁹⁹ *op cit* Dolowitz (n 97) 344.

ideas in one political system (past or present) is used in the development of similar features in another'.¹⁰⁰

The literature of policy transfer has mainly 'focused upon voluntary transfer, seeing the process as one in which policies applied elsewhere were studied by rational actors for their potential application within another political system'.¹⁰¹ It has been suggested that observation of the function of systems and other experiences to deal with similar problems is the basis of policy transfer, 'the key role of policy transfer therefore, is perspective evaluation; perspective evaluation starts by observing how a program operates in another country and develops a module of what is required to produce its effects somewhere else'.¹⁰²

The importance of policy transfer and lesson drawing is expanding.¹⁰³ Many intergovernmental and international organisations have begun to promote the exchange of ideas between countries.¹⁰⁴ For instance, the Centre for Management and Policy Studies (CMPS), a division attached to the British Cabinet Office, supports a 'lesson-drawing' dynamic within the British civil service. It has supplied several documents and designed a website for this aim that rationalise the following:

Looking abroad to see what other governments have done can point us towards a new understanding of shared problems; towards new solutions to those problems; or to new mechanisms for implementing policy and improving the delivery of public services. International examples can provide invaluable evidence of what works in practice, and help us avoid either re-inventing the wheel or repeating others' mistakes.¹⁰⁵

Yet, it has been suggested that, 'both transfer and the success of transfer are more likely if the policy is consistent with the dominant political ideology in the host country'.¹⁰⁶ For example, the 'transplanting' in the 1960s and 1970s of Anglo-Westminster parliamentary systems to South Pacific jurisdictions proved unsuited to indigenous institutions. The imported schemes were incompatible. Moreover, many of these countries lacked the legal knowledge on how to apply new constitutions.¹⁰⁷ In addition, 'the transferability of a constitution will be determined

¹⁰⁰ op cit Dolowitz (n 97) 344.

¹⁰¹ ibid 345.

¹⁰² op cit Rose (n 98) 33.

¹⁰³ Stone D, 'Transfer Agents and Global Networks in the "Trans-Nationalization" of Policy' (2004) 11(3) *Journal of European Public Policy*.

¹⁰⁴ op cit Rose (n 98) 105.

¹⁰⁵ See <[http://www.cmops.gov.uk/policy hub](http://www.cmops.gov.uk/policy%20hub)>accessed 16 July 2014.

¹⁰⁶ Robertson D, 'Political Conflict and Lesson Drawing' (1991) 11(1) *Journal of Public Policy* 70.

¹⁰⁷ Larmour P, 'Westminster Constitutions in the South Pacific: a "Policy Transfer" Approach' (2002) 10(1) *Asian Journal of Political Science* 39–54.

by the presence or absence of an appropriate *Grundnorm* ... the political preconditions, the mobilization of political forces, settlements between political groups over land, and ethnic representation before institutions stick'.¹⁰⁸

This study has recognised the cultural differences between the UK and Kuwait when conducting its policy transfer approach. The objective of this examination was to fully understand how such mechanisms are operating within its system from a technical and practical perspective, and how to utilise this knowledge to improve the control of the Executive's powers in Kuwait. As argued, 'policy transfer is not only about looking for a methodological nationalism approach that is sensitive to local culture, rather it is searching for subjects which are universal enough to function as a normative standard'.¹⁰⁹ This aspect of the study, therefore, sought only ideas and lessons which are compatible or able to be transformed to Kuwait's legal and political culture.

One important question that arises, however, is why the UK in particular is relevant to this thesis, and what would be gained from this transfer policy approach. The comparison is relevant for various reasons; firstly, the comparison with the UK as a constitutional monarchy is useful in enriching this study. The process of constitutionalising the monarchy in the UK has been one of the longest and richest constitutional reform processes in the world. This deep-rooted process developed over centuries and therefore created a long history of controlling the powers of the monarchy and its office while retaining the monarch as a largely symbolic unifying head of state.¹¹⁰ Similarly, in Kuwait, the Amir, likewise, functions as a unifying factor which is worth retaining. In fact, there are never calls to abolish the office. Even though the opposition has been challenging the Amir on political reforms, they have never been contrasted with calls to retain the Ruling Family. In addition, Kuwait is a small democratic state which is surrounded by great regional powers, most of which are governed by absolute rulers. This factor has influenced the people of Kuwait to be more attached to Al-Sabah as they are, relatively, the most democratic rulers in the Gulf.¹¹¹ The events of the Arab Spring brought chaos for different countries. Libya, Egypt, Syria, Yemen, Bahrain and others, have

¹⁰⁸ op cit Larmour (n 107).

¹⁰⁹ Swaaningen R, 'Critical Cosmopolitanism and Global Criminology' in Nellken D, *Comparative Criminal Justice and Globalization* (Ashgate 2011) 132.

¹¹⁰ op cit Bagehot (n 95).

¹¹¹ Sabrie S and Hakala P, *Kuwait's Political Crisis Deepens* (Policy Briefing Report, Policy Department European Parliament 2013)

<[http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491461/EXPO-AFET_SP\(2013\)491461_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491461/EXPO-AFET_SP(2013)491461_EN.pdf)>accessed 22 October 2016.

experienced painful events and lost stability. The radical changes in these states led to instability for a long period of time. This research tries to derive self-transformation solutions that could help to constitutionalise the Amir and Executive's powers and allow the governing system to remain through moderate and long lasting political change. Therefore, as there is no comparable democratic monarchy system in the region, the study chose the UK system as a potential model. It is one of the most appropriate examples from which this research can transfer policy from a relatively successful constitutional monarchy. Secondly, the deep historical relations between Kuwait and Britain, which started from the Treaty of Protection in 1899, have played a key role in determining the features of the Kuwait political and constitutional system. This underlines the importance of choosing the UK for this comparison approach. Finally, the researcher has conducted his studies in the UK. This facilitated access to various sources of relevant knowledge and data, and this was considered to be an additional reason to choose the UK.

1.6 Originality of the Research

After reviewing a considerable range of relevant published literature, which is believed to be among the most important work in this field of study, the researcher has recognised points of similarities and differences, which will now be discussed.

From a historical perspective, the following authors have described the outside influences that have affected and shaped the principal political and constitutional features of Kuwait. Abu Hakmah the Arabic version,¹¹² and his English version,¹¹³ and Mohammad Al-Yousifi¹¹⁴ were authors of the richest Arabic textbooks this study has considered. The importance of the latter is that it was the most recent comprehensive study available, although its publication and distribution is prohibited by the Kuwaiti authorities. With regard to English sources, Dickson¹¹⁵ wrote one of the most famous and important references of Kuwaiti history by a British author, particularly the events that occurred during his service as the British Political Agent to Kuwait

¹¹² Abu Hakmah A, *The Modern History of Kuwait* (1st edn, That Alsalasel Press 1984).

¹¹³ Abu Hakmah A, *The Modern History of Kuwait: 1750–1965* (Luzac & Company 1983).

¹¹⁴ Al-Yousifi M, part one *Kuwait: From Emergence to Independence*, part two *Kuwait: from Constitution to Invasion*, part three *Kuwait: From Liberation to Imperfection* (1st edn, Arabian Institution for Studies and Publishing 2013).

¹¹⁵ Dickson HRP, *Kuwait and Her Neighbours 1956* (Al-Khatrash F tr, 2nd edn, That Al-Slalsil Publishers 2002).

from 1929 until 1936. Additionally Smith,¹¹⁶ Joyce,¹¹⁷ Gause,¹¹⁸ Freeth and Winstone,¹¹⁹ Crystal,¹²⁰ Zahlan,¹²¹ Kerr,¹²² and Barr,¹²³ all provide an interesting historical approach to Kuwait's political and social developments. In addition, Tétreault carried out a socio-political analysis of the democratic experience of Kuwait in a contemporary historical context that was of much value for this study,¹²⁴ as did Baaklini, Denoex and Springborg who conducted a similar approach.¹²⁵

Although such literature was vital for this research, these sources were historical socio-political researches in which most of the evaluations were concentrated within their disciplines. This study differs, as it provides greater depth in its examination of the historical factors that contributed to shaping the selected features of the Constitution in a socio-legal approach. Thus, the study aims to explore the impacts of these historical influences on the constitutional structure and link them to the current practice of the democratic system. In short, this research attempts to address whether the Constitution of Kuwait, based on these influences, has been designed as a conservative structure that is contrary to democracy and the related ethical values.

The following leading constitutional references have given an outline of the constitutional structure of Kuwait: Al-Saleh,¹²⁶ Al-Tabtabaie,¹²⁷ Al-Shaier,¹²⁸ Al-Jamal,¹²⁹ Abdul-Fatah,¹³⁰ and Al-Mouqatei.¹³¹ These authors have generally described the features of the Constitution of Kuwait and its political system. Al-Saleh's work in particular,¹³² is considered to be the most

¹¹⁶ Smith S, *Kuwait 1950-1956: Britain, the Al-Sabah and Oil* (Oxford University Press 1999).

¹¹⁷ Joyce M, *Kuwait 1945-1996: An Anglo-American Perspective* (Frank Cass Publishers 1998).

¹¹⁸ Gregory Gause GF, 'The Persistence of Monarchy in the Arabian Peninsula: A Comparative Analysis' in op cit Kostiner (n 31).

¹¹⁹ Freeth Z and Winstone H, *Kuwait: Prospect and Reality* (Crane, Russak 1972).

¹²⁰ Crystal J and Al-Shayji A, 'The Pro-Democratic Agenda in Kuwait: Structure and Context' in Korany B and others (eds) *Political Liberalization & Democratization in the Arab World* (Lynne Rienner Publishers 1998).

¹²¹ Zahlan S, *The Making of the Modern Gulf States: Kuwait, Bahrain, Qatar, the United Arab Emirates and Oman* (Ithaca Press 1998).

¹²² Kerr M, *The Arab Cold War: Jamal Abdu al-Nassir and His Rivals, 1958-1970* (Oxford University Press 2004).

¹²³ Barr J, *A Line in the Sand: Britain, France and the Struggle that Shaped the Middle East* (Simon & Schuster 2011).

¹²⁴ Tétreault MA, *Stories of Democracy: Politics and Society in Contemporary Kuwait* (Columbia University Press 2000).

¹²⁵ Baaklini A and others, *Legislative Politics in the Arab World; The Resurgence of Democratic Institutions*, (Lynne Rienner Publishers 1999).

¹²⁶ op cit Al-Saleh (n 36).

¹²⁷ Al-Tabtabaie A, *The Constitutional System of Kuwait* (3rd edn, University of Kuwait Press 1998).

¹²⁸ Al-Shaier R, *The General Theory of the Constitution Law* (Dar al-Seyasah 1972).

¹²⁹ Al-Jamal Y, *The Constitutional System of Kuwait* (University of Kuwait Press 1970).

¹³⁰ Hasan H, *Principles of the Constitutional System of Kuwait* (Dar Al-Nahda Al-Arabiya 1968).

¹³¹ Al-Mouqatei M, *The Idler of the Constitutional System of Kuwait and its Political Institutions* (University of Kuwait Press 2008).

¹³² op cit Al-Saleh (n 36).

prominent study, which also covered the historical developments of the political system. Time, however, did not permit this author to finish the second part of his studies, which were to discuss the methods of reforms, as he passed away. The originality of the present study is that it offers a specific, rather than general, examination of the Executive's powers and their constitutional control methods. The research therefore aims to place emphasis on reforming the constitutional structure that currently provides the government with powers which undermine democracy and the ethical values of the rule of law, human rights and the separation of power principle. Also, this research delivers an up-to-date account of the recent developments of the Executive's practise of powers, as stated earlier, and conducts a critical evaluation of the role of parliament and the judiciary as controlling mechanisms toward these events.

Although Al-hamedah's work¹³³ was the latest constitutional textbook, its content was not different from the forerunners. Moreover, Al-Mouqatei's¹³⁴ recently published article discussed the constitutional perspective of the royal family of Kuwait and outlined the Amir's constitutional powers. However, he did not explore the impacts of these powers on the democratic system, nor did he examine the methods of controlling it.

The following authors, among others, have covered some elements of the area this study aims to examine. They have discussed the political crises between Parliament and the Executive in Kuwait, and described the parliamentary methods for controlling government activities. Ghanaim¹³⁵ and Sallam¹³⁶ outlined the methods of control of Parliament on governmental actions in the parliamentary system from political perspectives only. Al-Remaidhi¹³⁷ examined the efficiency of individual ministerial responsibility in the constitutional system of Kuwait, which deals with an important part of this research. Thus, this study aims instead to contribute by covering the entire system of the Executive's powers, including the Amir's powers which Al-Remaidhi excludes. In his PhD thesis, Al-Hajiri¹³⁸ discussed the political power and rule in Kuwait, and outlined how the Executive and the Al-Sabah family, in particular, maintained a

¹³³ Al-Hamedah K, *Kuwait's Constitutional System* (1st edn, University of Kuwait Press 2010).

¹³⁴ Al-Mouqatei M, 'The Constitutional Perspective of the Royal Family of Kuwait' (2012) 36(3) Kuwait University Journal of Law.

¹³⁵ Ghanaim M, *Methods of Control of Parliament on Governmental Actions in the Parliamentary System* (Dar-Alnahda Al-Arabia 1998).

¹³⁶ Sallam E, *Political Control of Activities of Executive in Parliamentary System* (A' allem Al-Kotob 1983).

¹³⁷ Al-Remaidhi A, 'Individual Ministerial Responsibility in Constitutional System of Kuwait' (PhD thesis, University of Essex 2004).

¹³⁸ Al-Hajiri A, 'Citizenship and Political Participation in The State of Kuwait: The Case of the National Assembly 1963–1996' (PhD thesis, University of Durham 2004).

personal autocratic role in Kuwait depending on several mechanisms, which allowed them to undermine Kuwait's democratic experience.

Some of these studies, aside from being more descriptive and only partially describing the role of some aspects of the Executive's powers, also differ from this thesis because they do not suggest reforms. Furthermore, few have critically analysed the impact of these powers on democracy, or assessed the constitutional system applied against the ethical values of democracy, the rule of law, human rights and the separation of power principle. Moreover, most of the literature reviewed so far has focused only on the role of executive power. Although the Amir retains critical constitutional powers which allow him to play a key role in the governing system, far too little attention has been paid to the impact of his role on the democratic system. This issue has grown in importance in light of the recent events that occurred in Kuwait.¹³⁹ Although it was observed that, 'routinely, the Amir, who retains supreme political powers and holds all the key positions within the Government, had manipulated the democratic function in the country'.¹⁴⁰ Nevertheless, the researcher noticed deficiencies in the studies which are devoted to examining, directly, the impacts of these powers on the democratic system and the desired values. Thus, this study aims to focus, in addition, on the role of the Amir and the Executive in this regard.

Accordingly, the key feature of the original research undertaken in this study is to investigate the capability of the current constitutional structure of Kuwait to reflect more faithfully the values of democracy, rule of law, human rights and separation of power principles. Thus, the importance of this research is that it is dedicated to evaluating the constitutional structure of the Executive's powers and its practice against the background of global ethical values outlined previously. In addition, this study adds a contemporary account of the problems of Kuwait's political and constitutional crises in order to place the examination of the various issues into the context of the current controversies in Kuwait, especially the recurrent dissolutions and court cases.

A further major claim of originality is that the researcher conducted a socio-legal study by interviewing and questioning the relevant figures and main activists in the parliamentary, political, and constitutional domains. This has added fieldwork findings to the originality of this research. In addition, this study adopts the method of policy transfer in order to import

¹³⁹ See the background section of this chapter, section 1.4.

¹⁴⁰ *op cit* Sabrie S and Hakala P (n 111).

ideas and draw lessons from the advanced experience of the UK's constitutional and legal practice. Such comparative political and constitutional analysis also grants the research an additional reason to claim its originality, as being the first study to accomplish such an approach.

1.7 Thesis Outline

The study can be divided into two sections. The first section contains chapters one to four; these lay out the problem areas of the research, the environment of the study's hypothesis and the research methodologies. Chapters five, six and seven, which form the second section, are more dynamic. They examine the research problems in practice through fieldwork and also provide the proposed reforms. In other words, the research progresses from setting the scene, by explaining the problems and setting out the defective environment in the first part, to combining an understanding of the problems and the environment in the second part, through a programme of reforms based on the desired values which are described in chapter three.

Following this introduction in chapter one, the second chapter seeks to examine the historical background of the political system, to analyse the constitutional structure and to review the practice of powers, historically. This historical analysis of the governing system of Kuwait is divided into two stages: pre and post the 1962 Constitution.

Chapter three discusses the values of constitutionalism, democracy, the rule of law, human rights, and the separation of powers. Such values are essential for any legitimate political practice in modern democracies. The system of controlling the Executive's powers is examined to ensure that such a system can function in accordance with these relevant values in the context of Kuwait. Therefore, the research in this chapter attempts to define such values and their impact on the democratic process and the accountability of the system of government.

The relationship between parliament and the courts, and the impacts of the role and functions of the Executive on them, are examined, not only through the research methods of literature and legal doctrines, but also with the aid of fieldwork. Therefore, this study collects data emerging from interviews with relevant informants, in order to examine in-depth the practical aspects of these areas. These empirical approaches are the sources of the research's fieldwork and are reflected in the thesis. Chapter four explains the design of the fieldwork, while the findings are analysed and outcomes discussed in chapters five, six, seven and eight.

The fifth chapter of the study describes the constitutional powers of the Amir and the Executive to define the critical powers that must be controlled. It also examines the process by which the Amir distributes power and the government structure. To address this issue, the study defines those constitutional powers of the Amir and the Executive that particularly need to be controlled, what those powers now are and how they should be reformulated. To do so, the study examines the role of the Executive regarding parliament in three aspects: the formation, function and dissolution of parliament. With regard to the formation of parliament, the study examines whether public voting is capable of leading to a real democracy expressing the people's opinions, in accordance with the existing electoral system. In addition, the study explores the Executive's supervision of the general election and its critical impact. The aim of this approach is to examine the impact of the electoral design on the legislature. As for the functioning of parliament, this study analyses the extent of the influence of the Executive's powers (the government and Amir) on parliamentary decisions. The research assesses the decision-making mechanism of parliament and its ability to reflect democratic ends. In respect of the prerogative of dissolution, the study discusses the government's right to dissolve the elected parliament, in order to explore how the prerogative has been exercised and to identify the impact of such a role on controlling Executive power. The prerogative of dissolution has witnessed heated debates among scholars about the Executive's practise of such a right. The aim is to engage in these arguments, especially following the vital judgments of the Constitutional Court of Kuwait,¹⁴¹ and the enactment of the Fixed-term Parliaments Act 2011 by the UK Parliament.¹⁴² Ultimately, the aim of this approach is to address how parliament could be established in order to control the Executive more effectively. The study also examines the predominant powers of the Amir and the Executive in relation to the judiciary, which are believed to affect the judicial controlling mechanism.

Controlling the Executive by parliamentary mechanisms is the subject of the sixth chapter. The aim of this approach is to examine the effectiveness of the role of parliament in terms of controlling the Executive's powers. The study examines the parliamentary mechanisms of control in theory and in practice. The purpose of this examination is to assess the political responsibility of the government in Kuwait towards the NA. It consists of two major sections. Firstly, it examines how to control the Executive's powers through parliamentary mechanisms.

¹⁴¹ Constitutional Court verdicts nos 6/2012 and 15/2012.

¹⁴² Fixed-Term Parliaments Act 2011.

Secondly, it analyses the impact of these mechanisms on the political responsibility of ministers. The prime aim of this examination is to identify the defective aspects that prevent the NA in Kuwait from playing its expected role in controlling the Executive. In addition, the study seeks to draw on the United Kingdom's laws and experiences where necessary to distil the policies and mechanisms that can systematically be transferred to Kuwait in order to improve the control of the Executive.

In the seventh chapter, the study discusses how to control the executive through judicial mechanisms. This chapter analyses the role of the judiciary as a separate power, in relation to the Amir and the Executive, and explores the ability of the judiciary to control the Executive's powers more effectively. The aim of this approach is to examine the quality of the independent status which is required for the judiciary to perform their responsibility to control the Executive's powers. In particular, the study focuses on the role of the Constitutional Court in controlling the Executive's powers and puts forward suggestions upon the desired ethical values and individual rights that should be emphasised to judges.

It should be noted that controlling executive powers by political mechanisms is a crucial element by which control of the Executive's powers can be achieved. Political parties, freedom of the press, election laws, civil society institutions, trade unions and other political mechanisms, to name just a few, can play an effective role in controlling executive powers. The essential role performed by political parties is one of the most important mechanisms of power control in most developed democracies. However, given that such subjects are too broad for the length of this research, it focuses mainly on the role that parliament and the judiciary have in controlling the Executive's powers. In fact, the term 'constitutionalising' does lay itself open to concentration on what are traditionally seen as constitutional mechanisms as opposed to political mechanisms. On the one hand, these constitutional mechanisms seem more related to parliament and the judiciary, whilst political mechanisms are probably less associated with 'constitutionalism' and are viewed as a dynamic form of limiting the Executive's powers by various influences. Thus, the chosen title for this study relates to the extent to which the research aims to search for structures that are impeded in the Constitution, rather than searching for the same inputs by less formal means. On the other hand, it is quite difficult for this study to cover such an important subject without drawing on the various types of political mechanisms. Therefore, with the objective of depth rather than breadth, the study concentrates on the role of parliament and the judiciary mechanisms in terms of constitutionalising the control of executive powers. Further studies on improving the control of the Executive by other

political mechanisms in Kuwait are thus left to others. Finally, chapter eight is devoted to addressing the study's conclusions.

In the following chapter, the study begins the first part of its examination by discussing the historical background of the research problems, and explaining the development of the constitutional system of executive powers before and after the promulgation of the Constitution of Kuwait.

Chapter Two

Historical Background to Kuwait's Democratic System

2.1 Introduction

In order to constitutionalise the powers of the Amir and the Executive, it is crucial to understand the historical roots of the present problems of Kuwait's democratic system. These arise because, 'History as a record of the human past has at all times been understood to include not only the reporting of particular facts, but also interpretation and generalization based upon the facts'.¹ Therefore, this chapter analyses Kuwait's political and constitutional history. The study seeks to define the inherent nature of the Constitution of Kuwait in terms of its purpose and ideology. By discussing the historical development of the political events that preceded the emergence of the Constitution and continued thereafter, the study examines the role of the internal and external factors that contributed to shaping the features of the applied constitutional system. The objective of this approach is to consider whether this Constitution received popular acclaim and whether it can function now as a democratic ruling system.

In view of the fact that, 'Political traditions are complex bundles of beliefs and practices that connect a community's collective past to the future',² it is essential to understand the background of the political culture and political traditions that paved the way for the dominance of the Amir and the Executive powers in the constitutional system. It has been suggested that, 'a people's willingness to surrender to the authority of the state (in the form of a king, or in the form of a particular philosophy or theology) is variable and culturally determined'.³ It is difficult, therefore, to understand the political system of Kuwait without accounting for political traditions that have been constructed in the peoples' conscience. Thus, 'the importance of the past to these traditions is reflected in such terms as 'national character' and 'political culture' concepts, implying that a community holds particular beliefs and behaves in particular ways because of its common history'.⁴

¹ Garraghan G, *A Guide to Historical Method* (Jean Delanglez ed, Fordham University Press 1946) 40.

² Tétreault M, *Stories of Democracy: Politics and Society in Contemporary Kuwait* (Columbia University Press 2000) 14.

³ Franklin D and Baun M (eds), *Political Culture and Constitutionalism: A Comparative Approach* (M E Sharpe 1995) 5.

⁴ op cit Tétreault (n 2) 14.

It is believed that by this socio-legal approach, the study can gain deeper insights into the roots of the present debate concerning the problems of the Executive's domination over the constitutional system in Kuwait. Furthermore, it is believed that the accumulation of historical socio-political events over time has played a key role in determining the current constitutional practice. Thus, in this aspect of the thesis, the study aims to explain how the Kuwait Constitution has to be understood in the context of its political history.

This chapter will first focus on the period pre-issuance of the Constitution of Kuwait in 1962. It examines the historical background of the political system starting from the origination of the state of Kuwait in 1756 and the rise of the Al-Sabah family as rulers of Kuwait.⁵ Moreover, the study will analyse the role of international and regional factors that affected the development of the political system in Kuwait and the impact of this period on the Constitution. Second, the study will provide a brief outline of the practice of powers in the constitutional era after the independence of Kuwait. From 1962 to 2012, the research will review how the Amir and the Executive have practised their de-facto powers. The study will survey the political and constitutional crises in order to address the extent of the government's implementation of the Constitution's provisions in the democratic process. The aim of this brief approach is to provide a general overview of the development of democracy post-Constitution. A deeper examination of this contemporary period is undertaken in later chapters.

In general, the contribution of this chapter to the overall thesis is to understand the roots of the problems of democracy, the separation of powers, rule of law, and human rights through examining the historical construction and the development of the Constitution of Kuwait. Three important objectives can be derived from this historical approach: firstly, to identify the development of the governing system over time; secondly, to define the role of the domestic and foreign factors that have shaped the constitutional system of Kuwait; and lastly, to address how the Amir and the Executive have exercised powers under the doctrines of the Constitution in a historical context.

⁵ Al-Saleh O, *The Constitutional System and Political Institutions in Kuwait* (Pt one, 2nd edn, Dar Alkotob Press 2003) 15.

2.2 Political System of Kuwait Pre-Constitution (1756-1961)

This section explores the historical development of Kuwait's political system before the issuance of the Constitution. The aim is to examine the origins of the political system and to plot the escalation of the Executive's power through history. It is thought that the participatory nature of Kuwaiti politics was a notable feature long before the Constitution. The people's attempts to control the Amir and the Executive's powers in this period are one platform for Kuwait's recent democratic practice. However, these ambitious attempts were disturbed by certain domestic and foreign factors. The study will address these attempts and examine the factors affecting the historical developments.

2.2.1 Origins of Kuwait's Political System

Slot claimed that, 'writing history about the Gulf States in the seventeenth and eighteenth centuries is much like writing the history of many parts of Europe in early medieval times'.⁶ This field of study is markedly limited in local sources. Most sources on the origins of the Gulf States are restricted to European traders' and travellers' observations. Kuwait was largely outside their focus of interest as they generally concentrated on other ports in the Arabian Gulf.⁷ It was not until the mid-nineteenth century that Britain began to see the strategic potential of Kuwait. On his way back from a visit to Riyadh in 1865, the explorer Colonel Pelly passed through Kuwait and reported the importance of its strategic ports for British interests.⁸

The history of contemporary Kuwait has often been associated with the migration of the Al-Utob (العتوب) tribe, and among them the Al-Sabah family, to Kuwait.⁹ Different places have claimed to have been the Al-Sabah's previous homeland. Most argue that they belong to the Arabic tribe of Aniza (عنزه) who had come originally from Najd in the centre of the Arabian Peninsula in the eighteenth century.¹⁰ Others argue that the Al-Sabah's roots belong to a Persian city called Bandar Dailum (بندر ديلم) on the other

⁶ Slot BJ, *The Origin of Kuwait* (Brill Press 1991) 7.

⁷ *ibid.*

⁸ Muir R, 'Britain and Kuwait' in Tempest P, *An Enduring Friendship: 400 Years of Anglo-Gulf Relations* (Stacey International Publishers 2006) 26.

⁹ Abdulmouti Y, *Kuwait in the Eyes of Others, Features and Characteristics of Kuwait's Society before Oil* (Center of Research and Studies on Kuwait 2003) 13.

¹⁰ Rush A, *Al-Sabah: History & Genealogy of Kuwait's Ruling Family 1752-1987* (Ithaca Press 1987) 3.

side of the Arabian Gulf.¹¹ The nature of the Arabian Peninsula climate made it difficult to rule this part of the world as a single unit.¹² This fact had allowed the locals to remain relatively independent from external powers and therefore to maintain a level of autonomy.

The Ottomans had periodically claimed the Arabian Peninsula from the sixteenth century until 1838.¹³ Around this time the Bani Khalid (بني خالد) tribe controlled the Arabian coast of the Gulf. This tribe, which was allied with the Ottomans, allowed the incoming Al-Sabah family and their companions to settle on the northeast shore of the Arabian Gulf in 1752.¹⁴ After their settlement, the people of Kuwait agreed to share the responsibility for managing their daily affairs between three families:

[T]he wealthy Al-Khalifa family were in charge of pearling and trade; the Al-Jalahma commanded the boats and extended naval protection; the Al-Sabah family provided the Governor who imposed law and order and handled Kuwait's relations with 'Bani Khalid' and with the shepherd tribes that provided the community's basic needs.¹⁵

Under this arrangement, the first ruler of contemporary Kuwait, Sheik Sabah I was selected in 1756.

Many local historians tend to emphasise the participatory nature of the politics behind the formation of Kuwait and the choice of its first Amir. For instance, Hasan Ali Al-Ibrahim believed that the selection of the first ruler was through consensus that had been reached by an oligarchy.¹⁶ Moreover, European travellers endorsed this assessment. For example, a French observer, Reclus, commenting in 1884 on the political relations between the people of Kuwait and their ruler, had remarked that, 'the people of this 'republic' (Kuwait) are one of the freest peoples in the world'.¹⁷

The process of selecting the first ruler of Kuwait reflected two significant features; firstly, the exclusivity of the Amir's position in the Al-Sabah family, and secondly, and most importantly, the requirement of the Kuwaiti people's allegiance to the selection

¹¹ Al-Yousifi M, *Kuwait: From Emergence to Independence* (The Arabian Institution for Studies and Publishing 2013) 85.

¹² Anscombe F, *The Ottoman Gulf: The Creation of Kuwait, Saudi Arabia, and Qatar* (Columbia University Press 1997) 12.

¹³ *ibid.*

¹⁴ *op cit* Rush (n 10) 194.

¹⁵ *ibid.*

¹⁶ Al-Ibrahim A, *A Political Study* (University of Kuwait Press 1975).

¹⁷ *op cit* cited in Tétreault (n 2) 286.

of their ruler. In that way, the governing system of Kuwait differed from other monarchies in the Arabian Peninsula,

Unlike the ruling families of countries like Bahrain and Saudi Arabia, they did not establish their dynasty by the sword. Nor could they claim descent from the Prophet Muhammad in the manner of the Imams of the Yamen or the Sharifs of Mecca and their descendants - the Kings of the Hejaz, Iraq and Jordan; instead they are said to have acquired the right to rule through a voluntary division of responsibilities between themselves and the other leaders of the community with whom they first arrived in Kuwait as settlers in the eighteenth century.¹⁸

Until the late 1800s, much actual power and social superiority rested with the merchant families, whose work produced the income on which Kuwait depended for its existence:¹⁹ ‘this historical division of tasks between the merchants and the Al-Sabah is known in Kuwait and throughout the Gulf as the ‘pact’ that accounts for Kuwait’s unique political stability in an area prone to violent feuds and tribal warfare’.²⁰ This has driven the suggestion that:

Alone among the Gulf states, Kuwait had a tradition of check-and-balance between the ruler and the mercantile elite long before the Western notion of democracy was introduced into the region, and is the reason why the idea of parliamentary politics has survived there in spite of the odds.²¹

This political arrangement between the ruler and the people of Kuwait succeeded, for a limited time, in providing the state with a stable governing system based on mutual obligations which formed the basis of Kuwait’s, relatively, democratic traditions. From 1756 until 1896, six rulers of the Al-Sabah dynasty assumed power based on the selection of the Al-Sabah family and the allegiance of the people of Kuwait: Sabah I (1756-1762); Abdullah Bin Sabah (1762-1812); Jabir Bin Abdullah (1812-1859); Sabah Bin Jabir (1859-1866); Abdullah Bin Sabah II (1866-1892); and Mohammad Bin Sabah (1892-1896). Throughout these rulers’ reigns, the political system of Kuwait continued to reflect the relatively participatory nature of politics between the Amir, who consulted the leading figures on major decisions, and merchants, who voluntarily

¹⁸ op cit Rush (n 10) 2.

¹⁹ op cit Tétreault (n 2) 14.

²⁰ Longva A, *Walls Built on Sand: Migration, Exclusion and Society in Kuwait* (Westview Press 1997) 22.

²¹ *ibid.*

financed him in a mutual obligation arrangement.²² As a result, ‘unlike some of the other ruling families in the Gulf States, Al-Sabahs’ past is free of violence as a means to power’.²³ However, it was not until the reign of Mubarak ‘the Great’ (1896-1915) that Kuwait experienced the power of autocracy following his murder of his two brothers, Mohammad the Ruler and Jarrah Bin Sabah.

2.2.2 Rise of Al-Sabah’s Power

On 17 May 1896, Mubarak seized power after assassinating his brothers, and declared himself as the seventh ruler of Kuwait.²⁴ This incident marked the first transition of power to the next Amir through violence. Mubarak broke the stable tradition which required both the selection of the Al-Sabah family members to provide the next Amir among them, and the allegiance of the people of Kuwait in this selection.²⁵

Many stories have been offered to explain the motivations behind Mubarak’s coup and the murder of his brothers. One of the explanations was that he was opposed to the former Amir’s policies, which involved remaining attached to the Ottomans’ rule, as Mubarak preferred that Kuwait kept its autonomy.²⁶ In fact, the most reasonable theory behind his coup was his quest to acquire personal power.²⁷ However, most of the studies agreed that Mubarak Al-Sabah (1896-1915) shaped the basics of Kuwait’s contemporary political features.²⁸

It was during his reign that Kuwait started to deal with the great powers in the world.²⁹ Mubarak, firstly, sought Constantinople’s blessing on his coup, but the Ottomans hesitated to support him due to the split in the Al-Sabah family which his action had caused. In a shrewd move, he then resorted to seeking support elsewhere, and his attempts finally succeeded in engaging British attention due to the importance of Kuwait’s location.³⁰ The British, who were keen to block the Russians’ and the

²² op cit Rush (n 10) 2.

²³ Zahlan R, *The Making of the Modern Gulf States: Kuwait, Bahrain, Qatar, the United Arab Emirates and Oman* (Ithaca Press 1998) 96.

²⁴ Kechichian J, *Power and Succession in Arab Monarchies; A Reference Guide* (Lynne Rienner Publishers 2008) 104.

²⁵ Al-Ghanim S, *The Reign of Mubarak-Al-Sabah: Shaikh of Kuwait 1896-1915* (IB Tauris 1998).

²⁶ op cit Kechichian (n 24) 104.

²⁷ op cit Anscombe (n 12) 93.

²⁸ op cit Al-Saleh (n 5) 50.

²⁹ op cit Zahlan (n 23) 35.

³⁰ op cit Muir (n 8) 26.

Germans' attempts to enter the Gulf's warm waters, welcomed Mubarak's approach.³¹ In addition, the view that Mubarak was, relatively, an independent ruler stimulated the British to initiate formal relations with Kuwait, which was concealed from the Ottomans.³² In fact, Mubarak took advantage of the weakness of the Ottoman Empire to gain benefits for Kuwait,³³ 'The British gave Mubarak substantial political and economic independence from the Ottoman Empire, to which Kuwait remained nominally attached until World War I, as the result of a series of mostly secret agreements beginning in 1899.'³⁴

On 23 January 1899, Malcolm John Meade, the British Political Resident of the Persian Gulf, signed the Treaty of Protection of the Sheikdom with Sheik Mubarak.³⁵ It described Kuwait simply as being 'in a treaty relation with Britain', in which it had no recognised legal status.³⁶ Therefore, Kuwait, as with most of the Gulf States, was not considered to be a colony, mandate or protectorate.³⁷ Such a special nature of relationship with Britain, 'preserved their social traditions and political systems, thus permitting the continued adherence to Arab tribal customs.'³⁸ However, it afforded the rulers a certain protection for their internal status since, 'British policy officially was against interfering in the internal affairs so long as British interests were not affected.'³⁹ This type of protection afforded them the moral and political support they needed from a great power such as Britain but also allowed them a free hand in the conduct of local affairs.⁴⁰

After his formal agreement with the British in 1899, Mubarak initiated an autocratic rule in Kuwait. Consequently, 'bolstered by Britain's political and financial support, Mubarak progressively distanced himself from the country's economic elite'.⁴¹ He began to rule independently and raise taxes heavily without consulting the prominent

³¹ op cit Muir (n 8) 27.

³² op cit Anscombe (n 12) 102.

³³ ibid 95.

³⁴ op cit Tétreault (n 2) 39.

³⁵ op cit Kechichian (n 24) 104.

³⁶ To read more about this agreement see Lauterpacht E and others, *The Kuwait Crisis; Basic Documents*, vol 1 (Cambridge University Press 1991) 9.

³⁷ op cit Zahlan (n 23) 20.

³⁸ ibid.

³⁹ ibid 22.

⁴⁰ ibid.

⁴¹ Baaklini A and others, *Legislative Politics in the Arab World; The Resurgence of Democratic Institutions* (Lynne Rienner Publishers 1999) 127.

merchants, which centralised the Sheikdom's local affairs in his own hands.⁴² Overall, most historians agreed that Kuwait, throughout the reign of Mubarak, was an autocracy.⁴³

The Kuwaiti-British ties also affected the reigns of later Sheiks who ruled Kuwait until independence and therefore shaped parts of its political and constitutional features. The system of this treaty allowed the British to deal only with the ruler. This practice strengthened his personal status and, over time, it contributed to the institutionalisation of his position.⁴⁴ Moreover, to some extent, the British influence was present on several occasions in relation to internal affairs, as will be shown in a later part of this chapter.

After Mubarak's death, Kuwait was ruled by his sons Jabir (1915) and Salem (1917). Salem seemed to prefer supporting the Ottomans against the allies during the First World War.⁴⁵ This action outraged the British who warned him that they would not rescue Kuwait if it were subject to foreign threat.⁴⁶ During Salem's reign, Kuwait had been attacked by the Ikhwan, (الأخوان), a religious force under the influence of Abdul-Aziz Ibin Saud, the Prince of Najd. This attack in 1920, named The Battle of Jahra, a town south of Kuwait, was considered by most Kuwaiti historians as by far one of the most difficult times for Kuwait.⁴⁷ Ironically, it has been argued that Britain was behind the invasion. In his assessment of the reaction of the British to Salem's alignment to the Ottomans, Abo-Hakmah suggested that Ibin Saud, the British ally, was instructed by his allies to urge the Ikhwan to attack Kuwait.⁴⁸ Salem, who chose not to ask for aid from the British in the face of this threat, decided to rely on his own resources and the support of the people of Kuwait. However, the invaders were well prepared, and the Kuwait army was heavily defeated. The Ikhwan then besieged Jahra for two months until Salem was compelled to ask for help from the British. They quickly intervened by sending a warship and aeroplanes, which dropped leaflets on Wahhabi encampments warning them to stop this aggression.⁴⁹ In order to ensure the protection of Mubarak's beleaguered successor, Sheik Salem, 'it took the combined forces and a novel use of

⁴² op cit Baaklini (n 41) 127.

⁴³ op cit Al-Saleh (n 5) 50.

⁴⁴ op cit Zahlan (n 23) 27.

⁴⁵ Abo-Hakmah A, *The Modern History of Kuwait: 1750-1965* (Luzac & Company 1983) 132.

⁴⁶ *ibid.*

⁴⁷ op cit Zahlan (n 23) 96.

⁴⁸ op cit Abo-Hakmah (n 45) 145.

⁴⁹ Joyce M, *Kuwait 1945-1996: An Anglo-American Perspective* (Frank Cass Publishers 1998) 5.

aircraft to shift the camel-mounted Ikhwan out of Kuwait territory'.⁵⁰ This shocking experience, which remained in Kuwaitis' memories for a long time, also outlined, for Kuwait's rulers, the significance of the need for their powerful ally. As a result, the British, henceforth, were always approached for consultation or support.

After the death of Mubarak, his two sons ruled, as had their father, without consulting the merchants and prominent figures of Kuwait and ignoring their demands for the establishment of an elected consultative council as a way of checking the ruler's powers.⁵¹ In fact, the Al-Sabah family, following Mubarak's agreement with the British, gained powerful outside support and became, thus, less reliant on local support. However, the people's demands for sharing power with the Al-Sabah family remained on the public agenda for a long time. In the following section, the study will discuss these attempts.

2.2.3 Influence of Domestic Reform Movements

After Salem's death in February 1921, a group of prominent figures held a meeting with the Al-Sabah family to renew the demands of the people to participate in running the country's affairs:⁵² 'The merchants were quick to inform the ruling family that they would support whichever of the candidates for the succession expressed a willingness to establish an advisory council'.⁵³ The merchants successfully concluded a charter with the Al-Sabah family which contained specific reform terms. The most important of these were: reforming the mechanism for electing candidates among the Al-Sabah dynasty, the nomination of three candidates from the Al-Sabah family⁵⁴ and the establishment of an elected body to run the country's affairs.⁵⁵ This agreement reinstated the importance of the people's alignment with the new Amir which had been diminished since Mubarak's coup in 1896. This tradition was applied until it was embedded in the Constitution in 1963.⁵⁶

⁵⁰ op cit Muir (n 8) 29.

⁵¹ op cit Baaklini (n 41) 172.

⁵² op cit Al-Saleh (n 5) 66.

⁵³ op cit Baaklini (n 41) 172.

⁵⁴ Three candidates were trying to succeed Sheik Salem; Abdullah Al-Salem, Hamad Al-Mubarak, and Ahmad Al-Jabir.

⁵⁵ op cit Al-Saleh (n 5) 67.

⁵⁶ Article 4 of the Constitution: 'Kuwait is a hereditary Emirate, the succession to which shall be in the descendants of the late Mubarak Al-Sabah'.

Ahmad Al-Jabir (1921-1950), who accepted these conditions, then became the tenth ruler of Kuwait.⁵⁷ However, in contrast to what he had agreed by this charter, in 1921 he established, instead, a consultative council to which he appointed twelve members. This body was made up of powerful merchants and prominent male figures who had been appointed by the Amir; women in that period were excluded from any type of political participation. Thus, it could be argued that such an institution contradicted democracy and its ethical values. Therefore, it is difficult to claim that *Majlis Alshura* (مجلس الشورى) was the origin of Kuwait's democratic practice. However, it could be argued that it paved the way to initiate the institutionalisation of the political participation of the Kuwaiti people in their country's affairs. The Amir, who intermittently consulted this council, however, did not wait too long to abolish it and returned to rule in the same manner as his predecessors.⁵⁸

During his reign, Kuwait faced important political and economic challenges. The global depression between the two world wars, along with the competition of simulated pearls from Japan, caused the decline of the prime pearl industry of Kuwait.⁵⁹ Moreover, the economic war on Kuwait by Abdul-Aziz, the King of Saudi Arabia, prevented the Bedouin tribes from shopping in Kuwait.⁶⁰ Such challenges had inflicted economic hardship on Kuwait and its merchants who were also suffering from the government's increasing taxes. It is argued that, 'In times of economic stress, political activity inevitably increases'.⁶¹ Under such circumstances, it was increasingly difficult for the Amir to continue ignoring the merchants' calls for reform. Moreover, in the late 1930s, Kuwait's educated population was becoming more aware of the political developments in the Arab world. The conflict between Jews and Arabs changed the feelings towards the British at that time, as they were viewed as supporting the Zionists.⁶² Thus, the Al-Sabah became hard-pressed to defend their close association with the British who were keen, in turn, not to show any kind of interference in favour of the rulers.⁶³

⁵⁷ op cit Zahlan (n 23) 36.

⁵⁸ ibid.

⁵⁹ op cit Joyce (n 49) 6.

⁶⁰ op cit Abo-Hakmah (n 45) 155.

⁶¹ op cit Zahlan (n 23) 36.

⁶² ibid.

⁶³ op cit Baaklini (n 41) 127.

While the growing reform movements in the Arab world had gained some support among Kuwaitis, a group of merchants formed a secret group, Al-Kottlah Al-Wataniya, (الكتلة الوطنية) (the National Block), which worked intensively to educate the people of Kuwait regarding their political and constitutional rights.⁶⁴ In addition, a recently signed oil concession agreement with the British raised fears that the Al-Sabah family might monopolise its revenues.⁶⁵ Such a combination of socio-economic and political developments urged Ahmad Al-Jabir to recognise the merchants' demands to establish the first elected parliament in the Arabian Peninsula. It has been claimed that the Amir Sheik Ahmad Al-Jabir took Britain's advice to agree to their demands due to an explosive situation which might threaten British interests in the region.⁶⁶ The British Commissioner in Kuwait, Colonel de Gaury, advised Ahmad Al-Jabir to consider adopting a type of democratic format to allow the people of Kuwait to run the country's affairs.⁶⁷

Under such pressure, the Ruler agreed to sign the *Alwathiga*, (الوثيقة), on 9 July 1938, which was deemed the first written Constitution.⁶⁸ This document, although it was brief, contained important constitutional principles, which could lead to a promising start for a democratic system in Kuwait.⁶⁹ In fact, it was commented that advanced democracies such as Britain and France did not start their constitutional practices with more than what this document offered.⁷⁰ The most important features of this document, although it was considerably brief, were: firstly, it contained one of the important democratic principles, the assurance of popular sovereignty through the elected representatives; secondly, it offered control of the public budget; and thirdly, it combined the legislative and executive powers in one body, the *Al Majlis Al-Tashreiee'* (المجلس التشريعي).⁷¹

Under this Constitution, elections were held in the same year. Kuwaitis elected fourteen representatives to run the first legislative assembly in the country.⁷² The Crown Prince,

⁶⁴ op cit Al-Saleh (n 5) 102.

⁶⁵ Crystal J and Al-Shayji A, 'The Pro-Democratic Agenda in Kuwait: Structure and Context' in Korany B and others (eds) *Political Liberalization & Democratization in the Arab World* (Lynne Rienner Publishers 1998) 102.

⁶⁶ Al-Adsani K, 'Half Year of Parliamentary Rule' (1947) cited by Al-Saleh (n 5) 6.

⁶⁷ Abu Hakmah A, *The Modern History of Kuwait* (1st edn, That Alsalasel Press 1984) 365.

⁶⁸ op cit Al-Saleh (n 5) 107.

⁶⁹ ibid 120.

⁷⁰ Abdulfattah H, *The Principles of the Constitutional System of Kuwait* (Dar Al Nahda Press 1968) 110.

⁷¹ op cit Al-Saleh (n 5) 110.

⁷² ibid 107.

Sheik Abdullah Al-Salem, chaired this Assembly. However, it was an exclusive election as just 150 prominent families enjoyed the right to vote, whilst the population of Kuwait at that time exceeded 60,000 inhabitants.⁷³ Some arguments to justify this exclusive franchise claimed that Kuwait was an open market for immigrant workers, and the country, in the early days, lacked a formal election register to show who was Kuwaiti and who was not, so it was thus difficult to hold an open election.⁷⁴ Also, this elite of voters represented the merchants who symbolised the powerful political power at that time.

This elected assembly lasted just five months, although it made some critical political and administrative achievements.⁷⁵ The powers of this body extended to considering foreign affairs and oil agreements with Western companies. Britain saw these powers as threatening its interests, as specified in the 1899 Protection Agreement with Kuwait.⁷⁶ Such threats resulted, therefore, in putting an end to those powers.⁷⁷ The British, who preferred to deal directly with the Amir, were opposed to any political changes that could lead to them having to deal with an elected body, and therefore, they advised the Amir to dissolve the Assembly. Accordingly, he followed this advice and the country then reverted to autocracy.⁷⁸

Although this elected body lived for nearly half a year, in this time it sought to control all the country's affairs including the newly discovered power, the oil revenues. These overreaching attempts were resisted by both Al-Sabah and the British.⁷⁹ Ahmad Al-Jabir, who had no desire to give up his powers to the merchants, armed with the support of his family, allied Bedouin tribes and Shi'a, dissolved the Al-Majlis on 21 December 1938.⁸⁰ He then called for a new election on the condition that he had a veto power over any decision of Al-Majlis.⁸¹ The re-elected opponent members later rejected this limitation and the Amir dissolved the assembly again, prior to its first meeting. After

⁷³ op cit Joyce (n 49) 6.

⁷⁴ op cit Al-Adsani (n 66) 105.

⁷⁵ op cit Al-Saleh (n 5) 66.

⁷⁶ To read more about this agreement see, Lauterpacht E and others, *The Kuwait Crisis; Basic Documents* vol 1 (Cambridge University Press 1991) 9.

⁷⁷ op cit Al-Saleh (n 5) 121.

⁷⁸ Al-Tuwajri H, 'Political Power and Rule in Kuwait' (PhD thesis, University of Glasgow 1996) 29.

⁷⁹ op cit Baaklini (n 41) 174.

⁸⁰ Herb M, 'Kuwait and the United Arab Emirates' in Angrist MP *Politics & Society in the Contemporary Middle East* (Lynne Rienner Publishers 2010) 338.

⁸¹ op cit Joyce (n 49) 6.

three days, the Amir's troops arrested Mohammad Al-Munayyis, one of the members of Al-Majlis, while he was distributing leaflets among the crowds calling for the deposition of the Al-Sabah family. Eventually, he was brought to trial and was then executed.⁸² The country returned to autocracy again until its independence from the British in 1961.

It is arguable that this short parliamentary experience reflected a recurrent popular ambition to have democratic practices.⁸³ In addition, the elected Assembly sought to apply powers that aimed precisely to control the Amir's unlimited powers.⁸⁴ However, a major weakness in this experience is that it was confined exclusively to powerful notables. Consequently, this exclusivity ended with its swift collapse, mainly because, 'by confining candidacy and membership to the notables, it naturally incurred the resentment of the rest of the population'.⁸⁵ Thus, the merchant elite alone had to face Ahmad Al-Jabir who was allied with Shia's, Bedouin tribes, and the majority of the people of Kuwait. Consequently, the event was viewed more as a conflict of elite interests between the merchants and the Amir and seemed to be less of a public issue. Nonetheless, despite this disadvantage, 'its popularity gave the idea of formal representation a privileged place in Kuwaiti popular history'.⁸⁶ In particular, because it was an indigenous, not a colonial, creation which Britain was opposing, it offered the some legitimacy for this institution.⁸⁷

Moving on, the outbreak of World War II delayed the first shipment of Kuwait's oil until 1946. This then became the new source of Al-Sabah's power and added more obstacles to the national reform efforts. In fact, 'petroleum wealth is at the root of many of the Middle East's economic, social, and political ailments and presents formidable challenges for the region's democratic reforms'.⁸⁸ In the next section, the study discusses the role of this new formula of power or, as argued, the 'curse of oil'.⁸⁹

⁸² *ibid.*

⁸³ *op cit* Al-Saleh (n 5) 111.

⁸⁴ *op cit* Baaklini (n 41) 172.

⁸⁵ *op cit* Zahlan (n 23) 38.

⁸⁶ *op cit* Crystal and Al-Shayji (n 65) 102.

⁸⁷ *ibid.*

⁸⁸ Ross M, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Yale University Press 2013) 2.

⁸⁹ *ibid.*

2.2.4 Oil: the New Formula of Power

The fact that, ‘oil has substantially altered the relationship between state and society in the Arab monarchies of the Gulf, is difficult for any analyst to dispute’.⁹⁰ After exporting its first shipment in 1946, Kuwait started to experience major political, social and economic changes.⁹¹ However, the story of most of these changes is beyond the scope of this research. As far as this study is concerned, the question is how this valuable commodity affected the political system of Kuwait. Most importantly, the argument is that oil allowed the development of a source of political support for the Al-Sabah family who over time became disconnected from the need to have support from other elites within Kuwait itself. This development affected the balance between Al-Sabah and the power holders in Kuwait, which, in turn, weakened the efforts to control the Executive’s powers.

The increasing flow of oil revenues led to the government’s financial autonomy. After long dependence on the taxation income gained from merchants and locals in Kuwait, the government became the wealthiest independent financier.⁹² Consequently, as ‘It is a truism in the rentier states literature that: no taxation, hence no representation. Under this banner, Al-Sabah did not have to worry, anymore, about taxpayers pressuring them for accountability’.⁹³

The nature of the British Protection Agreement and oil exploration concessions provided a means of channelling incomes directly to the Al-Sabah family.⁹⁴ Oil allowed the capture of resources by the Amir which were used to win influence and power.⁹⁵ In time, the Amir became the main financier and the dominant player in the local economy.⁹⁶ As a result, Kuwait almost behaved as a paternalistic state which provided services to its citizens through a corporatist environment that sought to create tied

⁹⁰ Gause GF, *Oil Monarchies: Domestic and Security Challenges in Arab Gulf States* (The Council on Foreign Relations 1994) 78.

⁹¹ op cit Al-Yousifi (n 11) 267.

⁹² Davidson C, *After the Sheiks, the Coming Collapse of the Gulf Monarchies* (Hurst & Company 2012) 24.

⁹³ op cit Crystal and Al-Shayji (n 65) 108.

⁹⁴ op cit Davidson (n 92).

⁹⁵ Gökhan B, *Hybrid Sovereignty in the Arab Middle East: The Cases of Kuwait, Jordan and Iraq* (Macmillan 2008).

⁹⁶ op cit Gause (n 90) 43.

relationships based on economic endowment,⁹⁷ whilst merchants, the former political power, simply served as contractors to the government.⁹⁸ Over time:

The oil revenues gave the state the resources to buy out those groups that historically had a say in the distribution of the state's revenues, indeed to buy out any group with an articulated sense of political entitlement.⁹⁹

By exercising such a vital role, the government used its spending to control both public and private sectors to grant or deny benefits, 'with the aim of gaining political loyalty or being able to deny it to those who opposed the Government'.¹⁰⁰ The oil revenues thus, which jumped from \$760,000 in 1946 to \$169 million in 1953, helped to create massive social changes and enabled a range of government-related jobs, which in turn helped to depoliticise the population.¹⁰¹ These policies created a relationship that was a form of patronage for its citizens and allowed the state, through a number of apparatuses, to control society, as well as through its secret police and military.¹⁰² This policy continued until recently; according to the latest employment statistics, 90.8% of the Kuwaiti work force are government employees.¹⁰³ Consequently, the bulk of Kuwaiti voters were actually government employees, which made political participation for them a more sensitive issue.

The rulers of Kuwait, after their long conflict with the merchants who made demands for political reforms, 'used economic inducements to gain the loyalty and break the autonomy of the Bedouins in their state; they offered housing and jobs, primarily in the police and military, to the Bedouins in exchange for political support'.¹⁰⁴ Through this policy, the government settled the tribes and made them economically dependent upon the Al-Sabah ruling family who used their support in the face of the merchant elite. However, the merchant elite derived their power from both economic and social factors.

⁹⁷ See Casebeer K, 'Aliquippa: The Company Town and Contested Power in the Construction of Law' (1995) 43 Buffalo Law Review 617; Green H, *The Company Town: The Industrial Edens and Satanic Mills That Shaped the American Economy* (Basic Books 2010).

⁹⁸ op cit Al-Yousifi (n 11) 267.

⁹⁹ op cit Gause (n 90) 42.

¹⁰⁰ ibid 43.

¹⁰¹ op cit Baaklini (n 41) 174.

¹⁰² ibid.

¹⁰³ Central Statistical Bureau, 2013 Report.

¹⁰⁴ Gause GF, 'The Persistence of Monarchy in the Arabian Peninsula: A Comparative Analysis' in Kostiner J (ed), *Middle East Monarchies: The Challenge of Modernity* (Lynne Rienner Publishers 2000) 174.

This well-established structure enabled the merchants to have the strength to negotiate their withdrawal from politics in exchange for wealth.¹⁰⁵ Thus, the oil wealth enabled Al-Sabah to, ‘convince the merchants to adopt a lower political profile’.¹⁰⁶ Overall, ‘in return for institutionalized economic advantages, including a sponsorship system and exclusive import licences, most of the merchant class tacitly agreed to leave governmental decisions to the Al-Sabah’.¹⁰⁷

After the death of Ahmad Al-Jabir, Abdullah Al-Salem (1950-1965) took the throne at a time when Kuwait’s income from oil was on the increase. In his reign, the developments in both material and human fields were remarkable.¹⁰⁸ One of the positive impacts of oil was the increased development of education among Kuwait’s population.¹⁰⁹ This ‘produced a growing number of citizens who had the intellectual resources and proclivity to voice their political demands in general terms’,¹¹⁰ which led the people of Kuwait to become more involved in regional political issues in the Arab world, and also increased the attention of international powers towards Kuwait, as discussed in the coming sections.

In summary, oil has led to enormous political, social and economic changes in the state’s structure, and has reshaped the historical dynamic between state and society in Kuwait.¹¹¹ Most importantly, oil revenues granted the Al-Sabah family and the Executive a stronger political position vis-à-vis the other elites in the state, and therefore, they became less dependent on their financial support. Consequently, ‘much of these elites’ strength had their basis in the opposition potential they had displayed earlier, particularly in the 1938 reform movement’¹¹² and they found themselves with less bargaining power than exercised in the past. This fact has hindered the reform efforts to control the Executive’s power, which became stronger relative to potential domestic competitors.

¹⁰⁵ op cit Crystal and Al-Shayji (n 65) 110.

¹⁰⁶ op cit Baaklini (n 41) 174.

¹⁰⁷ Crystal J, ‘Coalitions in Oil Monarchies: Kuwait and Qatar’ (1989) 21 *Comparative Politics Journal* 4, cited in Davidson C *Powers and Politics in the Persian Gulf Monarchies* (Hurst & Company 2011) 93.

¹⁰⁸ op cit Abo-Hakmah (n 45) 158.

¹⁰⁹ op cit Crystal and Al-Shayji (n 65) 108.

¹¹⁰ op cit Gause (n 90) 83.

¹¹¹ op cit Crystal and Al-Shayji (n 65).

¹¹² Koch C, ‘Kuwait’ in Nohlen D and others (eds), *Elections in Asia and the Pacific: A Data Handbook* vol 1 (Oxford University Press 2001) 156.

2.2.5 Influence of Foreign Powers on Political Life

Another important impact of oil is the increasing attention of great and regional powers on this oil rich state. Oil has created regional challenges and threats for Kuwait from its neighbours, which forced the state to constantly seek protection from a more powerful ally. This exposed the state to the influence of international powers.

2.2.5.1 British Consolidation of Al-Sabah

Based on a series of secret agreements, beginning with the Treaty of Protection in 1899, the British enlarged Mubarak's powers tremendously and gave him significant political and economic independence from the Ottomans.¹¹³ It has been claimed that, 'Mubarak received large sums of money each time he signed a new treaty ceding another portion of Kuwait's foreign policy autonomy to Britain.'¹¹⁴ Steadily, British influence spread over the Sheikdom's territory, trade, and its, as yet, undiscovered oil wealth. In exchange, Britain contributed to Mubarak's financial autonomy from domestic elements. The British also assured Mubarak that his sons, rather than the Al-Sabah remaining dynasty, would succeed to the throne.¹¹⁵

After the discovery of oil, Kuwait became even more important to the British.¹¹⁶ In 1934, the Kuwait Oil Company, a company registered in Britain and owned equally by the Anglo-Iranian Oil Company and the American Gulf Exploration Company, acquired a concession that covered most of Kuwait's land and its territorial waters.¹¹⁷ In 1951, with the aid of huge oil revenues, the government launched a massive state development plan. British firms were the main contractors on all major projects relating to roads, schools and hospitals, in addition to their domination over oil projects.¹¹⁸ At that time, therefore, British-Kuwaiti relations were greatly interrelated. One does not need to look further than British official documents to consider how Kuwait became so important to them. During the period of pre-independence, based on the fact that, '50 percent of the United Kingdom's consumption of oil was derived from Kuwait

¹¹³ op cit Koch (112).

¹¹⁴ op cit Tétreault (n 2) 39.

¹¹⁵ op cit Tétreault (n 2).

¹¹⁶ Smith S, *Kuwait 1950-1965: Britain, the Al-Sabah, and Oil* (Oxford University Press 1999).

¹¹⁷ op cit Joyce (n 49) 7.

¹¹⁸ *ibid* 2.

alone’,¹¹⁹ the British became more concerned with Kuwait’s stability and thereby its foreign and internal affairs.

On one occasion, whilst referring to Britain’s total defence bill of £1,500m, an official from the Foreign Office remarked about colonialism and commented that the Emirate of Kuwait was, ‘perhaps the only place where it can be shown to yield a positive dividend, if only by helping [us] to preserve a state of affairs which is still very favourable to us financially’.¹²⁰

On another important occasion, this Anglo-Kuwaiti tie touched internal sovereign relations as it was stated in the documents of the Secretary of State for Foreign Affairs that, ‘The Ruler of Kuwait has recently given striking proof of his continued confidence in Her Majesty’s Government by consulting the Political Resident for the first time about the problem of the succession and asking his views about various candidates.’¹²¹ In 1950, in order to strengthen their influence, the British had pressed the ruler to accept British advisors in several governmental positions.¹²² Moreover, the British were interested in the state’s local affairs to the extent of discussing the limits of any potential political reforms in Kuwait. On 7 June 1957, during a Cabinet meeting, it was disclosed that British representatives in Tehran, Baghdad and Bahrain, on discussing the future of British policy in the Persian Gulf,¹²³ believed, due to accelerated national demands for political reforms, that Britain should work towards adopting a temporary policy to ensure that any changes must not affect its interests. They claimed:

It is particularly important that any liberalization of the regimes designed to meet genuine grievances or to mollify reformist elements shall not go so far as to cripple the powers of the ruling families or compel them to bow to nationalist demands at the expense of their own attachment to us.¹²⁴

Overall, due to the mutually beneficial relationship between the British and the Al-Sabah family, the British supported the rule of Al-Sabah and provided them with political, economic and military support.¹²⁵ They were opposed to any political change

¹¹⁹ The National Archive Documents, ‘Memorandum by the Secretary of State for Foreign Affairs’ Catalogue Reference: CAB/129/87 Image Reference: 0038, 1.

¹²⁰ Minute by Beith JGS, 23 January 1962, FO 371/156670/B 1019/2, cited in op cit Smith (n 116) 2.

¹²¹ op cit (n 119) 6.

¹²² op cit Joyce (n 49) 18.

¹²³ Arab countries argue that this Gulf is named ‘The Arabian Gulf’.

¹²⁴ op cit (n 119).

¹²⁵ op cit Davidson (n 92) 28.

that might affect their interests. In exchange, Al-Sabah with the aid of their powerful ally became less reliant on local support than they had in the past, particularly with their increasing wealth of the revenue from oil.¹²⁶ The domestic political movements in Kuwait, therefore, were unable to press their demands for reform. The merchants, who were at that time the only elite with the ability to lobby effectively to control the government, withdrew from the political scene in exchange for wealth. However, far from the idea that Britain was blindly clinging to an imperial past until economic reality forced a withdrawal,¹²⁷ the documentary record demonstrates that British policymakers were constantly reviewing the costs and benefits of Britain's deployments in the Gulf, and in general the decolonisation of the area east of the Suez,¹²⁸ especially following the 1956 Suez War.¹²⁹ It was not until independence in 1961, 'when Britain formally withdrew its control over the increasingly prosperous and autonomous sheikhdom', that domestic political activity started to flourish again, 'after feeling the pull of Arab nationalism and Nasserism'.¹³⁰

Nevertheless, the process of the alignment of foreign power was a constant feature that characterised the political system in Kuwait. When the British left after independence,¹³¹ another foreign power entered the political scene.¹³² It was suggested that, 'Kuwait would not be a Middle East state today had the United States not constructed an international military coalition to turn back Iraq's annexation of the country and fought the Gulf War of 1990-1991'.¹³³

2.2.5.2 Arab Movement Led by Nasserism

After the oil revolution in Kuwait, the government launched massive development plans in various sectors of the state. Among the measures was raising the educational

¹²⁶ See Devereaux D, *The Formulation of British Defense Policy Towards the Middle East, 1948–56* (St Martins Press 1990).

¹²⁷ Sato S, 'Britain's Decision to Withdraw from the Persian Gulf, 1964–68: A Pattern and a Puzzle' (2009) 37 *Journal of Imperial and Commonwealth History* 99.

¹²⁸ Heinlein F, *British Government Policy and Decolonisation, 1945-63* (Routledge 2002).

¹²⁹ op cit Davidson (n 92) 28; Pickering J, *Britain's Withdrawal from East of Suez* (Palgrave 1998).

¹³⁰ op cit Baaklini (n 41) 175.

¹³¹ Rabi U, 'Britain's 'special position' in the Gulf: Its origins, dynamics and legacy' (2006) 42(3) *Middle Eastern Studies* 351.

¹³² Smith S, 'Power Transferred? Britain, the United States, and the Gulf, 1956–71' (2007) 21 *Contemporary British History* 1; Ovendale R, *Britain, the United States, and the transfer of power in the Middle East, 1945-1962* (Leicester University Press 1996).

¹³³ Gause GF, 'The Impact of International Politics' in Angrist M (ed), *Politics & Society in the Contemporary Middle East* (2nd edn, Lynne Rienner Publishers 2013) 58.

level of its people through, ‘a widespread introduction of educational facilities’.¹³⁴ Another indication of change was the launch of the first public radio station which started its broadcasts in 1951.¹³⁵ Such developments connected the well-educated youth of Kuwait with what was happening in the Arab world.

In July 1952, after the revolution of Jamal Abdul-Nasser and the Free Officers Movement, which sent King Farouq into exile, the revolutionary Egyptian Government launched a radio station to address its broadcasts to the Arab nations.¹³⁶ Most Arabs were delighted by the agreement that Cairo reached with London in 1954 providing for the evacuation of all British troops from the Suez Canal zone. Moreover, in 1956, Abdul-Nasser’s announcement of the nationalisation of the Suez Canal Company stimulated the Arab nations against the British presence in their countries. In this way, ‘Nasser’s appeal to people over the heads of their governments had given birth, in every Arab state, to a faction of “Nasserites” who were encouraged by Egypt to undermine the authority of their own governments.’¹³⁷ From 1949 to 1952, Arabian social and political enthusiasm led to domestic upheaval. Military coups had overthrown several Arab leaders who were regarded as Britain’s friends and who were replaced by those more radical.¹³⁸ In Kuwait, around 4,000 people, inspired by this propaganda, ‘gathered to hear pro-Nasser speeches. Although the crowd dispersed quietly, a hard core of 200 demonstrators clashed with the Kuwaiti security services’.¹³⁹

Many Kuwaitis were, therefore, affected by the Egyptians’ revolutionary anti-Western rhetoric. Among others was Dr Ahmad Al-Khatib, a leading Arab nationalist figure who challenged the British presence in Kuwait and ignited the demands for an elected parliament.¹⁴⁰ After the Anglo-French-Israeli attack on Egypt in October 1956, the Kuwaitis, who were following Cairo’s radio broadcasts, responded with massive demonstrations and called for the British to leave Kuwait.¹⁴¹ As a result of these heated events, Abdullah Al-Salem, ‘like other Gulf rulers, was torn between the demands of

¹³⁴ op cit Zahlan (n 23) 40.

¹³⁵ op cit Joyce (n 49) 4.

¹³⁶ ibid 31.

¹³⁷ Monroe E, *Britain’s Moment in the Middle East 1914-1956* (Johns Hopkins Press 1963) 208.

¹³⁸ ibid.

¹³⁹ op cit Smith S (n 132)12.

¹⁴⁰ op cit Baaklini (n 41) 175.

¹⁴¹ op cit Joyce (n 49) 39.

his fellow-Arabs, and his loyalty to the British'.¹⁴² These developments, which raised British concerns, led Sir Rupert Hay, the Political Resident, to state that, 'the informed population might begin to criticize patriarchal rule in Kuwait'.¹⁴³ In accordance with these concerns, in 1959, after the unification of Egypt and Syria, Dr Ahmad Al-Khatib suggested immediate unification with the United Arab Republic.¹⁴⁴ Moreover, Jasim Al-Qatami, a former Head of the Police Department, who failed to turn up for duty when he refused the ruler's instructions to prohibit demonstrations, declared that, 'for 300 years the Al-Sabah family has ruled Kuwait with tribal rules, these have long been out of date and against the tide of nationalism, which it is time to follow'.¹⁴⁵ As a result, it has been suggested in this regard that the:

[P]rincipal threat to the British position in the Gulf seems to come, immediately, not from the rulers who recognize the value to themselves of our relationship with them but from the dissident and reformist elements over whom Egypt exercises the greatest influence.¹⁴⁶

Under the pressure of the rising forces of Arab nationalism, 'the Working Party urged that it would clearly be wise to go before the consequences of staying became more dangerous to local stability than the consequences of departure'.¹⁴⁷ Following these developments, Britain considered that the 1899 Protection Agreement with Kuwait, as a 50-year-old formula, might invite charges of imperialism and thus, full independence of the Emirate had then become desirable.¹⁴⁸

In summary, the Arab Nationalist movement in the fifties was the prime feature of this period. The merchants were no longer the sole occupants of the political arena in Kuwait, as they were joined with new political players from the intelligentsia and workers.¹⁴⁹ The Al-Sabah and the British were seriously concerned about the massive upheaval occurring in the Arab world against autonomic rulers. Such developments justified the acceleration of political reform which led eventually to the independence

¹⁴² op cit Joyce (n 49) 39.

¹⁴³ ibid 4.

¹⁴⁴ ibid 54.

¹⁴⁵ ibid.

¹⁴⁶ op cit Smith S (n 132) 12.

¹⁴⁷ ibid.

¹⁴⁸ op cit (n 119) CAB/128/35 Image Reference: 0020.

¹⁴⁹ op cit Zahlan (n 23) 43.

of Kuwait from the British Protection Agreement in 1961. Two years later, the state created its first written constitution.

2.2.6 Political and Administrative Structure Pre-Constitution

The political and the administrative structure of Kuwait had been characterised by simple family traditions and tribal rules, particularly before oil. The Amir mostly performed all executive powers in consultation with his people, whilst customs and traditions were the source of the state's legal structure. Religious judges applied Islamic rules and traditional customs.¹⁵⁰ After the discovery of oil, the massive revenues expanded the government's services and activities, thus the need for more complicated bureaucracy became urgent so that it would develop in tandem with the state's progress. In the following sections the study provides a brief review of this period.

2.2.6.1 Executive Power

As development progressed, every Kuwaiti benefited from the Emirate's new wealth. Massive projects were carried out and therefore expansion of the administrative services became necessary. As a result, a great deal of bureaucratic apparatus and many government departments were established.

The Amir, through his appointed family members in key positions, mainly performed the executive powers. As merchants accepted a lower political profile in the period post-oil,¹⁵¹ no real control was imposed on the Executive at this time. This was particularly important, 'considering the trading families had historically played a leading role in pressing for greater governmental accountability'.¹⁵² Nevertheless, due to the impact of the Egyptian revolution on Kuwait, in 1952 the demands for reforms succeeded in convincing Abdullah Al-Salem to accept the formation of a 24-member elected government mechanism for municipal, educational, health, religious and other institutions.¹⁵³ Although these bodies were intended to undertake parts of the Executive's powers, they were restricted by exclusive elections for limited voters.¹⁵⁴

¹⁵⁰ Al-Tabtabaie A, *The Constitutional System in Kuwait* (University of Kuwait Press 1998) 257.

¹⁵¹ op cit Baaklini (n 41) 174.

¹⁵² ibid 175.

¹⁵³ op cit Zahlan (n 23) 40.

¹⁵⁴ ibid.

These elected councils were short-lived as they were soon to be replaced by appointed members and headed by one of the Al-Sabah family members chosen by the Amir.¹⁵⁵ On 7 February 1959, the Amir rearranged these offices, which were reduced to 10 offices to deal with the governance of Kuwait.¹⁵⁶ The offices were entrusted with limited authority and mainly advised the Amir, who would accept or reject their advice.¹⁵⁷ Moreover, just a few months before independence, the Amir formed a High Governmental Council, which consisted of the heads of these governmental offices, all of whom were members of the ruling family. This council, which was regarded as the highest executive body in the state, was entrusted to put forward the country's overall policies and to oversee the governmental offices in a similar role to a cabinet in modern systems.¹⁵⁸

2.2.6.2 Legislative Power

In the period of pre-independence, there was no formal legal system in Kuwait particularly before the discovery of oil. The Sharia Law (Islamic rules), and trade customs and traditions were the prime sources of law. In 1938, Kuwait and the Arabian Peninsula experienced an elected parliament, the *Al Majlis Al-Tashreee*. This assembly took over legislative and executive powers, and to some extent judiciary powers, from the ruler. One of the important achievements of this body, although it lasted for less than half a year, was to draft the first Constitution of Kuwait. The document contained eight articles; the most important among them were as follows:

First Article: The nation is the source of authority and is represented by a committee of elected representatives.

Second Article: The legislative council ought to legislate the following Laws: -

Budget law, Judiciary law, General security law, Education law, Health law, Building law, Emergency law, and any other law seen as necessary to be legislated in the interests of the country.

Third Article: The national council to be a reference for all internal and external provisions, conventions and treaties and for any other

¹⁵⁵ op cit Al-Tabtabaie (n 150) 304.

¹⁵⁶ Majid H, 'Critical Study of Constitutional and Development in Kuwait' (PhD thesis, University of Newcastle 2010) 53.

¹⁵⁷ Al-Jamal Y, *The Constitutional System of Kuwait* (University of Kuwait Press 1970) 133.

¹⁵⁸ op cit Majid (n 156) 54.

new issue of this nature that would not be considered legal except if agreed upon by the council's consent and under its supervision.

Fourth Article: As the state has no court of appeal the functions of the said court will thus be allocated to the legislative council, and an independent committee is set aside for this purpose.

Fifth Article: The head of the national legislative council is the one who represents the executive authority in the country.¹⁵⁹

The Amir, after hesitation, ratified this law on 2 July 1938, even though this constitutional document, which granted the elected Assembly both executive and legislative powers, left the ruler with limited authority. This body, however, did not complete its first year due to the factors explained earlier and this document was effectively abandoned.

However, after the discovery of oil, due to the economic developments that occurred in every sector of the country, the need for modern legislation had then become urgent. Several Acts were issued by the Amir to organise the legal structure of the state, but there was no separation of powers in this period as the Amir was holding both executive and legislative powers.¹⁶⁰ The governmental offices, which were discussed in the previous section, were also instructed to propose and draft laws for the Amir who then ratified them by his wish or denied to grant his approval.¹⁶¹

2.2.6.3 Judiciary Power

In the period pre-independence, different mechanisms carried out the judicial functions in Kuwait. The courts were organised as follows:

The Grand Executive Court was presided over by the Head of Judiciary. The judgments of courts of a lower degree were ratified in the Grand court. The Islamic Courts, presided over by the Head of Islamic Courts, applied Islamic rules on civil and criminal cases. The Ja'afari (Shei'at) Courts examined family cases of the Shei'at population in Kuwait. There were also Dispute Resolution Arbitration Committees which dealt with disputes between merchants, municipalities, workers and craftsmen. The general nature

¹⁵⁹ op cit Al-Tabtabaie (n 150) 286.

¹⁶⁰ ibid 256.

¹⁶¹ ibid 306.

of litigation featured simplicity, however. All judges and arbitrators were government employees who had no independent power and were subject to government authority.¹⁶²

In 1959, the Amir issued a new Act to organise the judiciary which divided the courts into three levels: First, Appeal and Supreme Courts.¹⁶³ The General Attorney headed the public prosecution with a number of deputies to investigate, conduct and prosecute criminal cases. It also provided the judges with a relatively independent status.¹⁶⁴ This Act, after several amendments, is still valid.

2.2.7 Independence of Kuwait and its Ruling System During the Transition Period (1961-1963)

After a few days of Kuwait's independence had passed Abdul-Karim Qassem, the Prime Minister of Iraq (1958-1963), 'officially laid claim to Kuwait on the basis of its former status within the Ottoman province of Basra'.¹⁶⁵ In late February 1961, Radio Bagdad started to broadcast these Iraq's views opposing Kuwait's independence, and emphasising that the former 1899 Protection Treaty between Kuwait and the British was illegal.¹⁶⁶ Two immediate effects of these threats were notable; the British troops were reinforced to protect the Emirate, thus proving their commitment towards protecting Kuwait, and the consolidation of the people of Kuwait around their ruler to support him, which was to be repeated in the 1990 Iraqi invasion of Kuwait.¹⁶⁷ Moreover, America's appointment of its first Ambassador to Kuwait in January 1962 was another important sign of international recognition to the newly independent Emirate.¹⁶⁸ Therefore, although Iraq's claims created difficult times for the newly independent state, they quickly vanished due to the solid internal and international support for Kuwait's independence. Following these events, on 14 May 1963 Kuwait jointed the United Nations as an independent sovereign state.¹⁶⁹

¹⁶² op cit Al-Tabtabaie (n 150) 311.

¹⁶³ Act no 23/1959.

¹⁶⁴ op cit Al-Tabtabaie (n 150) 314.

¹⁶⁵ op cit Majid (n 156) 53; Zahlan (n 23) 46.

¹⁶⁶ op cit Joyce (n 49) 94.

¹⁶⁷ op cit Zahlan (n 23) 48.

¹⁶⁸ ibid 110.

¹⁶⁹ See <<http://www.un.org/press/en/2006/org1469.doc.htm>> accessed 30 November 2016.

Zahlan suggested that the event of Qassem's threat, 'marked a turning point in the constitutional development of Kuwait'.¹⁷⁰ The Al-Sabah, following their long dependence on foreign protection, then turned to another pillar of popular support.¹⁷¹ Sheik Abdullah Al-Salem, who was proud of his people's support, recognised the need to grant them a more active political role. In fact, none of the Al-Sabah wanted to relinquish their control; however, the Iraqi threat had resigned them to the inevitability of change.¹⁷² A change that, 'heightened the sense of national identity (the patriotic kind), seems to facilitate democracy' at that specific time.¹⁷³

A contrary interpretation suggested that the independence of Kuwait and its limited constitutional system was no more than another political tactic by the British and had not been primarily driven by internal pressure or governmental demands.¹⁷⁴ Others, however, believed that the formation of the Constitution of Kuwait was a purely national effort and that it formed a contract between the people of Kuwait and their ruler, in which the ruler, Sheik Abdullah Al-Salem Al-Sabah, accepted the proposed draft of the Constitution presented by a Constituent Assembly, Al-Majlis Al-Ta'asisi (المجلس التأسيسي), without any objections.¹⁷⁵ In reality, as Kuwait's rulers became, 'ever less dependent on British support and strategic resources, they also became less responsive to British political advice'.¹⁷⁶

After independence, the Amir alone held all legislative and executive powers.¹⁷⁷ In order to initiate the new constitutional era of the state, the Amir issued a temporary constitution which contained 38 Articles.¹⁷⁸ The most important features of this brief constitution were the formation of the Constituent Assembly that was entrusted to draft the permanent Constitution of Kuwait. This Assembly was formed of two types of membership: twenty members who had been elected by a general election and fourteen appointed ministers. The election took place on 30 December 1961 and was, overall,

¹⁷⁰ op cit Zahlan (n 23) 46.

¹⁷¹ op cit Crystal and Al-Shayji (n 65) 110.

¹⁷² op cit Joyce (n 49) 140.

¹⁷³ op cit Crystal and Al-Shayji (n 65) 114.

¹⁷⁴ Humaidan A, *The Political Future of the Petroleum Emirates in the Gulf* (PhD thesis, University of Paris 1967) 138, 139, cited in Al-Saleh (n 5) 204.

¹⁷⁵ ibid Al-Saleh 204.

¹⁷⁶ op cit Tétreault (n 2) 41.

¹⁷⁷ op cit Al-Tabtabaie (n 150) 318.

¹⁷⁸ Amiri Decree no 1/1962.

free and dominated by opposition figures.¹⁷⁹ Most of the appointed ministers were from the Al-Sabah family, while the elected members represented different social and political backgrounds.¹⁸⁰ It was recognised that, although these ministers participated in the Assembly's discussions, they chose not to vote on the final draft of the Constitution in order to leave this decision to the elected members.¹⁸¹ That fact reflected, at that time, a notable democratic practice.

In November 1962, the Amir ratified the Constitution which contained two different traditions: the hereditary rule and a relatively representative government in a hybrid political system.¹⁸² The year after, Kuwait held its first parliamentary general elections.

2.2.8 Reflection on The Era Before 1963

The origins of Kuwait's political system were based on tribal traditions and family rules. The Amir, the ruler, was chosen in accordance with a form of simple consultation between the Al-Sabah family and the people of Kuwait. The lack of financial resources led the ruler to depend on a local taxation system. Therefore, the merchants, who had formalised most of the state economics, were in a position to exert their demands to control the political decisions.

The reign of Mubarak Al-Sabah witnessed, for the first time, a violent transition of power in the political system of Kuwait. Also, Mubarak's 1899 Protection Agreement with the British added another means of power, which depended on a foreign element in contrast to the political traditions of Kuwait. Mubarak initiated an autocratic form of rule which affected most of his successors. The British, who found Kuwait strategically important to the Empire's interests, provided political and economic support to Mubarak and his successors.

In the fifties, the discovery of oil brought numerous changes to Kuwait's political, economic and social structure. The nature of the Kuwait-British agreement enabled Al-Sabah to have sole control over the high oil revenues. This strengthened the financial status of the government and made Al-Sabah less reliant on local support. Moreover, Britain became more interested in the newly-discovered wealth. Kuwait became the

¹⁷⁹ op cit Baaklini (n 41) 174.

¹⁸⁰ op cit Al-Tabtabaie (n 150) 318.

¹⁸¹ op cit Al-Saleh (n 5) 165.

¹⁸² op cit Baaklini (n 41) 175.

prime oil exporter to the United Kingdom and, in return, Kuwait's oil revenues were heavily invested in sterling. Thus, the British were keen to stabilise the Emirate's political and economic status. In this way, the British, who preferred not to deal with elected elites, worked closely with Al-Sabah to maintain their political dominance and control.

However, the events of the Egyptian revolution inspired the people of Kuwait to demand political reform. New social strata were formed from nationalists and educated youth, which filled the vacuum after the merchants' withdrawal from the political scene. Thus, a new and different basis of sharing power, which was based on popular participation, replaced the oligarchy form of politics in Kuwait. The upheaval in the Arab world, which had overthrown several monarchies and rulers by military coups and popular revolutions, had led Al-Sabah on the advice of the British, to consider adopting new political reforms in order to accommodate the people's demands. Furthermore, after independence in 1961, the Iraqi threat to Kuwait revealed the importance of popular support to maintain state stability, which eventually made the formation of the Constitution of Kuwait a common aim of the people of Kuwait and Al-Sabah.

2.3 Post 1963 Practice of Democracy Under the Constitutional Rule

After the creation of the Constitution in 1962, seventeen months after independence, Kuwait became the only constitutional state in the Arabian Peninsula. Abdullah Al-Salem was marked, 'as the first Gulf ruler who granted his subjects a written Constitution'.¹⁸³ This Constitution identified the ruling system in Kuwait as democratic and stated that state sovereignty resided with the people.¹⁸⁴ This constitutional document provided a parliamentary system that was based on a general, direct and secret ballot.¹⁸⁵

It should be noted that this section has outlined the Executive's practice of powers after the application of the democratic system starting from 1963 and up to 2012. The aim

¹⁸³ op cit Kechichian (n 24) 108.

¹⁸⁴ Article 6 of the Constitution: 'The System of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution.'

¹⁸⁵ Article 80 of the Constitution: 'The National Assembly shall be composed of fifty members elected directly by universal suffrage and secret ballot in accordance with the provisions prescribed by the electoral law'.

of this approach is to briefly reveal the important proceedings that have occurred in this period. Part of these contemporary historical events have also been explained in the background of the first chapter whilst a deep analysis of these practices, which is the core of this thesis, is undertaken in chapters six and seven

2.3.1 Procession of Democracy During 1963-1990

On 8 November 1962, the Constituent Assembly forwarded the draft Constitution to the Amir Sheik Abdullah Al-Salem who ratified it, unaltered, three days later.¹⁸⁶ In spite of criticisms, the Constitution contained significant parliamentary powers.¹⁸⁷ However, the continuation of the parliamentary function was routinely interrupted by the Amir's exercise of the dissolution prerogative or by unconstitutional suspension. Moreover, four years after the issuance of the Constitution, in the 1967 elections, 'reports of government rigging were widespread'.¹⁸⁸ The first practice of the dissolution power by the Amir was in 1976, and several articles of the Constitution were then suspended in order to prevent any new election. The next parliament was elected eleven years later in 1985, which was dissolved again in the following year with the suspension of some constitutional articles. Further dissolutions took place in 2003, 2006, 2008, 2009, 2011 and 2016. Nevertheless, 'when in session the Assembly played an important role in mobilizing and articulating opposition to Kuwait's rulers'.¹⁸⁹ Even with its limited powers, 'it did function as an important forum for public debate and was always a source of criticism of the Government on important policy issues ranging from the budget to oil policy, women's rights, corruption, and the place of religion in politics'.¹⁹⁰

Arguably, the first Assembly to be elected in 1963 was one of the most powerful, efficient and active Assemblies that Kuwait ever had. It was intended that this democratic system would provide the ruling system with a legitimate shield against foreign threats. Also, the ruling family hoped that the parliament would, 'act as a rubber stamp for Al-Sabah decisions'.¹⁹¹ However, the first elections produced a, 'volatile and assertive opposition which was dominated by a pan-Arab block led by Ahmad Al-

¹⁸⁶ op cit Baaklini (n 41) 175.

¹⁸⁷ ibid 176.

¹⁸⁸ op cit Zahlan (n 23) 50.

¹⁸⁹ op cit Crystal and Al-Shayji (n 65) 104.

¹⁹⁰ ibid.

¹⁹¹ Roberts D, 'Kuwait' in Davidson C, *Power and Politics in the Persian Gulf Monarchies* (Hurst & Company 2011) 94.

Khatib, once the dean of the Kuwaiti opposition'.¹⁹² From the day it convened, this parliament actively contributed to formulating all public policies.¹⁹³ Such a fact might explain the limited progress of the parliamentary system in Kuwait after this experience. The Amir's government has worked on every level to hinder any attempt to control its activities. Therefore, firstly, there was the attempt to rig the 1967 election. Then, there was the dissolution of the 1976 parliament and the suspension of some of the Constitution's provisions relating to the democratic system.

After the Iranian revolution in 1979, worries in Kuwait escalated due to Khomeini's attempts to export revolutionary ideas;¹⁹⁴ 'Kuwait, with its Shiite minority, a quarter of the population, and geographical proximity to Iran, seemed particularly vulnerable.'¹⁹⁵ These concerns were confronted by resorting again to domestic support. Therefore, it was vital for the Al-Sabah to reconvene the inactivated National Assembly. Therefore, the 1981 election followed, but with newly-designed electoral districts that involved a substantial change, in order to ensure favourable candidates for the regime.¹⁹⁶ The outcomes were what the government had sought, with the domination of the districts by candidates who were mostly from tribal areas, a stronghold of the regime.¹⁹⁷

In contrast, the 1985 election was seen 'as increasingly threatening the regional environment' by its sharp opposition to members of the Al-Sabah ruling family.¹⁹⁸ The outcome of this election resulted in the return of the Democratic National Alliance headed by Dr Al-Khatib. This parliament, which combined a majority of opposition deputies, 'presented the Government with formidable opposition which was amplified by the press'.¹⁹⁹ The Amir regarded such opposition as an abuse by the elected parliament in a way which threatened the unity of the country, and considered that it was his responsibility to save the state and to dissolve parliament.²⁰⁰ This conclusion was claimed as the basis upon which to dissolve parliament in 1999. It was also adopted by the current Amir Sabah Al-Ahmad to dissolve recent Assemblies of 1999, 2006,

¹⁹² op cit Crystal and Al-Shayji (n 65).

¹⁹³ op cit Baaklini (n 41) 178.

¹⁹⁴ ibid.

¹⁹⁵ ibid.

¹⁹⁶ ibid.

¹⁹⁷ op cit Roberts (n 191) 94.

¹⁹⁸ op cit Crystal and Al-Shayji (n 65) 104.

¹⁹⁹ Deegan H, *The Middle East and Problems of Democracy* (Open University Press 1993) 38.

²⁰⁰ *The Middle East International Newspaper* 8 August 1986.

2008, 2009 and 2013.²⁰¹ As a result, the Amir dissolved the 1985 Assembly within its second year, suspended the constitutional provisions in relation to the general election and also imposed censorship on the press.²⁰²

These events energised the political arena in Kuwait in the late 1980s. A pro-democracy movement started to gather in *Diwanniahs* (الديوانيات), men's social gatherings, calling for the restoration of constitutional rule.²⁰³ After heavy clashes with the police, the Amir Sheik Jabir Al-Ahmad (1979-2006) announced on 22 April 1990 a compromise proposal contained in a new Act in 1990²⁰⁴ establishing a new Consultative National Assembly (المجلس الوطني) in contrast with the provisions of the Constitution.²⁰⁵ Most of the movement's organisers rejected the proposal, considering such an Act, 'as a retreat from the 1962 Constitution'²⁰⁶ as such a council might contribute to a fundamental revision of the 1962 Constitution.²⁰⁷ The opposition leaders campaigned for a boycott and resistance to this unconstitutional arrangement. Many of them were imprisoned. However, this body did not live long enough to make fundamental changes due to the Iraqi Invasion of Kuwait that same year. Many had argued that these movements, 'encouraged Saddam Husain of Iraq to think, mistakenly, that the Iraqi invasion would meet with some measure of popular support in Kuwait'.²⁰⁸

During the invasion period, the Kuwaiti government was keen to establish an international coalition to free the country. To do so, it was important to secure the support of the world's great powers for this coalition. In his speech at the United Nations Assembly on 24 September 1990, on the Iraqi invasion of Kuwait, François Mitterrand, the French President emphasised the importance of protecting, 'the democratic choice' of the people of Kuwait, which raised concerns for the Kuwaiti government in exile.²⁰⁹ The French position also revealed, for the Al-Sabah, the importance of democracy in securing the military option to free Kuwait, as the

²⁰¹ Amiri Decrees nos 164/2006, 82/2008, 85/2009, 443/2011 and 276/2016.

²⁰² op cit Deegan (n 199) 38.

²⁰³ op cit Gause (n 90) 90.

²⁰⁴ Amiri Order no 12/1990 to Establish the National Council.

²⁰⁵ op cit Crystal and Al-Shayji (n 65) 104; Al-Moqatee M, 'The Constitutional and Legal Aspects raised upon the Establishment of the National Assembly' (1993) 3(17) Kuwait University Journal of Law 219.

²⁰⁶ op cit Gause (n 104) 169.

²⁰⁷ op cit Baaklini (n 41) 186.

²⁰⁸ op cit Gause (n 104) 169.

²⁰⁹ Al-Yousifi M, *Kuwait: from Constitution to Occupation* (The Arabian Institution of Studies and Publishing 2013) 258.

international allies would never accept the sacrifice of their troops for the sake of an autocratic Sheikdom.²¹⁰ Thus, the Kuwaiti government decided to organise a public conference in exile to demonstrate the support of the Kuwaiti people for the Al-Sabah ruling family.

Therefore, due to the Iraqi invasion, ‘the ruling family was under great pressure to promise that the liberation of Kuwait would be accompanied by a significant political changing’.²¹¹ Most of the Kuwaitis who had preferred to stay and resist the Iraqi occupation in Kuwait had to be assured that all their sacrifices would not be in vain. Thus, on 15 October 1990, the Amir Jabir Al-Ahmad sponsored a highly publicised conference in Jeddah, Saudi Arabia. At this meeting, the opposition was determined to agree a deal with the ruling family in which reaffirming loyalty to the Al-Sabah was given in exchange for the Al-Sabah’s promise to restore democratic rule after liberation.²¹² After three days, the conference concluded a charter that contained, amongst other decisions, the government’s obligation to restore constitutional rule after the country’s liberation.²¹³ The next section discusses the period after the country’s liberation.

2.3.2 Developments After Liberation

After the liberation, ‘The parliamentary elections of October 5, 1992, were thus a fulfilment of the promise that had been made two years earlier.’²¹⁴ The outcome of these elections was far from the government’s wishes. Most of the elected deputies were from the opposition.²¹⁵ Therefore, the strained relationship between the government and parliament continued after the country’s liberation from the Iraqi invasion. In fact, the impacts of this invasion on Kuwait’s politics were vital as ‘The trauma of the invasion had greatly politicized Kuwaiti society.’²¹⁶ Not surprisingly therefore, the post-liberation parliament sought a greater role in governing the country, particularly after the government’s failure to protect the national security of the state. However, one of

²¹⁰ *ibid.*

²¹¹ *op cit* Baaklini (n 41) 186.

²¹² *op cit* Al-Yousifi (n 209).

²¹³ Al-Mdaires F, *The Muslim Brotherhood Groups in Kuwait* (2nd edn, Dar Quertas Publishers 1999) 46.

²¹⁴ *op cit* Baaklini (n 41) 188.

²¹⁵ *op cit* Zahlan (n 23) 55.

²¹⁶ *op cit* Baaklini (n 41) 188.

the significant features of political life after the liberation was the government's cessation of the practice of suspending the constitutional provisions. Apparently, the government found another means of manoeuvre to hinder the ability of parliament to have control over its activities.²¹⁷ By the excessive use of the right of dissolution and by amending electoral laws by Amiri decrees, as explained in chapter one, the government proved its unwillingness to be under real control.

2.4 Conclusion

One of the distinguishing features of the Gulf Monarchies is that, 'They remained traditional, tribal, and less developed – and thus more in tune with their societies.'²¹⁸ Such a fact would explain their survival through various historical stages that had eliminated more modernist political systems in the Arab world. However, the people's attempts to participate effectively in running their country's affairs differentiated between one monarchy and another.

The study has touched on the origins of Kuwait's ruling system which shows the particularity of its political features. The Al-Sabah dynasty periodically consulted the people of Kuwait with regard to running the state's affairs. Such a practice was due to the effect of internal and external factors. Oil and international influences, in particular, had empowered the Executive to become disconnected from the needs of local elements. Evidently, the Executive, controlled by the Al-Sabah family, was determined to resist any form of effective mechanisms to control its powers pre and post-issuance of the Constitution. This fact was a common feature in both historical stages. In each stage, the Executive adopted different strategies to hinder any political reform and to maintain, continuously, a level of predominant powers.

In the period pre-Constitution, autocracy was based on personal power. The alliance with powerful foreign allies added another means of power. Moreover, the high revenues of oil played a key role in strengthening the Executive in different dynamics.

In the period post-Constitution, there were ambitious efforts to control the Executive's power. Parliament was keen to practise the constitutional powers that enabled it to

²¹⁷ Ulrichsen K, 'Politics and Opposition in Kuwait: Continuity and Change' (2014) 4(2) *Journal of Arabian Studies* 214–230.

²¹⁸ *op cit* Gause (n 104) 169.

control the Executive's activities. However, the latter found a way to use the Constitution to hinder these attempts. Whether by the extensive use of the prerogative of dissolution, or by manipulating the electoral laws through emergency Acts, or even by the suspension of the Constitution's provisions, the Executive managed to resist any type of control in the long run.

Despite the recurrence of autocratic rule, one could wonder how and why Kuwait converted dramatically less than two years after independence, from autocracy to limited democracy. To understand the facts, it is important to account for the status of Kuwait within its internal and external environment at that time. Thus, it is important to account for the surrounding circumstances at the time of the Constitution's creation as Kuwait at that time was under the influence of the Arabic movements for reform, led by Egyptian ideology and the Iraqi threat. The aim was to accommodate the demands of the people to reform the political system and to strengthen the home front against foreign interference. This temporary aim was the main driving force which hastened independence and formed the basis of adopting a restricted democratic system.²¹⁹ The culture that influenced constitutional law and constitutional practice, and therefore shaped the limits of the democratic system, was more affected by external considerations than by internal demands for reform. Thus, the adoption of a democratic system was initially to confront the Iraqi claims and to oppose the view that the people of Kuwait preferred unification with Iraq. Thus, the effective way to reject these claims was by applying a democratic system that would provide the new Emirate with more legitimacy.

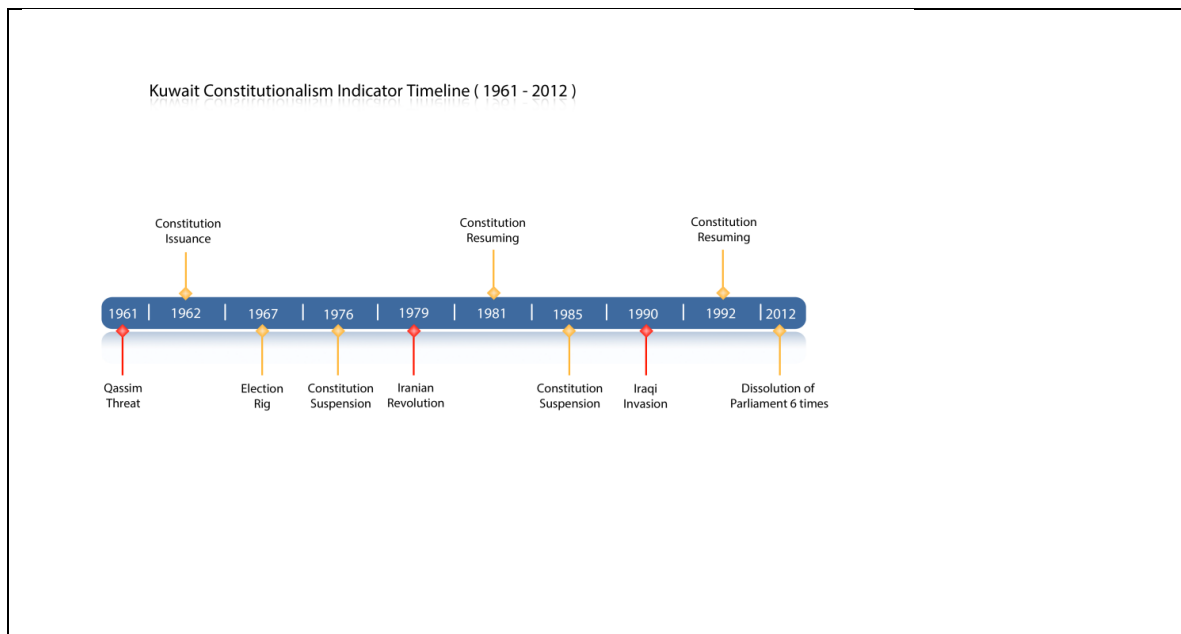
However, after the first parliamentary election in 1963, the parliament made a considerable effort to control the Executive's power. Therefore, in the next election in 1967, there were attempts by the government to rig the general elections. Ten years later, the Amir dissolved parliament in 1976 and suspended the constitution provisions that regulate its functions. However, due to the impacts of the Iranian revolution on Kuwait as discussed earlier, it was considered important to restore parliament in order to accommodate any internal opposition. Elections were held again in 1981 after amending the electoral system to produce favourable government candidates. However, the 1985 election outcomes were far from what the government planned, as this

²¹⁹ op cit Smith (n 116).

parliament was dominated by opposition candidates and was therefore dissolved within one year. A suspension of the Constitution was applied until the Iraqi invasion and elections were held after the liberation of the country. Subsequently, there were no more suspensions of the Constitution. However, the democratic practice was interrupted by different measures.

By observing the historical procession of political practices in the constitutional era, it is possible to outline the connection between the restoration of the Constitution and times of foreign threats. In other words, the rise of constitutional practices has always followed regional crisis. Otherwise, the Al-Sabah prefer to rule without any effective control imposed on them. Figure 2.1 shows the relation between these foreign events and the implementation of the Constitution provisions in their historical context.

Figure 2.1 Kuwait Constitutionalism Indicator Timeline (1961-2012)



In conclusion, by addressing how the Amir and the Executive have exercised their powers under the doctrines of the Constitution, the study proposes that, in its historical context, democratic practice in Kuwait has been resisted by the Amir and the Executive. Seemingly, the acceptable limits of democratic practices, from government perspectives, were those that would only secure a pro-government parliament. Otherwise, strong opposition practice was constantly considered to be a sufficient reason to dissolve the elected parliaments. The crux of democracy has been missed in this respect. Ironically, the Amir and the Executive have continually regarded any

reliable exercise of control by parliament as a type of abuse that challenges the state's public security. Therefore, this limited democratic system seems unable to provide mechanisms which might be elaborated through an effective control system. The Executive tends to seize control of parliament instead of being subject to its control. Also, the judiciary, on various occasions, has lacked the capacity to implement effective legal controls as a separate power. The Executive's powers embedded in the constitutional system are, in fact, problematic with regard to the purpose of applying the ethical values of democracy, rule of law, human rights and the separation of power. Such a fact reveals the importance of reforming the constitutional system so that it reflects more efficient mechanisms in order to constitutionalise the control of the Amir and the Executive.

In summary, this factual research approach reveals three important features which have emerged from the history of Kuwait: First, the Amir has a tendency to revert to autocratic forms of government. Secondly, the people have a recurrent wish to take a role in government. There is a belief that the people have almost a right to political participation. And lastly, a curious fact has also emerged from this historical context. Despite their continuing attempts to control the Executive's powers, at the same time, the people of Kuwait remain loyal to the Amir. They maintain the idea that the Amir can remain as the head of state, although they would like to control those of his powers which they vehemently dislike.

It could be viewed that these are two contradictory ideas. However, the aim of this research is to move towards some version of modernity in a system where it is possible to share and control the power of governance. But equally, modernity does not guarantee to produce democracy. The lessons of the chaos and violence of the Arab Spring events are very recent examples to learn from. There are many countries in the region who have the wealth to achieve modernity, such as Iraq, Libya and Egypt, to name just a few, but are far from democracy. Modernity does not mean deposing monarchs. A large number of countries have retained their monarchies, but nevertheless remain modern democracies, such as the UK which is a clear example of a constitutional monarchy. The study, therefore, is cautious about being absolutist in its desire for the reform of Kuwait into a modern democracy or a republic. Neither of these will necessarily correlate with the thesis' desires. The study aims to retain every part of the state's ideology in play but to move forward. As Bagehot once declared, 'A republic

has insinuated itself beneath the folds of a monarchy'.²²⁰ The next chapters will explain how to move steadily in a soft transformational way toward constitutionalising executive powers.

In the following chapter, the study continues its analysis by setting out the measurement tools which will be used in its assessments. Constitutionalism, and the ethical global values relevant to Kuwait will be addressed next.

²²⁰ Bagehot W, *The English Constitution* (1867) (e-book) <<http://www.gutenberg.org/ebooks/4351>> accessed 28 Nov 2016.

Chapter Three

Constitutionalism and Ethical Values Relevant to Kuwait

3.1 Introduction

From moral, political and philosophical perspectives, it has been suggested that, ‘power is legitimate where the rules governing it are justifiable according to rationally defensible normative principles’.¹ One should realise that, ‘for a society to remain cohesive, for a government to be capable and willing to protect the rights of all its citizens, there must be certain shared values.’² In his efforts to assess the relation between democracy and constitutionalism, Nino, in his work *The Constitution of Deliberative Democracy*, viewed democracy as a normative value, ‘not just an end in itself but a vehicle for the creation of a more just society’.³ Thus, in modern political systems democracy has been legitimised, not only by the existence of certain formal institutions, but also for the substantial values which it embodies and can deliver.⁴

In written constitutions, the doctrine of constitutionalism emphasises that government must be controlled by certain fundamental principles.⁵ The core principle of this doctrine is that power granted to an official or institution is not a legal privilege to be exercised without limits, but an authority which must be exercised under conditions of accountability.⁶ Others argue it is:

[A]s an umbrella term to cover either the new constitutional settlement between the Judiciary, Parliament and Government, or distinct constitutional concepts such as democracy, parliamentary sovereignty, the rule of law, separation of powers, accountability, and legality (constitutionality), fundamental rights (especially liberty) and the avoidance of arbitrary power.⁷

¹ Beetham D, *The Legitimation of Powers: Issues in Political Theory* (Macmillan 1991) 5.

² Franklin D and Baun M (eds), *Political Culture and Constitutionalism: A Comparative Approach* (ME Sharpe 1995) 5.

³ Koh H and Slye R (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 5.

⁴ Calsamiglia A, ‘Constitutionalism and Democracy’ in *ibid* 140.

⁵ Bogdanor V, *The New British Constitution* (Hart Publishing 2012) 21.

⁶ Lucas J, *The Principles of Politics* (Oxford University Press 1966) 208.

⁷ Murkens E, ‘The Quest for Constitutionalism in UK Public Law Discourse’ (2009) 29(3) *Oxford Journal of Legal Studies* 1–29.

Therefore, this doctrine has been observed as a normative standard to measure, ‘the grounds of legitimacy and the proper exercise of political power’.⁸

As a result, post Second World War, and through the influence of the United Nations Universal Declaration of Human Rights in 1948, the world has witnessed a shift towards constitutionalism. The UNDHR charter laid down global values and was a foundation constitutional document of the international legal and political new world order.⁹ These values, ‘affirmed the force of ideas and a vision of respectful and peaceful coexistence in the aftermath of utter brutality and destructing’.¹⁰ Many nation states were inspired by, ‘the spirit of the ideal of modern constitutionalism - consisting essentially in limitation of the powers of government, adherence to the rule of law, protection of fundamental rights, and guarantees for the maintenance of an adequate level of democracy’.¹¹

In order to constitutionalise the Executive’s powers in Kuwait, this chapter aims to identify and explore the desired constitutional values that should be embedded in the Kuwaiti constitutional system. In previous chapters, the thesis argued that the design of Kuwait’s Constitution lacked the necessary features to control the Executive’s powers. In 1962, Kuwait created its first written constitution. However, the efforts of the framers of the Constitution, even though they sought to accommodate the global trend of constitutionalism, were, and to a great extent still are, far from complete. The thesis proposition is that the constitutional structure of the democratic system of Kuwait provides the Executive and the Amir with powers that undermine democracy and the principles of the rule of law, human rights and the separation of powers. Such a limited democratic system seems unable to provide the mechanisms which can install an effective control system. However, ‘the process of holding a decision-maker to account is a process of debating what the standards should be’.¹² Therefore, the study attempts to use selected

⁸ *ibid.*

⁹ Tsagourias N and White N, *Collective security: theory, law and practice* (Cambridge University Press 2013) 120.

¹⁰ Moeckli D and others, *International Human Rights Law* (Oxford University Press 2014) 3.

¹¹ Rosenfeld M, ‘Is global constitutionalism meaningful or desirable’ (2014) 25(1) *European Journal of International Law* 177–199.

¹² Fisher E, ‘The European Union in the Age of Accountability’ (2004) 24 *Oxford Journal of Legal Studies* 513.

global values as standards to examine and to reform the constitutional system of Kuwait, in order to reflect more efficient mechanisms that are capable of controlling the powers of the Amir and the Executive. For this purpose, the study has chosen the values of democracy, the rule of law, human rights and the separation of powers as they are recognised as normative global standards accepted in modern political practice. As a matter of justification, the importance of the chosen values is that they are considered essential and prime elements in controlling executive powers in any political system.

Ultimately, the study aims to use these standards to guide the research analysis in order to test and to reform the constitutional system and practice of Kuwait. If Kuwait is to be part of the mainstream within the broad theory of these global ethical values, such standards ought to be respected within the constitutional and political practices of Kuwait. If these standards are not met, the outcome for Kuwait will be critical. However, the study does not propose any original theory of constitutionalism in this chapter. The objective is to define the concepts of the selected global values in accordance with the previous discussions of theorists and commentators. The purpose of this theoretical approach is to prove that these selected values should be considered important and relevant to any democratic polity, as they form solid foundations in international law and practice. They will be justified on the basis of deep political thoughts which have been translated into legal support. The study does not cover every aspect of every theory, nor does it discuss the Kuwaiti constitutional system in this chapter. Rather, the level of engagement will be about exploring some aspects instrumentally and selectively, in order to set standards for the meanings of these values. The discussion is therefore at a philosophical or abstract level in relation to the desired universal values. Such standards will be applied appropriately as ideological tools of measurement to guide the research analysis and its proposed solutions. Thus, later comparisons with Kuwait are conducted in chapters five, six and seven.

The study claims that these values are universal and applicable to any given society. These values are, in a rational sense, as relevant for Kuwait as to any other country. This argument can be supported by three justifications. First, such values are universal philosophical ideals in modern political and constitutional thinking. Second, they are supported by international law, and finally, they are recognised in the ideas of the scholars of Islam, as well. Thus, these multiple sources of justification mean that these doctrines are not

revolutionary values. The study's reform agenda does not demand a complete dismantling of the current ideology of the state of Kuwait. Rather, by respecting these universal values, it is believed the study is more able to promote its soft transformation agenda of reform.

One initial question which needs to be asked, however, is whether these global ethical values are essentially linked to each other in the same bundle, or whether they are independent. What is the relationship between democracy and the global values of the rule of law, human rights and the separation of powers?

Historically, from the time of Aristotle to the Middle Ages and the Magna Carta,¹³ 'the struggle for liberty and rights against absolutism in its several forms, including the absolutism of the state and its use of law',¹⁴ predated democracy's contemporary meanings. In the UK and most developed democracies, the first of these values to be secured was the rule of law. Therefore, this recognition of the rule of law, human rights, the allocation of powers, and the adjudication upon those powers, challenges any claim that these values developed in tandem with democracy. It is apparent that these values developed independently in a historical context, and in some cases in a contrasting interrelation. In particular, until the beginning of the twentieth century, the practice of British democracy contrasted with human rights values. Until 1918,¹⁵ voting was not seen to be a basic human right but was related more to the qualifications of wealth and gender.¹⁶

Evidently, democracy without the guidance of controlling values has produced tyranny. Many dictators such as Hitler, Mussolini, Saddam and Gadhafi, to name just a few, imposed totalitarian regimes in the name of the rule of law.¹⁷ Ironically, Hitler and Gadhafi even used referendums to justify their oppressive rules.¹⁸ The rule of law has also been used to deny rights. Race discrimination was imposed by law and supported by precise legislation to administer it in the United States until the 1960s and in South Africa until the

¹³ Blackburn R, 'Magna Carta and the Development of the British Constitution' (2015) 125 *The Historian* 26–29.

¹⁴ Bradley A and Ewing K, *Constitutional & Administrative Law* (Pearson 2011) 91.

¹⁵ On 6 February 1918, by the virtue of s1 of the Representation of the People Act 1918, the franchise was entirely altered.

¹⁶ Watt B, *UK Election Law: A Critical Examination* (Glass House Press 2006) 43.

¹⁷ Lively J, *Democracy* (ECPR Press 2007) 13.

¹⁸ Emerson P, *Defining Democracy: Voting Procedures in Decision-Making, Election and Governance*, (Springer 2012) 143.

1990s, even though both countries had democratic systems. Therefore, there seem to be historical interactions between democracy and these ethical values. History can provide examples in which democratic polities have ruled using such complex relations. In other words, democracy has been administered in the context of denying the very means of democracy.

The argument which this thesis presents stems from the idea that these wider values have become essential instruments in democratic theory and practice. Indeed, the substantial practice of democracy has expanded its concept to include other important values such as human rights, the rule of law and the separation of powers, instead of being merely about electoral politics. On the one hand, democracy in contemporary politics plays a vital role in protecting and maintaining human rights and strengthening the rule of law,¹⁹ and on the other hand, democracy has become in significant need of these ethical values in order to flourish, expand and justify political legitimacy.²⁰

In the following sections, the study provides its justifications for how and why these values are relevant to Kuwait. This approach is discussed in two main sections. The first section contains a mixture of philosophy and international law, discussing the values of democracy, human rights, rule of law and the separation of powers from an international perspective. The second section discusses these values from an Islamic perspective.

3.2 Democracy

The term ‘democracy’ varies in meaning from a way of life to a form of government. Since the first use of this term by the Ancient Greeks, the application of democracy has been inconsistent and, over time, many variations of its practice have occurred.²¹

Theoretically, democracy is of interest to political, social, philosophical and constitutional researchers and is dispersed in a vast body of literature. It can offer a wide range of important aspects that extend far beyond the limits of this study. One way of avoiding this

¹⁹ Bingham T, ‘The Rule of Law’ (2007) 66(1) Cambridge Law Journal 67–85.

²⁰ *op cit* Beetham (n 1) 113.

²¹ *op cit* Lively (n 17) 2.

problem is to focus on a narrow concept of democracy as a formal decision-making process in political systems. The focus of this study is to analyse how participation, as a choice of the people, can affect the control of executive power. Thus, what are the required conditions for the effective democratic accountability of government? This section addresses the coherence between popular participation and the public accountability of governments in representative democracies.

The history and culture of each country contribute strongly in determining the precise features of individual democracies.²² The United Kingdom is an example of a representative democracy, although it is not the only form which representative democracy can offer. For example, the governing system of the United States, where an elected president is the head of the government, provides a significant example of representative democracy. However, based on the aims of this study, as stated in chapter one, the UK's law and experience were selected for comparison because it offers an available model of a constitutional monarchy operating within a democracy. Such model provides a logical base for a comparative analysis for the purpose of transferring successful policies to Kuwait.

3.2.1 Defining Democracy

In comparative politics, many theorists have struggled to agree on a general definition of democracy.²³ As argued by Lijphart, 'democracy is a concept that defies definition'.²⁴ However, a relatively clear and consistent set of ideas can be deduced from the debate in the related literature.

Beetham suggested that, 'democracy is a political concept, concerning the collectively binding decisions about the rules and policies of a group, association or society.'²⁵ In order to narrow the scope of its research, this study explores a 'procedural-structural definition'²⁶ which may serve its objectives. The definition focuses on the liberal democracy model

²² Oliver D, *Constitutional Reform in the UK* (Oxford University Press 2003) 29.

²³ Beetham D, *Defining and Measuring Democracy* (Sage Publications 1994) 27.

²⁴ Lijphart A, *Democracy in Plural Societies* (Yale University Press 1984) 4.

²⁵ op cit Beetham (n 23) 28.

²⁶ Arat Z, *Democracy and Human Rights in Developing Countries* (Lynne Rienner Publishers 1991) 19.

which Kuwait has adopted or at least tried to apply.²⁷ Liberal democracy, as observed by Coulter, is:

The political organization of a nation-state characterized by comparatively greater levels of competitiveness, participation and liberties; that is, a liberal democracy is pluralistic with regard to competitiveness, inclusive with regard to participation, and liberational with regard to liberties. On the opposite end of each of these three continua are polities which are coercive with comparison to competitiveness, participation, and liberties.²⁸

It is also possible to define democracy descriptively.²⁹ Such an attempt can be undertaken, according to Beetham, 'in terms of the institutional procedures and practices of those countries which are commonly called "democratic"—legislatures, judiciaries, constitutions, procedures such as multi-party elections, universal suffrage, the separation of powers, the rule of law and so on'.³⁰

The problem of identifying democracy by these conceptual strategies, however, is that they do not recognise the differences between democracy as an institutional procedure and democracy as a normative ideal.³¹ Further, the descriptive approach cannot analyse the relation between the core principles of democracy and their institutional embodiment,³² nor can it provide criteria against which to assess these institutional procedures and ascertain how they can become more democratic.³³ Nevertheless, they may help to understand what these institutional arrangements are really about. Similarly, identifying democracy alone by its regulative ideas and core principles, without an understanding of the institutional arrangements by which it should practically be realised, does not resolve the disputes about the definition of democracy and whether it is desirable or practicable or both.³⁴ However, in order to avoid the wide scope of these

²⁷ Al-Hajeri A, 'Citizenship and Political Participation in the State of Kuwait the Case of the National Assembly' (PhD thesis, University of Durham 2004) 21.

²⁸ Coulter P, *Social Mobilization and Liberal Democracy* (Lexington Books 1975) 1.

²⁹ Weir S and Beetham D, *Political Power and Democratic Control in Britain: The Democratic Audit of the United Kingdom* (Routledge 1999) 7.

³⁰ *ibid.*

³¹ Beetham D, *Democracy and Human Rights* (Polity Press 1999) 26.

³² *ibid.*

³³ *op cit* Beetham (31) 27.

³⁴ *ibid.*

arguments, this section has focused on how to measure and audit the democratic features in a given political system.

Democracy as a political concept stands primarily on the principles of popular control and political equality.³⁵ These principles can provide standards for the level of democracy and its institutional practices. However, given that these two principles are general, Beetham, in his book *Defining and Measuring Democracy*, demonstrated the efforts of several political scientists to break these principles down into four measurable criteria for the purposes of assessment.³⁶ With regard to popular control over government, Beetham argued that the principles must be divided into the following criteria. The first is the degree of popular election of the parliament or head of state. This should be assessed by criteria such as the reach of the electoral process, its inclusiveness, fairness and its independence. He summed this up with the phrase ‘free and fair election’. The second criterion is the extent to which there is an open and accountable government. The criterion should assess the powers of these accountability bodies, by both legal and actual means, in terms of their efficiency, independence and citizens’ access to information. Thirdly, popular control should also be assessed by the extent of guaranteed civil and political rights and liberties. Without the freedoms of speech, association, assembly and all those freedoms related to a liberal democracy, no popular control, Beetham claimed, is possible. Finally, a free and open society is judged to be an important factor in order to assess the effectiveness of popular control.³⁷

Beetham added that political equality must also be assessed in each area of these four criteria in order to achieve a complete democratic audit. Under a free and fair election, political equality can be assessed by measuring how voting has an equal value and effect among all citizens. In terms of open and accountable government, this can be assessed by examining the degree of individuals’ ability to influence government powers or obtain redress. Civil and political rights can be measured by how far these freedoms are protected for all citizens. Finally, a social society can be measured by the extent of equal

³⁵ *ibid* 31.

³⁶ *ibid* 28.

³⁷ *ibid* 30.

opportunities for all individuals with regard to self-organising, access to media, and the ability to influence and check government powers.³⁸

It can be concluded that the participation of people in their governments is a vital attribute of democracy.³⁹ This basic meaning is the most widely accepted definition used to describe democracy.⁴⁰ The degree of popular political participation in any country is regarded as one of the indices by which democracy must be measured.⁴¹ Thus, the quality of participation can effectively determine the quality of democracy.⁴² However, democracy is realised not only when people vote about decision-making, but also when they exercise control over decision-makers who act on their behalf, and when, ‘control is mediated rather than immediate’.⁴³ Thus, it is true that, ‘democracy implies voting but voting does not imply democracy’.⁴⁴

Ultimately, ‘at the heart of democracy thus lies the right of all citizens to a voice in public affairs and to exercise control over government’.⁴⁵ In summary, there are various types and models of democracy, but their various practices should aim to achieve two important objectives: avoiding executive tyranny as a negative practice of power through effective accountability, and, as a positive purpose, promoting popular participation as a means of empowerment. The study uses these two ideas as important democratic ends which must be reflected in any democracy. The next two sections illustrate these ideas in greater detail.

3.2.2 Democracy as a Method of Accountability

Accountability is needed where there is danger of executive tyranny. In democratic systems, each official who exercises power should be under an obligation to explain his or

³⁸ op cit Beetham (n 31) .

³⁹ Riker W, *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (Waveland Press 1988) 5.

⁴⁰ Lijphart A, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, (Yale University Press 1984) 1.

⁴¹ op cit Beetham (n 23) 44.

⁴² Blackburn R, *The Electoral System in Britain* (Macmillan Press 1995) 1.

⁴³ op cit Beetham (n 31) 4.

⁴⁴ op cit Riker (n 39) 5.

⁴⁵ op cit Beetham (n 31) 92.

her actions and, when appropriate, to suffer the consequences of bad results.⁴⁶ The accountability system is a crucial element in democracy because, on the one hand, it promotes openness, effectiveness, and public participation, and eliminates corruption and the domination of power.⁴⁷ On the other hand, it can be, ‘a means of safeguarding the liberty of subjects, of protecting them against unnecessary or arbitrary constraints on their actions’.⁴⁸

Accountability and control are independent concepts. Accountability refers to the process of giving an account, while control refers to the authority to give an instruction. Nevertheless, they also have an overlapping relationship in theory and in practice.⁴⁹ The relationship between these different concepts has been captured well as, ‘two parallel and interlocking mechanisms’.⁵⁰ It has been argued that because of the very power to require the giving of an account, accountability will often exert influence over the actions of whoever is required to give an account.⁵¹ Therefore, in a representative system which depends on popular participation, governmental tyranny and oppression can be countered effectively. From this standpoint, ‘accountability is valuable because it is a powerful antidote to the corrupting effect of power’.⁵² However, two important factors are needed in order to apply efficient control over government: access to information and the ability to sanction. Otherwise, ‘without transparency, accountability may be blind...without the possibility of sanctions, accountability processes are empty’.⁵³

The accountability of state institutions is a result of their stewardship of the public interest, and by this criterion they must be judged.⁵⁴ In other words, ‘the public interest is the legitimating justification for government, and accountability should promote this’.⁵⁵ There

⁴⁶ Borowiak C, *Accountability and Democracy: The Pitfalls and Promise of Popular Control* (Oxford University Press 2011).

⁴⁷ op cit Oliver (n 22) 48.

⁴⁸ op cit Lively (n 17) 100.

⁴⁹ Stenning P, ‘Accountability in the Ministry of the Solicitor General of Canada’ in Stenning P (ed), *Accountability for Criminal Justice: Selected Essays* (Toronto University Press 1995) 50.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² op cit Lively (n 17) 101.

⁵³ op cit Borowiak (n 46) 7.

⁵⁴ op cit Oliver (n 22) 48.

⁵⁵ *ibid.*

are various mechanisms which can impose government accountability. For example, politicians, the public, courts and administrative auditing bodies perform accountability over the executive's activities.⁵⁶ Moreover, governance literature distinguishes between traditional and more fluid types of accountability. The first includes political, professional, bureaucratic and personal accountability; while the second type includes performance and deliberation as alternative types of accountability.⁵⁷ However, this study limits its attention to the parliamentary or political accountability of government and legal accountability in order to be consistent with its objectives.

Accountability has been recognised in practice as a doctrine that is comprised of several constituent parts which are identified as redirectory, informatory, explanatory, amendatory and sacrificial elements.⁵⁸ Redirectory accountability is the starting-point of accountability which aims to ensure that the right person delivers information.⁵⁹ It requires that those who are questioned must, if necessary, redirect questions to those who are best placed to provide answers. This type of accountability is prevalent in relation to matters concerning devolved powers such as executive agencies.⁶⁰ Similarly, informatory accountability requires a minister to provide information about his indirect accountability to parliament for the actions of devolved bodies. It does not aim for blame, but to place an account to whom accountability is due for providing information. Explanatory accountability involves not only obtaining information, but also the duty of providing an explanation about the provided information. Amendatory accountability aims for explanation and action following any shortcomings acknowledged in the account.⁶¹ Ultimately, when accountability indicates responsibility according to the information contained within the account, sacrificial accountability requires that those who are responsible resign.⁶² Dissecting the concept of accountability into these categories allows specificity over the

⁵⁶ *ibid* 48–52.

⁵⁷ Erkkila T, 'Governance and Accountability: A Shift in Conceptualisation' (2007) 31(1) *Public Administration Quarterly* 1–38.

⁵⁸ Flinders P, *The Politics of Accountability in the Modern State* (Ashgate 2001) 12.

⁵⁹ Woodhouse D, *Ministers and Parliament: Accountability in Theory and Practice* (Clarendon Press 1994) 28.

⁶⁰ *op cit* Flinders (n 58) 12.

⁶¹ Turpin C, *British Government and the Constitution* (Weidenfeld 1985) 346.

⁶² *op cit* Flinders (n 58) 13.

executive's activities and eliminates any ambiguous aspects about who is to be responsible or to blame.

In the constitutional system of the UK, political accountability stands primarily on the doctrine of ministerial responsibility towards Parliament.⁶³ The convention of ministerial responsibility therefore, 'forms the cornerstone of the British Constitution'.⁶⁴ It has been argued that, 'political constitutionalism contends that constitutionalism is better achieved by political rather than legal mechanisms'.⁶⁵ However, the dual function of parliament to sustain government and to hold it to account when needed has a complex political impact.⁶⁶ This political role inevitably involves party considerations entering into the process.⁶⁷ Such a fact might mean that the mechanisms of accountability are also used as weapons in party political confrontation.⁶⁸

In the UK, the executive powers which are necessary to govern the country are vested in the Queen; however, the royal prerogative is exercised on the advice of ministers who are responsible to Parliament in which ministerial responsibility lies. This constitutional arrangement has developed political neutrality for the monarch's office, whereby prerogative power in practice is conducted almost always on the government's advice.⁶⁹ Thus, the Queen is not personally responsible for her acts of state or even for criticism of the exercise of her power. Instead, it is the responsibility of ministers to defend these acts in Parliament and to be accountable for its results.

Depending on the system of governance, it is sufficient to say that there are various ways of achieving executive accountability. The doctrine of the collective responsibility of ministers to parliament is one of the most essential principles in modern democracies,

⁶³ Bamforth N, 'Accountability of and to the Legislature' in Bamforth N and Leyland P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 268.

⁶⁴ op cit Flinders (n 58) 56.

⁶⁵ Horne A and Walker C, 'Lessons learned from political constitutionalism? Comparing the enactment of control orders and terrorism prevention and investigation measures by the UK Parliament' [2014] Public Law 267.

⁶⁶ op cit Flinders (n 58) 2.

⁶⁷ Lord Nolan, First Radcliffe Lecture (Warwick University 7 November 1996) cited in Flinders (n 58) 57.

⁶⁸ See Turpin C, 'Ministerial Responsibility: Myth or Reality?' in Jowell J and Oliver D (eds), *The Changing Constitution* (Clarendon 1989).

⁶⁹ Blackburn R, 'The Future of the British Monarchy' in Blackburn R, *Constitutional Studies: Contemporary Issues and Controversies* (Mansell 1992) 2.

particularly, in a representative parliamentary as in Kuwait. This principle has been observed within the British state, ‘as the fulcrum on which the constitutional structure of the state is constructed’.⁷⁰ Although no specific legal text establishes the doctrine,⁷¹ this rule exists in practice.⁷² The doctrine means that if ministers, in their conduct of national affairs, fail to retain the confidence of the House of Commons, they must all vacate their offices. It means also, ‘when used in its strict sense, the legal responsibility of every act of the Crown in which he takes part’.⁷³ Collective responsibility, ‘provides parliament with the means of holding the Government as a body accounted, and individual ministerial responsibility enables the House to focus on a particular minister’.⁷⁴ However, Giddings describes the common consequences of individual ministerial responsibility as follows:

If a minister is said to be accountable to parliament, to the Government as a whole, and to the generality of his or her party, for the effective discharge of role responsibility, and at least for the absence of personal irresponsibility, historical analysis shows that the most significant sanctions holders have been Prime Ministers.⁷⁵

Such an important impact regarded accountability, ‘as central to the concept of responsible government, and maybe regarded as essential in a system with a dominant executive and without the legal checks provided by a constitutional court’.⁷⁶ However, the relation between the capacity of legislature to keep a government accountable and the effectiveness of this role can be better determined, ‘if there were better measures of capacity and/or of effectiveness’, which are capable of detecting the internal and external factors and the facilitating conditions.⁷⁷ It has been argued that political will is a key driver for parliamentarians to perform the oversight function effectively. Therefore, any attempt to

⁷⁰ op cit Flinders (n 58) 16.

⁷¹ Except for *AG v Jonathan Cape Ltd* [1976] QB 752; Cabinet Office, Ministerial Code <<https://www.gov.uk/government/publications/ministerial-code>>.

⁷² Dicey AV, ‘Ministerial Responsibility and the Rule of Law’ in Marshal G, *Ministerial Responsibility* (Oxford University Press 1989) 22.

⁷³ *ibid.*

⁷⁴ op cit Woodhouse (n 59) 1.

⁷⁵ Giddings P, *Parliamentary Accountability: A Study of Parliament and Executive Agencies* (MacMillan 1995) 22.

⁷⁶ op cit Woodhouse (n 59) 1.

⁷⁷ Pelizzo G, *Government Accountability and Legislative Oversight* (Routledge 2014).

examine the capacity of legislature to make government accountable must consider the applicable facilitating conditions.⁷⁸

The parliamentary mechanisms for controlling the Executive in the UK and Kuwaiti democratic systems, and the constitutional watchdogs, are examined in chapters six and seven.

3.2.3 Democracy as a Method of Empowerment

The virtue of democracy is that it is not only a political decision-making method or an institutional arrangement capable of being an end in itself. Democracy can also enrich society due to the political engagement of citizens, individuals' capacities and achievements, and its expression of the right to self-government.⁷⁹ Self-control is a, 'necessary instrument of that human dignity and self-respect that moral philosophers of almost all persuasions have regarded as the best human achievement'.⁸⁰ To this end, 'the democratic process is an end-in-itself in that it requires or rather means the maximum possible participation of all citizens in the activity of public decision-making'.⁸¹

The educative function of involvement in a political system can develop 'an environment making for better men'.⁸² In line with Kant's philosophical theory,⁸³ 'political systems should create environments which are capable of treating people as ends and not as people serving others' ends. Thus, people should be treated in terms of their independence and their own goals, values and spirits. Such an inspiring concept should serve as the ultimate realisation of democracy. People as an end in themselves with their inherited values as human beings should be counted as equal, no matter how different they are, in order to have a voice in determining the way in which they are governed.

Through this noble treatment of individuals, democracy can empower people to express their will in electoral terms, in order to participate in creating their policies and exercising

⁷⁸ *ibid.*

⁷⁹ *op cit* Lively (n 17) 108.

⁸⁰ *op cit* Riker (n 39) 6.

⁸¹ *op cit* Lively (n 17) 104.

⁸² *ibid* 105.

⁸³ See Gregor M and Timmermann J (eds and tr), *Immanuel Kant: Groundwork of the Metaphysics of Morals* A German-English Edition (Cambridge University Press 2011).

accountability over the holders of power. However, electoral accountability might not always be sufficient. A perfect electoral system without conscious citizens might not reflect perfect outcomes. In fact, ‘democratic accountability derives meaning not only from the need for greater control but also from the need to build and shape community through participation’.⁸⁴ It is thus because, ‘mutual accountability points to the prospect that a democratic community can be formed and strengthened when individuals are accountable to one another in an equal and reciprocal fashion’.⁸⁵ However, the accountability capabilities of citizens and how they are distributed across a society can enhance or diminish democratic empowerment. If citizens are, systemically, unable to exercise accountability over power and to engage freely in their political culture, even the best-designed accountability institutions will be incompetent.⁸⁶ Citizens’ self-determination to speak, discuss and change politics is therefore fundamental.

Moreover, through such an empowering function, democracy can be recognised as a source of legitimacy. It has been agreed that the key element of legitimacy in developed societies is people.⁸⁷ Popular sovereignty and representative government have become the legitimate source of political authority. This sovereign power stems from the people’s will, which they delegate to their representatives through the ballot box.⁸⁸ Therefore, democratic governments are regarded as having a greater degree of legitimacy than others and, accordingly, their decisions are received by citizens with a greater degree of acceptance.⁸⁹

At this point, the chapter has explained why democracy is important as a universal value. The next section explains how democracy can be delivered.

3.2.4 Models of Democracy

The conclusions of previous discussions show that democracy serves the key objectives in constitutionalism of making government respond to democratic wishes by being

⁸⁴ op cit Borowiak (n 46) 13.

⁸⁵ ibid 14.

⁸⁶ ibid.

⁸⁷ op cit Beetham (n 31) 75.

⁸⁸ Hirst P, *Representative Democracy and Its Limits* (Cambridge Polity Press 1999) 24.

⁸⁹ op cit Lively (n 17) 101.

accountable, and empowering people so that individuals can take part in the decision-making process. The ideal democratic practice is that which is capable of responding perfectly to the preferences of the people.⁹⁰ Even though such an ideal model has never existed and might never be reached, it must always serve as an aspiration for what a democratic system should promote.⁹¹ However, as argued previously, despite the various debates about the models of democracy, the, ‘liberal democratic ideal remains the most universal...until an alternative exists’.⁹²

According to Pickles’ classification, there are four types of democracy: direct, representative, political, and economic and social.⁹³ Although this is not the only classification of democracy, it is the most suitable and also the simplest. It facilitates the examination of the important features of democracy: direct and representative democracies, which are concerned with the methods of decision-making processes, and liberal and social-economic democracies, which are more interested in the outputs of democracy.⁹⁴

3.2.4.1 Direct Democracy

The foundation of the concept of direct democracy in political systems is the direct participation of people in policy decisions. Each voter has a right to vote directly on the most important political issues in his or her political system. Most classical and modern theorists of the direct democracy school assert that true democracy is difficult to achieve without a full, direct and unmediated engagement of all citizens in the political arrangement, discussion and decision-making process.⁹⁵ The main principle of this theory is that individuals should make their own laws and policies, amend and execute the powers. Parliament generally exercises this role in a representative democracy. Barber, in his work *Strong Democracy*, observed that through such a type of self-government, active citizens have the ability to govern themselves directly, mainly when there is a significant need for

⁹⁰ op cit Lijphart (n 40) 1.

⁹¹ ibid.

⁹² Gilley B, *The Right to Rule: How States Win and Lose Legitimacy* (Columbia University Press 2009) 46.

⁹³ See Pickles D, *Democracy* (Methuen 1971) cited in Demir H, ‘The Role and Treatment of Political Parties in Liberal Democracies with Reference to the United Kingdom, Turkey and the European Convention of Human Rights’ (PhD thesis, University of Leeds 2000) 11.

⁹⁴ ibid.

⁹⁵ op cit Pickles (n 93) 12.

a popular choice.⁹⁶ He argued that, ‘the idea of participation has an intrinsically normative dimension, a dimension that is circumscribed by citizenship’.⁹⁷ Thus, he believed that a strong democracy could be achieved through citizens’ choices instead of their will, and through their full democratic engagement in politics and decision-making instead of mediated voting.

The most obvious mechanism which reflects direct democracy is referenda, which allows the ‘People’ as a political sovereign,⁹⁸ to participate directly in the decision-making process. The main advantage of a referendum is that it can provide the legitimacy required for an important decision which needs a direct popular influence.⁹⁹ However, government controlled referenda, as they decide how and when to use them, can be ‘political weapons in the hands of governments rather than weapons against governments’.¹⁰⁰ Arguably, ‘There are many aspects of the process that can be manipulated to suit the ends of the government of the day’.¹⁰¹ For example, there is no guarantee that people are going to make informed choices in regard to the information provided in referenda. And this raises several issues as to whether the pros and cons are equal in choosing their decisions.¹⁰² Another problem is that referenda lack the flexible nature of politics in a representative model of democracy. When a majority decides an issue, there can be a real danger to minority rights, ‘because they cannot measure intensities of belief or work things out through discussion and discovery’.¹⁰³ Whilst in a representative democracy, representatives often negotiate compromise solutions which take into consideration minority rights. Others, however, believe that a, ‘referendum is not always a blunt majoritarian instrument’, particularly if combined with a popular initiative.¹⁰⁴ Also, the way questions are formulated can make a significant difference. Thus, referenda as argued ‘are overwhelmingly binary. They ask

⁹⁶ Benjamin B, *Strong Democracy: Participatory Politics for a New Age* (Oxford University Press 1984) 131.

⁹⁷ *ibid* 140.

⁹⁸ Ackerman B, *We the People: Transformations* vol II (Cambridge 1998).

⁹⁹ *op cit* Lijphart (n 40) 204.

¹⁰⁰ *ibid*.

¹⁰¹ Davies B, ‘The EU Referendum: Who Were the British People’ (2016) 27 *King’s Law Journal* 323.

¹⁰² Levy R, “‘Deliberative Voting’: Reforming Constitutional Referendum Democracy’ [2013] *Public Law* 555.

¹⁰³ Butler D and Ranney A (eds), *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research 1978) 36.

¹⁰⁴ *op cit* Lijphart (n 40) 32.

effectively a ‘yes/no’ question’.¹⁰⁵ Arguably, ‘they are vulnerable to elite control and tend to aggregate pre-formed opinions instead of promoting meaningful deliberation’.¹⁰⁶ In addition, ‘Setting the franchise is therefore hugely significant. Choosing those entitled to vote determines the sovereign to be consulted’.¹⁰⁷ Nevertheless, there is a significant benefit of referenda which cannot be neglected.¹⁰⁸ Most importantly, ‘its instrumental role in fostering a wider culture of civic participation’,¹⁰⁹ particularly if they are regulated by independent professional bodies. Such a mechanism would produce accurate tools for measuring collective public opinion about specific important matters, such as the referendum which was held to explore public opinion towards remaining in or leaving the European Union.¹¹⁰ Voting in a general election may not reveal the same result, because the will of the electorate in a general election is based on various issues.

3.2.4.2 Representative Democracy

Representative democracy, or the Westminster model of democracy as described by Lijphart,¹¹¹ is based on the realisation that political authority is presented as a delegated power from people to elected agents.¹¹² In this model of democracy, people do not practice decision-making directly as they do in a direct democracy, but through their representatives who in turn hold the governing elite to account. Popular control in a representative democracy generally takes the form of control over decision-makers rather than over decision-making.¹¹³

Supporters of representative democracy believe that it is the most appropriate governing system, particularly in large societies. Thus, ‘the essence of the Westminster model is

¹⁰⁵ op cit Davies (n 101).

¹⁰⁶ Tierney S, ‘Direct Democracy in the United Kingdom: Reflections from the Scottish Independence Referendum’ [2015] Public Law 633.

¹⁰⁷ op cit Davies (n 101).

¹⁰⁸ op cit Levy (n 102).

¹⁰⁹ Daly E, ‘A Republican Defence of the Constitutional Referendum’ (2015) 35 Legal Studies 30.

¹¹⁰ For example see ‘The Brexit’ <<http://www.bbc.com/news/uk-politics-32810887>> accessed 24 October 2016.

¹¹¹ op cit Lijphart (n 40) 1.

¹¹² op cit Hirst (n 88) 24.

¹¹³ op cit Beetham (n 23) 28.

majority rule'.¹¹⁴ But, if democracy is intended to reflect the will of the people, a majority might not always form the people's will. As Schumpeter states, 'the will of the majority is the will of the majority and not the will of the people'.¹¹⁵ However, it could be said that, 'the alternative answer to this dilemma is: as many people as possible'.¹¹⁶ Through organising broad public engagement in the process of decision-making, it is possible to achieve broad public participation which forms the will of most people.¹¹⁷ However, Dworkin defended a constitutional concept of democracy which rejects the majoritarian premise as a defining goal of democracy.¹¹⁸ He believed that such a concept presents a different aim of democracy whereby, 'collective decisions...[are] made by political institutions whose structure, composition, and practices treat all members of the community as individuals, with equal concern and respect'.¹¹⁹

Therefore, representation is essential, but not sufficient, for democracy; there must be institutions within a representative democracy which are capable of protecting individuals' rights against the will of the majority.¹²⁰ Most importantly, such institutions must not be controlled by a majority but through an independent governing structure. A perfect representation model, therefore, is not one which is governed by collective preferences; rather, it is a model which is capable of generating a forum for discussion of the moralities in which society believes.¹²¹ Democracy as a form of government is, in fact, beyond the majority rule of the people:

It is a state in which individuals and minorities have an assurance of certain basic protections from the majoritarian interest, and in which independent courts of law hold the responsibility for interpreting, applying and – importantly – supplementing the law laid down by

¹¹⁴ op cit Lijphart (n 40) 4.

¹¹⁵ Schumpeter A, *Capitalism, Socialism and Democracy* (Harper Collins Publishers 2008) 272.

¹¹⁶ op cit Lijphart (n 40) 4.

¹¹⁷ ibid 5.

¹¹⁸ Dworkin R, 'The Moral Reading and the Majoritarian Premise' in Koh H and Slye R (eds) *Deliberative Democracy and Human Rights* (Yale University Press 1999) 96.

¹¹⁹ op cit Dworkin (n 118) 96.

¹²⁰ op cit Calsamiglia (n 4).

¹²¹ ibid.

parliament in the interests of every individual, not merely of the represented majority.¹²²

It could also be argued that an election might not always be deemed to be a pure expression of the people's will in the case of limited electoral competition among a small set of alternatives.¹²³ However, the doctrine of representation through election is neither about forming a popular government nor about forming a mere device which literally executes the will of people. In fact, it is nearly impossible for any government to adopt the diverse, contradictory and changing will of electors. Rather, representative democracy is about creating a set of political mechanisms which are capable of exercising constraint over government through political competition, public scrutiny and public influence.¹²⁴

It has been argued that, 'the central feature of democratic legitimacy, of course, resides in the electoral system'.¹²⁵ Although comparative analysis is not among the objectives of this study, it is worth noting that the idea of representativeness and how electoral systems can determine whom to represent, and what to represent, has a great impact on the democratic governing system. The design of electoral systems can be built on a plurality or a majority formula in which winners depend generally on the majority of votes. In addition, it can be designed on a proportional representative system, which depends on a geographic formula in order to sustain a fair allocation of seats to all constituencies that may suffer denial of representation under plurality or majority electoral systems. As a result, there are other electoral systems models that combine a mixed method of plurality and proportional voting systems to secure the national and locality levels of votes, such as the German and the American electoral systems.¹²⁶

¹²² Sir Sedley S, 'The Common Law and the Constitution' in Lord Nolan of Brasted and Sir Sedley S *The Making and Remaking of the British Constitution* (Blackstone Press 1997) 25.

¹²³ op cit Hirst (n 88) 26.

¹²⁴ *ibid.*

¹²⁵ Urbinati N and Warren M, 'The Concept of Representation in Contemporary Democratic Theory' (2008) Annual Review of Political Science University of British Columbia 398
<<http://polisci.annualreviews.org>> accessed 25 October 2016.

¹²⁶ Grofman B and Lijphart A, *Electoral Laws and their Political Consequences* (Algora Publishing 2003) 38.

Therefore, the quality of representation is one of the important indices that democracy can be measured by. From Beetham's point of view in *Defining and Measuring Democracy*, some questions have proven relevant to an examination of democratic auditing:

To what extent is appointment to legislative and governmental office determined by popular election, on the basis of open competition, universal suffrage and secret ballot? To what extent are the election and procedures of voter registration independent of government and party control? To what extent do the votes of all electors carry equal weight? What proportion of the electorate actually votes, and how closely do the composition of parliament and the programme of government reflect the choices actually made by the electorate?¹²⁷

The answers to these questions in Kuwait will be explored in subsequent chapters.

3.2.4.3 Liberal or Political Democracy

In line with Locke's liberalism theory,¹²⁸ liberalism, as a political concept, was introduced by Western countries such as Britain and the United States in the seventeenth and eighteenth centuries. According to the political tradition of liberal democracy, 'the exercise of state power is to be justified primarily in terms of the public interest rather than the interests of particular classes, groups or parties'.¹²⁹ Thus, political or liberal democracy, which has been developed through representative democracy, is more concerned with protecting individuals' rights from the potential inputs of democracy. Recent theories of liberalism assert that there is an essential relationship between liberty and democracy.¹³⁰ The central argument of liberalism is the protection of certain fundamental freedoms in order to maintain legitimate government. Therefore, liberal democracy is recognised as a political system which preserves such freedoms from violation, which may even be sanctioned through the democratic process itself.¹³¹

¹²⁷ op cit Beetham (n 23) 36.

¹²⁸ See Macpherson C (ed), *Second Treatise of Government by Locke J* (Hackett Publishing Company 1980).

¹²⁹ Oliver D, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press 1991) 6.

¹³⁰ Mill JS, *Considerations on Representative Government* (Everymans' Library 1951).

¹³¹ Dhal R, *Democracy and Its Critics* (University of Yale Press 1989) 169.

Beetham, in his work *Democracy and Human Rights*, distinguished five components of liberalism which have proved to be indispensable to democracy. Firstly, there is the securing of fundamental freedoms through a higher law in order to secure effective popular control over the decision-making process. Secondly, there is the separation of powers among the Executive, Legislature and Judiciary in order to maintain the rule of law. Thirdly, there is the institution of a representative assembly elected by free and equal voting arrangements in order to reconcile the requirements of popular control and political equality. Fourthly, limiting the state's influence in society by the separation of public and private spheres in order to secure an autonomous sphere for citizens to participate in politics. And finally, there is the epistemological premise that the common good for society is what people decide and that this is the only criterion for the public good. Beetham suggested that these components, as well as defining the characteristics of liberal democracy, can be supported to the extent that without them no popular control over collective decision-making is sustainable.¹³²

3.2.4.4 Economic and Social Democracy

In line with the Marxist argument against the exploitation of class by class, and to eliminate this exploitation, the proposition of socio-economic democracy is to shift the decision-making process from elites and property holders to the broader public, the people who work for them, in order to bring about the rule of the people.¹³³ The theory of economic and social democracy is more concerned about the outputs of society. Social theorists, who criticise liberal democracy, assert that democracy must tackle the social and economic roots of class inequalities. They believe that democracy is more than simply about developing a decision-making process or other political and legal arrangements.

The origins of the implementation of the economic and social school of democracy go back to the period of the Cold War between the East and the West. As an outcome of the Second World War, in 1945 the United Nations pushed forward the idea of protecting human rights in what has been known as the New World Order. The Americans and the British were

¹³² op cit Beetham (n 31) 49.

¹³³ op cit Schumpeter (n 115) 235.

more concerned with civil and political human rights to support the ideas of liberal democracy. On the other side, the USSR and the Chinese were interested in the limitation of civil and political rights, which reflected the liberal form of democracy. By demanding the protection of economic and social human rights, the socialist camp called for an increase in the standards of developing countries to a state where their citizens could effectively enjoy the benefits of liberty. They believed that a democracy that is capable of securing economic and social rights of human beings is more likely to produce social justice than a liberal one. As a kind of compromise, the UN presented, at the same time, two international covenants on human rights:¹³⁴ the International Covenant on Civil and Political Rights of 1966 (ICCPR), and the International Covenant on Economic Social and Cultural Rights of 1966 (ICESCR). Both sides accepted this package.¹³⁵ However, in terms of enforceability and priority, it is sufficient to say that under the ICCPR provisions, there is a structure of adjudication. In Europe, there is The European Court of Human Rights,¹³⁶ and even within the United Nation system there is a Human Rights Committee, which takes individuals' complaints.¹³⁷ Thus, these rights can be protected by clear decisions which individualise the rights that should be enjoyed in a given country, in a given situation and under a given law. Whereas, under the ICESCR the rights are not enforceable, generally speaking, either under national constitutions or under international measures. They might be overseen by a review system, but this is not for the benefit of individuals.¹³⁸ Therefore, for a clearer enforcement system, the study gives the ICCPR priority in its following assessments.

¹³⁴ UN General Assembly Resolution 2200A (XXI) 16 December 1966.

¹³⁵ Donnelly J, *International Human Rights* (4th edn, Westview Press 2013) 8.

¹³⁶ Article 1 of the European Convention on Human Rights 1950

<http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 29 December 2016.

¹³⁷ Article 28 of the ICCPR 1966 <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 29 December 2016.

¹³⁸ See Gerstenberg, 'The Justiciability of Socioeconomic Rights, European Solidarity, and the Role of the Court of Justice of the EU' (2014) 33(1) Yearbook of European Law 245–276.

3.2.4.5 Democracy as an International Standard of Governance

Until the early 1990s, there was widespread agreement regarding the domestic nature of most democracy arrangements.¹³⁹ The term ‘democracy’ was rarely used in the writings of international law scholars.¹⁴⁰ How nations behave on matters such as decision-making issues has mainly been regarded as an internal subject that is outside the scope of international law. Many diplomats and human rights lawyers have come to regard violations of the right to democratic governance as less urgent than other human rights violations.¹⁴¹ Therefore, ‘it is hardly surprising that under international law (apart from treaties), there was no general endorsement of the principle of democracy’.¹⁴²

However, on 31 July 1994 the world witnessed the first use of international law to enforce democracy. The United Nations Security Council, in an exceptional response, passed Resolution 940 under Chapter VII,¹⁴³ which authorised multinational military action against the ruling military junta which had seized power over the elected democratic government of Haiti.¹⁴⁴ Such action, which primarily aimed to reinstate democracy, was nevertheless criticised for violating Haiti’s sovereignty.¹⁴⁵ As argued:

The right of self-determination that is at the heart of the democratic entitlement vests in none other than the people, and that it is they, and not some foreign power that they have similarly not elected, who must determine their own destiny.¹⁴⁶

Moreover, cultural relativism, economic development and politics have been challenging the universality of political human rights values.¹⁴⁷ Many powerful undemocratic countries

¹³⁹ Please note section 3.4.1.

¹⁴⁰ Fox G and Roth B, ‘Introduction: the Spread of Liberal Democracy and its Implications for International Law’ In Fox G And Roth B (eds), *Democratic Governance And International Law* (Cambridge University Press 2000) 1.

¹⁴¹ Reisman W, ‘Sovereignty and Human Rights in Contemporary International Law’ in *ibid* 257.

¹⁴² Crawford J, ‘Democracy and the Body of International Law’ in *ibid* 91.

¹⁴³ United Nations Security Council Res (1994) UN Doc S/940(1994).

¹⁴⁴ *op cit* Reisman (n 141) 248.

¹⁴⁵ *ibid* 251.

¹⁴⁶ Byers M and Chesterman S, ‘You, the People: Pro-democratic Intervention in International Law’ in *ibid* (n 140) 291.

¹⁴⁷ See Cerna CM, ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts’ (1994) 16 *Human Rights Quarterly* 740–752; Donnelly J, ‘Cultural Relativism and Universal Human Rights’ (1994) 6 *Human Rights Quarterly* 400; Douglas EE, ‘The Structure

such as China, Russia and Saudi Arabia, to name just a few, were invulnerable to such international pressure. In fact democracy, as an international standard, was a less prioritised organising principle within international governance compared to human rights. By way of proof, most international sanctions were generally used to encounter threats against international security (eg Iran) or very occasionally regimes which violated rights (eg Belarus and Zimbabwe) but not against undemocratic systems. Even so, many scholars have started to argue about the emerging right to democratic governance in international law.¹⁴⁸ Frank believes that an, ‘international system is moving towards a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance’.¹⁴⁹ However, it has been observed that most of the efforts of the related international organisations were, in fact, applied to monitoring election procedures in newly-transformed democratic states. Therefore, there has been a warning that, ‘The present approach to democracy in international law ignores behaviour beyond elections’.¹⁵⁰ It is true that an election is one of the key features of a democracy, but there are other important aspects that can affect the credibility of the democratic practice. Governments can always proclaim adherence to their democratic standards over elections. Such an approach will not be sufficient unless the development of an international law of democracy is based on the ability of individuals and societies to decide that democracy exists in reality rather than being illusory.¹⁵¹

To sum up, it is difficult for democracy to be conceptualised by an agreed set of particular universal standards. There will always be room for alternative ideas and forms on how to apply the perfect democratic governance system for each given state. Thus, international law has, up to now, been weak in presenting any well-defined global agenda toward universal democratic governance.

for Human Rights Versus Stability: The Chinese Communist Party and Western Values Clash’ (2003) 29(2) *Denver Journal of International Law and Policy* 159.

¹⁴⁸ Slaughter AM, ‘International Law in a World of Liberal States’ (1995) *European Journal of International Law* 536.

¹⁴⁹ Frank T, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 91.

¹⁵⁰ Burchill R, ‘The Developing International Law of Democracy’ (2001) 64 *Modern Law Review* 134.

¹⁵¹ *op cit* Burchill (n 150).

3.3 The Rule of Law

As stated earlier, the rule of law in general terms has been, ‘understood as a doctrine of political morality which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free and civilized societies’.¹⁵² It requires that citizens be subject only to the law, that legislative action is separate from an adjudication function and that the entire polity is under the law and none is above it.¹⁵³ In addition, the rule of law is a cornerstone for the protection of human rights in modern democracies.¹⁵⁴ According to the United Nations Universal Declaration:

It is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.¹⁵⁵

The literature contains many definitions which emphasise various attributes of the principle of the rule of law in which a narrower and wider conception of the rule of law is distinguished.¹⁵⁶ Dicey stresses that this doctrine, which is deemed to be a characteristic of the English Constitution, includes three distinct though associated meanings; the absence of the arbitrary power of the government; the idea of legal equality among all subjects; and that the general rules of constitutional law are laws passed by judges.¹⁵⁷ The idea of the rule of law as he explained, especially ‘excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens’.¹⁵⁸ However, it is not sufficient to specify only formalistic meanings of the rule of law in legal documents where its substantive applications are absent. For this perspective, it was emphasised that the modern concept of the rule of law in a free society is a dynamic concept which must be employed by jurists, ‘on procedural and substantive safeguards required for the proper

¹⁵² Carroll A, *Constitutional and Administrative Law* (Pearson 2013) 48.

¹⁵³ Rosenfeld M, *The Rule of Law and the Legitimacy of Constitutional Democracy* (Public Research Paper, Cardozo Law School March 2001).

¹⁵⁴ op cit Bingham (n 19).

¹⁵⁵ See United Nation Universal Declaration in 1948, Preamble, third paragraph.

¹⁵⁶ See Moller J and Skaaning E, ‘Systematizing Thin and Thick Conceptions of the Rule of Law’ (2012) 33 *Justice System Journal* 2.

¹⁵⁷ Dicey AV, *Introduction to the Study of the Law of the Constitution* (Wade ECS ed, 10th edn Indian reprint publisher unknown 1985) 187–195.

¹⁵⁸ *ibid* 292–203.

administration of justice’,¹⁵⁹ and to create economic, social, and cultural conditions, ‘under which his legitimate aspirations and dignity may be realized’.¹⁶⁰

According to the World Justice Project (WJP),¹⁶¹ a simple way to measure the rule of law in a given country is to examine, ‘the outcomes that it brings to societies in terms of accountability, respect for fundamental rights, or access to justice’.¹⁶² For this purpose, the WJP has developed an index, based on a quantitative measurement tool, which offers a comprehensive picture of the rule of law in practice in 99 countries and jurisdictions including the Middle East and the United Kingdom.¹⁶³ The data, which emerged from this index, shows that the Middle East countries scored amongst the lowest ranking in delivering the means of the rule of law in their societies.¹⁶⁴

The rule of law as a universal value is a very important factor in confronting executive tyranny. However, this notion nevertheless has its limits.¹⁶⁵ It is important that judges respect their role under the principle of separation of powers. The judges are not so well suited to decide upon policy.¹⁶⁶ In the following sections, the study discusses the role of judges in ensuring the rule of law and the limitations to this role.

3.3.1 The Rule of Law and the Role of Judges

The role of judges, ‘is to bring about the realization of the rule of law’.¹⁶⁷ Judicial review, therefore, forms an important path for supporting constitutionalism.¹⁶⁸ This doctrine leads to the conclusion that judges, and not the executive or the legislature, are the final

¹⁵⁹ International Commission of Jurists, ‘Declaration of Delhi 1959’ <<http://www.icj.org/history/part-one-1952-1970/>> accessed 25 October 2016.

¹⁶⁰ *ibid.*

¹⁶¹ The World Justice Project ‘Rule of Law Index’ (2014) <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf> accessed 25 October 2016.

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ McGoldrick D, ‘The Boundaries of Justiciability’ (2010) 59(4) *International Comparative Law Quarterly* 981.

¹⁶⁶ Daly P, ‘Justiciability and the ‘Political Question’ Doctrine’ [2010] *Public Law* 160.

¹⁶⁷ Barak A, *The Judge in A Democracy* (Princeton University Press 2008) 55.

¹⁶⁸ Brown N, *Constitution in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2002) 106.

interpreters of the law.¹⁶⁹ Thus, the essential groundwork of any constitutional government is the independence of the judiciary and the integrity of the legal process which forms the key element of the rule of law.¹⁷⁰ Indeed, ‘judicial independence is a central component of any democracy and is crucial to the separation of powers, the rule of law, and human rights’.¹⁷¹ Therefore, it is essential for judges to exercise this important role in order to maintain an independent relationship with other branches of the governing system, the executive and parliament. This means that the judiciary should not be exposed to external influence and political pressure. Failing to secure such status can undermine the judges’ important role. The methods of appointment of the judiciary, and constitutional judges in particular, can be a serious limitation on their independence. Thus, under the UK’s Constitutional Reform Act 2005, an Independent Judicial Appointment Commission became the only responsible body empowered to recruit and select judges, thus ending the previously held sole right of the Lord Chancellor of his recommendation for appointment. In written constitutions, the fundamental human rights of individuals are commonly addressed in constitutional codes. Any constitutional principle must be legally addressed and enforced by law in order to be functional, and the courts are the source of this enforcement.¹⁷² It is the responsibility of judges to protect, maintain and enforce these rights. The interpretation of constitutional principles has, in fact, an essential influence on providing a solid constitutional foundation for the efficiency of the rule of law. This task depends heavily on the role of judges in implementing and interpreting constitutional doctrines.

Thomas Jefferson once argued: ‘the Constitution...is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please’.¹⁷³ The question then arises, what type of methodology should a judge apply to interpret a constitutional text? Indeed, in a constitution that requires a supermajority for the constitution to be

¹⁶⁹ *op cit* Barak (n 167) 55.

¹⁷⁰ Allan TRS, ‘The Politics of the British Constitution: a response to Professor Ewing’s paper’ [2000] *Public Law* 374–383.

¹⁷¹ *op cit* Barak (n 167) 76.

¹⁷² *op cit* Rosenfeld (n 153).

¹⁷³ Cited in Taylor MJC, ‘A More Perfect Union: Ableman v Booth and the Culmination of Federal Sovereignty’ (2003) 28(2) *Journal of Supreme Court History* 101–115.

approved or amended, as in the case of the United States, France and Kuwait, the constitutional doctrines have a greater significance in a democracy. ‘They have unusually wide support during the process of their legislation as they maximize the welfare of the greatest number’.¹⁷⁴ If such a constitution, during the process of interpretation can be simply changed by the will of judges and not by elected legislators, it is then possible to demolish the will of the framers by such an undemocratic decision.

Dworkin argued that judges must apply a moral reading method when interpreting constitutional texts.¹⁷⁵ Also, he asserted that they must not apply their own convictions to the Constitution unless these are consistent in principle with the Constitution’s overall structure.

They must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles – the best understanding of what equal moral status for men and women really requires.¹⁷⁶

All this, he adds, must be conducted by the requirement of constitutional integrity and in line with past constitutional interpretation by all judges as if they were, ‘authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole’.¹⁷⁷

In contrast, the nature of the British legal system is quite different. Under the doctrine of legislative supremacy, ‘all that a court can do with an Act of Parliament is to apply it’.¹⁷⁸ This doctrine, in the relation between the legislature and the judiciary, imposes upon the courts a duty to apply the parliamentary legislation, which the court may not hold to be invalid or unconstitutional.¹⁷⁹ Under this system:

[A]ll maxims were established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close

¹⁷⁴ McGinnis J and Rappaport M, *Originalism and the Good Constitution* (Harvard University Press 2013).

¹⁷⁵ op cit Dworkin (n 118) 86.

¹⁷⁶ ibid 90.

¹⁷⁷ op cit Dworkin (n 118) 90.

¹⁷⁸ Keir DL and others, *Cases in Constitutional Law* (Clarendon Press 1967).

¹⁷⁹ op cit Bradley and Ewing (n 14) 59.

resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament.¹⁸⁰

Therefore, a freedom like the right to individual liberty is part of the Constitution, not because it is a secured freedom in a constitutional code, but because it, ‘is part of the Constitution because it is inherent in the ordinary law of the land’¹⁸¹ of which, ‘it is secured by the decisions of the courts, extended or confirmed as they are by the Habeas Corpus Acts’.¹⁸²

Moreover, although literal and golden rules were traditionally the only methods to interpret legislation, which focus only on the meaning of the particular words of the statute in question, in recent years the English courts witnessed important developments.¹⁸³ As a consequence of joining the European Union and, in particular, the enactment of the Human Rights Act 1998,¹⁸⁴ the courts came under an ‘interpretative obligation’, which required them to focus beyond simply the wording of legislation, but also upon its aims and purposes.¹⁸⁵ Such a role enables them to interpret legislation, ‘consistently within the EU law and compatibly with rights under the ECHR’.¹⁸⁶

3.3.2 Legal Accountability

Legal accountability or accountability through the courts is a vital aspect of the rule of law.¹⁸⁷ In fact, there is no means of constitutionalism and rule of law without limiting the government’s power.¹⁸⁸ The efficient legal accountability of executive powers and public bodies’ functions can impose an obligation on decision-makers to justify their action in legal terms. In this regard, administrative law and its practical procedures through court reviews has played, ‘an important part in securing good administration, by providing a

¹⁸⁰ op cit Dicey (n 157) 197.

¹⁸¹ ibid 201.

¹⁸² ibid 197.

¹⁸³ Thwaites R, ‘The Changing Landscape of Non-Justiciability’ (2016) *New Zealand Law Review* 31.

¹⁸⁴ See Walker C, ‘Counter-terrorism and human rights in the UK’ in Breen-Smyth M (ed), *The Ashgate Research Companion to Political Violence* (Ashgate 2012) 443–463.

¹⁸⁵ Manchester C and Salter D, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation*, (4th edn, Sweet & Maxwell 2011) 50.

¹⁸⁶ ibid 64.

¹⁸⁷ op cit Oliver (n 129) 51.

¹⁸⁸ op cit Bradley and Ewing (n 14) 59.

powerful and effective method of ensuring that the improper exercise of power can be checked'.¹⁸⁹ The role of this law in practice is to govern the making of decisions by public bodies and their procedures.¹⁹⁰ In other words, 'judicial review of administrative action exists to safeguard legality'.¹⁹¹

Liberal legality conceives the rule of law as a guarantee against arbitrary government.¹⁹² Thus, a proper application of the rule of law can create a legal system which enables judges to, 'guard against despotic and tyrannical rule and circumscribe the authority of rulers, forcing them to rule in compliance with established procedures and norms'.¹⁹³

This type of judicial control method is different from the political control mechanisms which parliament generally exercises. In fact, as argued earlier, 'the political constitution ends where judicial review is exercised'.¹⁹⁴ The courts can apply accountability in individuals' disputes more adequately than politicians, given their ability for legal enforcement. Such authorities, 'empower them with the capacity to deliver explanatory, informatory and amendatory accountability'¹⁹⁵ while parliament might lack access to information, 'because of political considerations and because of lack of enforcement powers'.¹⁹⁶ Also, it is possible that political decisions might be premised on the balance of power rather than mere facts. Even in critical matters such as security, politics can be dominant. By contrast, in court, 'parliamentary privileges are absent and issues rarely become entwined in party political point scoring'.¹⁹⁷ However, this method of control is not applicable to all government activities as, 'law is not and cannot be a substitute for politics'.¹⁹⁸ With some sensitive or broad (polycentric) political issues, the nature of the problem cannot and must not be solved unless through political accountability.¹⁹⁹ As

¹⁸⁹ See 'The Judge Over Your Shoulder' (4th edn, January 2006)

<http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf> accessed 13 January 2015.

¹⁹⁰ *ibid.*

¹⁹¹ Allan TRS, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1994) 183.

¹⁹² *op cit* Brown (n 168) 8.

¹⁹³ *ibid.*

¹⁹⁴ *op cit* Oliver (n 22) 52.

¹⁹⁵ Oliver D, 'The Judge Over Your Shoulder' (1989) *Parliamentary Affairs* 42, 302.

¹⁹⁶ *op cit* Horne and Walker (n 65).

¹⁹⁷ *op cit* Flinders (n 58) 133.

¹⁹⁸ Griffith J, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 16.

¹⁹⁹ *op cit* Oliver (n 22) 52.

suggested, the essence of judicial review over the activities of the government's officials is summarised as follows:

They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.²⁰⁰

Ultimately, the universal value which this chapter seeks, in this section, to take forward in its assessments relates to the idea of the rule of law being enforceable by judges. Of course, it is for all branches of government to adhere to the rule of law. However, as far as the judges are concerned, it is an important constitutional moral principle, but equally they must respect their own role within the Constitution. Thus, judges also have a duty to respect constitutionalism.²⁰¹ They have to realise when it is appropriate to intervene and when not.²⁰² The principle of justiciability, it is argued, 'is important because it delineates the scope of judicial review and ultimately the rule of law'.²⁰³ Defining whether the essence of the dispute under examination is a legal claim or a political issue is a critical question that judges need to decide first. Every official, including judges, must know their place in relation to the principle of separation of powers otherwise, as will be discussed in chapters six and seven, this could be problematic.

3.4 Human Rights

Human rights are one of the fundamental universal values that should be respected in any modern society. It is thus because they are based on universal notions of philosophy, humanity and supported by the international law. Also, because of their direct influences on democracy by empowering individuals to have political participation and as a result, limiting tyranny. Thus, the focus of this section is on political and civil human rights.

²⁰⁰ *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 635 (1952) (Jackson J); Marshall CJ established the power of federal judicial review of congressional legislation accompanied by deference to the legislature's interpretation of its powers: *Marbury v Madison* 5 US (1 Cranch) 137 (1803); *McCulloch v Maryland* 17 US 316 (1819) cited in *op cit* Allan (n 191) 53.

²⁰¹ See *Miller v The Secretary of State for Exiting the European Union* [2016] EWHC 2768.

²⁰² *op cit* McGoldrick (n 165).

²⁰³ *op cit* McGoldrick (n 165).

In a modern sense, human rights have been defined as, ‘the ultimate basis for a universal human community’.²⁰⁴ They are therefore:

Inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.²⁰⁵

It has been argued that human rights were originally associated with the tradition of natural law.²⁰⁶ However, today they are commonly secured and protected as legal rights in both national and international laws. The United Nations Universal Declaration of Human Rights 1948 has inspired states to adopt its principles. Therefore, a series of treaties have followed this important universal declaration in order to ensure the protection of human rights. These include the European Convention on Human Rights 1950 and, most importantly for Kuwait, the ICCPR 1966.²⁰⁷

In the UK, the evolution of the legal system and its approaches to protect human rights dates back many centuries. In the absence of a comprehensive human rights bill, they were scattered across various statutes and common law rules.²⁰⁸ Starting with the famous declarations of the Magna Carta which was perceived as ‘the first great act of the nation’,²⁰⁹ the Petition of Rights 1627 and the Bill of Rights 1688,²¹⁰ up to the enactment of the Human Rights Act 1998, there has been a long and fair adherence to individuals’ rights.²¹¹ One clarification should be noted, however, that the European Convention on Human Rights 1950, although described as, ‘the most important instrument in international law to emanate from the Council of Europe’²¹² particularly with regard to civil and political rights, did not

²⁰⁴ Rosenbaum A, *The Philosophy of Human Rights: International Perspectives* (Aldwych Press 1980) 4.

²⁰⁵ United Nations, Office of the High Commissioner of Human Rights <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 18 November 2016.

²⁰⁶ op cit Rosenbaum (n 204) 8.

²⁰⁷ op cit Bradley and Ewing (n 14) 399.

²⁰⁸ Walker C and Weaver R, ‘The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World’ (2000) 33 *University of Michigan Journal of Law Reform* 497.

²⁰⁹ op cit Blackburn (n 13) 26–29.

²¹⁰ See Arlidge A and Judge I, *Magna Carta Uncovered* (Hart Publishing 2014).

²¹¹ Feldman D, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press 2002).

²¹² op cit (n 208).

perform as a vehicle to de novo appeal, as certain protection of liberties and human rights remained the responsibility of national authorities.²¹³

Thus, several alternatives, including institutional reforms, were sought to increase the protection of human rights even to include diminishing the danger of the ‘elective dictatorship’ suggested by Lord Hailsham, which might threaten rights.²¹⁴ These efforts eventually led to the enactment of the HRA 1998 which incorporated the European Convention of Human Rights into UK law,²¹⁵ but also engendered, ‘a culture of rights more pervasive than its technical legal requirements’²¹⁶ where the process of decision-making among legislators, administrators, and judges upon human rights became, in practice, focused on substance rather than form.²¹⁷

3.4.1 Human Rights and Democracy

It is true that, ‘democracy and human rights have been regarded as distinct phenomena, occupying different areas of the political sphere’.²¹⁸ Democracy as a form of government is regarded as a constitutional arrangement which traditionally defines internal matters which organise sovereign issues.²¹⁹ In contrast, human rights, which are more concerned with the quality of individuals’ lives, have become universal to the extent of being subject to international protection.²²⁰ Under such jurisdiction, national governments can be challenged in international judicial procedures even though they are acting in accordance with national law.²²¹

However, in modern politics, the separation of democracy and human rights no longer exists. Accordingly, it has been acknowledged that democracy and human rights have

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ See Walker C, ‘Counter-terrorism and human rights in the UK’ in Breen-Smyth, M (ed) *The Ashgate Research Companion to Political Violence* (Ashgate 2012) 443–463.

²¹⁷ *op cit* Walker and Weaver (n 208).

²¹⁸ *op cit* Beetham (n 31) 89.

²¹⁹ Please note section 3.2.4.5.

²²⁰ *op cit* Beetham (n 31) 89.

²²¹ *op cit* Bradley and Ewing (n 14) 399.

become firmly attached to each other.²²² In particular, political rights and liberties that aim to enhance public debate through introducing various views and thoughts, which give the community members an opportunity to select among various options, have become integral to democracy.²²³ They are therefore, ‘necessary to the functioning of the institutions that distinguish modern democracy from other kinds of political orders’.²²⁴ The purpose of ensuring these general civil liberties in democratic systems is to enhance the ‘Promotion of Truth’.²²⁵ The truth, as John Stuart Mill once argued, ‘can’t be displayed integrally without highlighting all its sides’.²²⁶ This democratic environment cannot be achieved without ensuring freedoms which enable every individual to know the truth.²²⁷ Thus, human rights and democracy have been conceptualised in the, ‘right of democracy’.²²⁸ This concept has been captured by Article 21 of The United Nations Universal Declaration of Human Rights:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.²²⁹

Also, in 1999, a resolution by the United Nations Commission on Human Rights entitled ‘Promotion of the Right to Democracy’ affirmed that: ‘democracy fosters the full realization of all human rights’.²³⁰ Therefore, it has become widely accepted that good

²²² op cit Beetham (n 31) 89.

²²³ See <<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-civil-and>> accessed 25 October 2016.

²²⁴ Dahl R, ‘Democracy and Human Rights under Different Conditions of Development’ in Savic O (ed) *The Politics of Human Rights* (Verso 1999) 166.

²²⁵ Al-Sulami M, *The West and Islam: Western Liberal Democracy versus the System of Shura* (Routledge 2003) 412.

²²⁶ Collini S, *JS Mill: 'On Liberty' and Other Writings: Cambridge Texts in the History of Political Thought* (Cambridge University Press 1998).

²²⁷ *ibid.*

²²⁸ Rosas A, ‘Democracy and Human Rights’ in Rosas A and others (eds) *Human Rights in a Changing East-West Perspective* (Pinter Publishers 1990) 17.

²²⁹ See <<http://www.un.org/en/universal-declaration-human-rights/>> accessed 25 October 2016.

²³⁰ United Nations Commission on Human Rights Res 57 (1999) UN Doc E/CN.4/RES/1999/57 paras 1 and 2.

governance requires states to respect, protect and fulfil the human rights principles of the conventions to which they have acceded. Failing to do so raises the question of accountability.²³¹ It is thus because in a democratic system, which protects the liberties and rights of individuals, people will be able to set the limits of government action.

Moreover, international legal scholars have now commenced a project of fashioning the international legal norms of democratic governance. Marks and other scholars have argued for the idea of cosmopolitan democracy that extends democracy to international and transnational settings.²³² These efforts of bringing democracy to international law sought to entrench the idea that democracy is relevant whenever and wherever it is needed for improving the conditions of individuals' collective lives.²³³ The basis of this argument is that democracy should be understood not only as a method of forming governments, but also as, 'an ideal of popular self-rule and equal citizenship'.²³⁴

The significant variation in the content of human rights exceeds the limits of this study. For the purposes of this research, the study aims to shed some light on the important principles of human rights which ought to be secured in order to sustain the efficient democratic accountability of government. The starting point for examining the relation between democracy and political and civil human rights is to define the perspective from which democracy should be approached. If democracy is viewed as popular control over collective decision-making,²³⁵ it is citizens rather than institutions that play the key role of securing democratic ends.²³⁶ The control citizens have over their government and their equal rights in this regard are the basic principles of democracy.²³⁷

In modern liberal democracies, one of the legitimising features is popular sovereignty, which is carried out consistently through electoral means.²³⁸ In these systems, 'popular

²³¹ Sano H, 'Good Governance, Accountability and Human Rights' in Sano H (ed) *Human Rights and Good Governance* (Martin Nijhoff Publishers 2002) 137.

²³² Marks S, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*, (Cambridge University Press 2000) 101–120.

²³³ *ibid.*

²³⁴ *op cit* Marks (232).

²³⁵ *op cit* Beetham (n 31) 90.

²³⁶ *ibid* 92.

²³⁷ *ibid* 91.

²³⁸ *op cit* Beetham (n 1) 162.

election and representative bodies will effectively secure against governmental tyranny and oppression'.²³⁹ It is thus because in environments where the liberties and rights of individuals are protected, people will be able to set the limits of government action by performing various forms of accountability. Accountability is valuable in this regard because, 'responsible government will be less arbitrary in its actions than other systems'.²⁴⁰ However, the participation of individuals requires fundamental conditions in order to be effective. Thus, in order for citizens to perform popular control effectively, they ought to enjoy specific rights. Here, the significance of political and civil human rights is evident.

An individual has an innate wish to enjoy liberty. As argued by John Locke, the natural liberty of a man is in being free, not subject to any supreme power on earth, nor being under the will or authority of any human or law except for the law of nature.²⁴¹ Liberty, in fact, has been regarded as the main principle and essence of the modern democratic ideology. Liberties such as the freedom of expression, freedom of assembly and freedom of association, encourage the exchange of thoughts and opinions among society's members, facilitate the spread of information, and enhance the means of protecting individual dignity and interest in the society in a general sense.

As for the Freedom of Speech, assembly, and association, they are prerequisites and basic rules for describing any system as a democratic one.²⁴² It has been argued that the Freedom of Speech is justified on the basis of its importance in discovering the truth, promoting individuals' rights of self-development and fulfilment, its crucial role to the working of a democratic constitution and its necessity to encounter the suspicion of government.²⁴³ It means the right of every society member to express his opinions, thoughts and convictions in all areas of life, without threat or fear. The main objective of ensuring Freedom of Expression is to urge and encourage citizens to debate publicly in order to exchange freely and publicly their thoughts, opinions and suggestions about the issues and problems which

²³⁹ op cit Lively (n 17) 100.

²⁴⁰ ibid 101.

²⁴¹ See Laslett P (ed), *Locke: Two Treatises of Government* (Cambridge University Press 1999).

²⁴² See Gibbons T, *Media Law in the United Kingdom* (Wolters Kluwer 2014).

²⁴³ See Barendt E, *Freedom of Speech* (Oxford University Press 2007).

are of concern to their lives.²⁴⁴ Any restriction on this crucial freedom must be, ‘prescribed by law and necessary in a democratic society in the interests of national security, territorial integrity or public safety’.²⁴⁵

With regard to the freedom of assembly, which is represented in the community members’ right to assemble in order to maintain their joint interests, it is deemed to be one of the basic rights ensured by, and even distinguishing, the democratic system in the modern age.²⁴⁶ Freedom of assembly means enabling citizens to assemble peacefully to discuss, protest and explain their opinions and attitudes toward significant and crucial public issues.²⁴⁷ Although it is commonly agreed in legal writing that there is no right to hold a public meeting in the United Kingdom, however, ‘meetings and processions may take place when they are not prohibited under the general criminal and civil law, or have not been banned by the police or other authority under their statutory powers to ensure public order’.²⁴⁸

In addition to freedom of assembly, freedom of association is another essential component of democracy, ‘providing individuals with invaluable opportunities to, inter alia, express their political opinions, and engage in literary and artistic pursuits’.²⁴⁹ It means the right of the subjects to form independent bodies and organisations, aiming either to gain authority such as political parties, or affecting government decisions such as interest groups. It acts as a keeper and defender of the community members’ rights and interests against the tyranny of the majority, as well as working to restrain public officials from power abuse. Without securing, ‘the freedom of expression, of association and of assembly, people cannot have a say, whether in the organization of civil society or in matters of government policy’.²⁵⁰ However, to measure the practice of democracy in any country, it is important

²⁴⁴ Lichtenberg J, ‘Foundations and limits of freedom of the press’ in Lichtenberg J (ed) *Democracy and the Mass Media* (Cambridge University Press 1990) 102, 107.

²⁴⁵ European Human Rights Convention 1950 Article 10.

²⁴⁶ Clayton G, ‘Reclaiming Public Ground: The Right to Peaceful Assembly’ (2000) 63(2) *Modern Law Review* 252–260.

²⁴⁷ Lane J, *Constitutions and Political Theory* (Manchester University Press 1996) 95.

²⁴⁸ For more see op cit Barendt (n 243).

²⁴⁹ United Nations, Human Rights Council resolution 15/21 October 2010.

²⁵⁰ op cit Beetham (n 31) 91.

to observe the existence of political rights in a realistic, not nominal, sense.²⁵¹ Therefore, Dahl asserted the following:

The range of rights and liberties available to citizens in democratic countries, however, goes well beyond what is strictly required for the existence of democracy itself, for people in democratic countries tend to value rights and liberties generally. Stable democracies are supported by a broader culture, political and general, that places more than trivial value on such qualities as personal freedom, fairness, legality, due process and the like.²⁵²

Dahl defined the following obstacles which may hinder the development of democratisation and, thus, a full achievement of democratic rights and liberties in a given country, even though political and civil rights are formally addressed: the leaders' employment of violent coercion to gain and sustain power; the malfunction of the socio-economic order; the persistence of conflicts regarding subculture differences among people; and finally, foreign influence and control.²⁵³ The study discusses these obstacles in subsequent chapters, in particular, for the purpose of this thesis, the extra constitutional techniques used to gain and sustain power on the part of leaders.

3.5 Separation of Powers

In this section, the principle of the separation of powers overlaps with the ambit of the previously discussed values of the rule of law and human rights. Thus, the study focuses briefly on the features of this principle with regard to the relation between the branches of government which are most related to its objectives.

The origins of the British governing system reside in the monarch, whereby the king exercised the three functions of government: legislature, executive and judiciary.²⁵⁴ This fusion of power is no longer accepted. Rightly, the French jurist Montesquieu argued, 'there can be no liberty ... if the legislative, executive and judicial powers of government were to be exercised by the same person'.²⁵⁵ Legal historians observed that:

²⁵¹ op cit Dahl (n 131) 166.

²⁵² *ibid.*

²⁵³ op cit Dahl (n 131) 172.

²⁵⁴ op cit Bradley and Ewing (n 14) 80.

²⁵⁵ Cited in op cit Carroll (n 152) 40.

This threefold division of labour, between a legislator, an administrative official, and an independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic government itself.²⁵⁶

The doctrine of the separation of power, thus, was developed against a background of abuses of power and the tyranny of government. It ‘has proved essential to secure the different forms of accountability’.²⁵⁷ Thus, in modern politics this doctrine has become one of the important features of democracy. The core proposition of the doctrine is that public function of the three organs of government ought to be distinguished from each other and exercised by different institutions, in order to prevent an overconcentration of power in a person or an institution.²⁵⁸ However, this doctrine does not insist that the three powers of government should be isolated entirely in terms of their operation, since such an arrangement would be unworkable.²⁵⁹ There must be a certain level of cooperation. Moreover, Vile, in his work *Constitutionalism and the Separation of Powers*, suggests that, ‘the multifunctionality of the political structure can, and perhaps must, be carried to the point where any attempt at a division of function is quite impossible’.²⁶⁰ However, no matter how constitutions may vary in the application of the principle of the separation of powers, ‘the independence of the superior courts from government and legislature seems fundamental to the rule of law’, and thus to constitutionalism.²⁶¹

In the United States, French and Kuwaiti political systems, the principle of the separation of power is applied formally between the branches of government. In the UK, this doctrine is respected but not absolute.²⁶² A strong constitutional convention mandates that ministers must be members of one or other house of Parliament.²⁶³ Therefore, there is nearly a complete fusion between the legislature and the executive, which was described by

²⁵⁶ Henderson E, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963) 5.

²⁵⁷ Gamal Eldin M, ‘Democracy and Human Rights in the Constitution of Kuwait’ (1998) 22(2) Kuwait University Journal of Law 16.

²⁵⁸ Le Sueur A and others, *Public Law: Text, Cases, And Materials* (3rd edn, Oxford University Press 2015) 114.

²⁵⁹ Barnett H, *Constitutional & Administrative Law* (9th edn, Routledge 2011) 73.

²⁶⁰ Vile MJC, *Constitutionalism and the Separation of Powers* (Oxford University Press 1967) 349.

²⁶¹ op cit Allan (n 191) 69.

²⁶² op cit Barnett (n 259) 72.

²⁶³ op cit Bradley and Ewing (n 14) 84.

Bagehot as the efficient secret,²⁶⁴ ‘a cabinet with not only executive but also legislative predominance’.²⁶⁵ According to Tomkins,²⁶⁶ this doctrine is better understood in the relations between parliament and the Crown that reflect the only sovereign powers in the British constitutional system.²⁶⁷

Another form of application of the doctrine of the separation of powers was recognised in the British constitutional tradition by the distinction between the monarch in person and the executive power. Bagehot, who described this as the efficient and the dignified parts of the constitution, initially addressed this distinction.²⁶⁸ This doctrine has led over time to the neutrality of the monarch regarding the works of the executive. Practically, there is a complete separation of powers between the will of the monarch’s person and of the executive’s works. This British version of the doctrine of the separation of powers is of fundamental interest to the study and is discussed in detail in later chapters.

The doctrine of the separation of powers can be identified in the UK more obviously in the function of the judiciary, in particular after the Constitutional Reform Act 2005. This Act ended the fusion of the legislative and judicial functions by instituting a Supreme Court, which was separated from the House of Lords,²⁶⁹ ‘injecting an independent element into judicial appointments and removing the Lord Chancellor’s roles as Head of the Judiciary and Speaker of the House of Lords’.²⁷⁰

In summary, the value of the separation of powers can have various meaning according to the applied form of governance. However, this universal doctrine imposes a clear distinction between the government and the judicial function. It also requires that powers should not be over concentrated in a single body in order to avoid personal or institutional tyranny.

²⁶⁴ Bagehot W, *The English Constitution* (Smith P ed, Cambridge University Press 2001) 65.

²⁶⁵ See Cox G, *The Efficient Secret: The Cabinet and the Development of Political Parties* (Cambridge University Press 1987).

²⁶⁶ Tomkins A, *Public Law* (Oxford University Press 2003) 64.

²⁶⁷ op cit Le Sueur (n 258) 126.

²⁶⁸ op cit Smith (n 264) 5.

²⁶⁹ op cit Bradley and Ewing (n 14) 84.

²⁷⁰ Alder J, *Constitutional & Administrative Law* (Palgrave Macmillan 2013) 149.

3.6 Constitutionalism from Islamic and Arabic Perspectives

The ideas of modern constitutionalism ought to be translated into texts and reflected in national constitutions in order to harvest their fruits. As a starting point, under the provisions of the Constitution of Kuwait: ‘The people of Kuwait are a part of the Arab Nation’,²⁷¹ and ‘The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation’.²⁷² The question which arises then is to what extent are Arabic and Muslim societies ready to embrace the values of constitutionalism in their legal systems? Can the Middle Eastern states be regarded as a suitable platform to adopt such principles? In this section, the study focuses on the political and constitutional characters of Islamic law and addresses how far the Islamic and Arabic societies, including Kuwait, can accommodate the Western thoughts of liberal constitutionalism which have been outlined in this chapter. Thus, the study here reexamines constitutionalism and its related ethical values from Arabic and Islamic perspectives.

This section raises three important questions: is democracy compatible with the Islamic ideology? can human rights be protected under Islamic law? and does the Western concept of the rule of law contradict the Islamic concept of the rule of law? The study cannot promise to provide an exhaustive analysis of these questions within the limited scope of the research, neither could it ignore raising these issues whilst discussing constitutionalism in Kuwait. The aim, however, is to narrow the discussions on these arguments to the extent that the study utilises a rational overview of whether constitutionalism is able to perform as a platform in later chapters, which consider constitutionalising the control of the Executive powers in an Arabic Islamic country, namely Kuwait. In doing so, the study highlights, briefly and selectively, the important religious and ideological arguments in Islamic modern political theories which are of relevance to constitutionalism.

The study argues, in this regard, that some of Islam’s political theorists provide progressive interpretations of Islamic thoughts which are, ‘comparable to modern Western notions of

²⁷¹ Article 1 of Constitution.

²⁷² *ibid* Article 2.

democracy, pluralism, and human rights'.²⁷³ It has been said that, 'if constitutionalism is defined as a set of ideologies and institutions predicated on the idea of the limitation and regulation of government authority by law, then the Islamic Sharia would seem to lend itself to constitutionalist interpretations fairly naturally'.²⁷⁴ It is further claimed in this regard that, 'the arguments that make Islamic culture and Islam despotic by definition are erroneous'.²⁷⁵ Centuries ago, Montesquieu, for example, proclaimed that Islam had a violent streak that predisposed Muslim societies to authoritarianism and that, in contrast, Christianity is remote from such despotism.²⁷⁶ Relatedly, in recent literature Samuel P Huntington in his work, *The Clash of Civilizations and the Remaking of the Modern World*, also adopted the same hypothesis. He argued that 'Islam's borders are bloody and so are its innards'.²⁷⁷ However, it is commonly agreed that the modern ideas of constitutionalism and human rights stemmed from the 'aftermath of the brutal and aggressive universal wars which were principally committed by the developed countries'.²⁷⁸ Such conclusions are usually based on the observations of the practices of individuals but not drawn from a deep understanding of the actual values in the religion of Islam.²⁷⁹ Little consideration, therefore, has been 'paid to the interaction between religious establishment and leadership and their socioeconomic and political setting'.²⁸⁰ Thus, one should distinguish initially between Islam as a religion and the ad hoc practices of the Islamic and Arabic polities.

According to Sharia (Islamic law), the Quran (The word of God) and Sunnah (The word and deeds of the Prophet Mohammad pbuh) form the key sources of the Islamic legislation.²⁸¹ According to the Holy Quran:

²⁷³ Moussalli A, 'Islamic Democracy and Pluralism' in Safi O (ed) *Progressive Muslims: On Justice, Gender and Pluralism* (Oneworld Publications 2003) 286.

²⁷⁴ Brown N, 'Islamic Constitutionalism in Theory and Practice' in Cotran E and Sharif A (eds) *Democracy, the Rule of Law and Islam* (Kluwer Law International 1999) 491.

²⁷⁵ op cit Moussalli (n 273) 297.

²⁷⁶ Cohler A and others (eds), *Montesquieu, The Spirit of the Laws* (Cambridge University Press 1995) cited in Fish S, 'Islam and Authoritarianism' (2002) 55 *World Politics* 1.

²⁷⁷ Huntington S, *The Clash of Civilizations and the Remaking of the Modern World* (Simon and Schuster 1997) 258.

²⁷⁸ Moeckli D and others, *International Human Rights Law* (Oxford University Press 2014).

²⁷⁹ See Rehman J, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart Publishing 2005).

²⁸⁰ Abootalebi A, *Islam and Democracy: State-society Relations in Developing Countries, 1980-1994* (Garland Publishing 2000) 117.

²⁸¹ Al-Khallaf A, *Elm Ossol Al-Feqh* (Dar Al-Hadith Publishing 2002) 23.

People, we created you all from a single man and a single woman, and made you into races and tribes so that you should recognize one another. In God's eyes, the most honoured of you are the ones most mindful of Him: God is all knowing, all aware.²⁸²

The Islamic philosopher Abbas Al-Akkad in his work, *Democracy in Islam*, explains that this Quranic verse outlines the value of a universal equality of all norms of human rights despite their differences.²⁸³ Fahmi Huwaidi also asserts that this principle is not subject to any form of limitation as it is grounded on the basis of unified origin of all humanity.²⁸⁴ Islam vividly secures the right of conviction (belief) as 'there shall be no compulsion in [acceptance of] the religion',²⁸⁵ rather, the Quran's instructions to the believers in this concern are to 'invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best',²⁸⁶ and only 'say, the truth is from your Lord, so whoever wills – let him believe; and whoever wills – let him disbelieve'.²⁸⁷ Therefore, anyone should have the right to choose, 'for you is your religion, and for me is my religion'.²⁸⁸ However, in the case of, 'they dispute with you, then say Allah is most knowing of what you do'.²⁸⁹ In this sense, everyone shall be responsible for his own freedom as 'after all, Allah will judge between you on the Day of Resurrection concerning that over which you used to differ'.²⁹⁰ Ultimately, judgement is for God rather than subject to the rule of humans.

Huwaidi argues that the protection of the freedom of religion in Islam indicates that Islam values human beings' freedom of choice; it is most worthy, therefore, to ensure the remaining types of freedom.²⁹¹ Diversity is a humankind feature which originates in the need for the idea of pluralism. Hence, this would amount to the argument that this 'Quranic celebration of the notion of human diversity...could also be developed into an ethic that

²⁸² Quran Verse *Al-Hujurat* (49:13).

²⁸³ Al-Akkad A, *Democracy in Islam* (3rd edn, Dar Al-Maaref Press 1953).

²⁸⁴ Huwaidi F, *Democracy and Islam* (Cairo Al-Ihram Press 1993) 26.

²⁸⁵ Quran Verse *Al-Baqarah* (1:256).

²⁸⁶ op cit (286) Verse *Al-Nahal* (15:125).

²⁸⁷ ibid Verse *Al-Qahf* (18:29).

²⁸⁸ ibid Verse *Al-Kafirun* (109:6).

²⁸⁹ ibid Verse *Al-Haj* (22:68).

²⁹⁰ ibid Verse *Al-Haj* (21:68).

²⁹¹ op cit Huwaidi (n 284) 25.

respects dissent and honours the right of human beings to be different'.²⁹² Such Islamic thoughts, 'could also be fertile ground for developing a robust democratic agenda'.²⁹³ However:

Self-determination, including the right to decide the foundation of human rights one finds acceptable, is integral to the 'human' in human rights. The foundations of human rights we accept are specific to who we are, in our own context, which need not be, and is unlikely to be, accepted by all other human beings who share the same commitment to these rights.²⁹⁴

Therefore, it is more useful to argue that, 'the appropriate framing of the general subject of Islam and human rights should be about how to promote the practical application of human rights among Muslims',²⁹⁵ instead of debating upon the incompatibility of Islam with these universal values.

From a historical overview, 'Islamic civilization has produced a wealth of theological, philosophical, and juridical literature on virtually every aspect of the state, its powers, and its functions'.²⁹⁶ The governing system in Islam stands primarily on the principle of Shura (الشورى).²⁹⁷ Shura is a Quranic term that addresses the decision-making process in the Islamic political system.²⁹⁸ This doctrine has long been misinterpreted as a principle of consultation.²⁹⁹ Many writers believe that Shura is a non-mandatory system of consultation in which the Caliph (ال خليفة), the Ruler of the Islamic State, practices tyrannical rule without any form of accountability.³⁰⁰ Al-Sulami, however, argues that Shura means the participation of all citizens in public affairs through the processes of selecting the Caliph

²⁹² Khaled A, 'Islam and the Challenge of Democratic Commitment' in Bucar E and Barnett (eds) *Does Human Rights Need God* (Eerdmans Political Science 2005) 58–103.

²⁹³ Johnston D, 'Islam and Human Rights: A Growing Rapprochement' (2015) 74(1) *American Journal of Economics and Sociology* 1, 113–148.

²⁹⁴ An-Na'lm A, 'Islam and Human Rights' in Witte J and Green C (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2012) 57.

²⁹⁵ op cit (n 294) An-Na'lm 57.

²⁹⁶ Lewis B, 'A Historical Overview' in Diamond L and others (eds), *Islam and Democracy in the Middle East* (John Hopkins 2003) 219.

²⁹⁷ Al-Rayes M, *The Islamic Political Theories* (7th edn, Dar Al-Turath Publishing 1952).

²⁹⁸ Al-Mulaigi Y, *The Principle of Shura in Islam: in Comparison with the Values of Western Democracy*, (Academic Edification Press, no publication year).

²⁹⁹ op cit Abootalebi (n 280) 129.

³⁰⁰ See Macdonald D, *Development of Muslim Theology: Jurisprudence and Constitutional Theory* (Scribner 1903); op cit Al-Mulaigi (n 298).

and electing their representatives to exercise control over government.³⁰¹ He believes that the outcomes of Shura are binding on the Caliphs. In addition, Al-Baiyaa, (البيعة), is the process where the Ummah (الأمة), the nation of Islam, chooses the Caliph. It requires that the Ummah pledges its allegiance to the Caliph on the contractual basis of applying and preserving the doctrines of the Sharia in return for their obedience to his rule.³⁰² This fundamental Islamic rule is also a binding condition on the Caliph's practice of power which must lead to him being discharged from office if he fails to maintain the requisite practices.³⁰³ In the past, the Shura process was conducted in a simple form in the early days of Islam due to low numbers of citizens and the simplistic nature of the political system. However, Al-Sulami adds, in modern politics popular Shura could not be achieved without applying an electoral mechanism to which modern Islamic scholars should start paying more attention in relation to its procedural and structural issues.

It has been argued that human rights were enriched in Sharia six centuries before the emergence of the Western formulations of human rights.³⁰⁴ Liberty is, in fact, one of the cornerstones of Islam's ideology, as it emphasises the liberation of individuals from any type of worship or obedience except for God.³⁰⁵ All forms of human rights, therefore, are protected within the Islamic political system with no limitations, as long as they do not violate the Islamic values and principles, and do not infringe the community members and their dignity.³⁰⁶ Some Islamic scholars observed that human rights norms are, 'essential to humans flourishing individually and collectively, and that, rightly understood, Islam strongly urges its followers to embrace that concept'.³⁰⁷ There is no power in Islam that could abolish human rights as they, 'flow out of God's creation of humanity and, as a result, are inherent to them'.³⁰⁸

³⁰¹ Al-Sulami M, 'A Critical Study of Modern Democracy Criteria and the Attitude of Islamic Governance System Towards Them' 28 *Annals of the Arts and Social Sciences Quarterly* 273, 83.

³⁰² Al-Marzouqi I, 'Political Rights and Democracy in Islamic Law' in op cit Cotran (n 274) 475.

³⁰³ op cit Al-Marzouqi (n 302).

³⁰⁴ Abdel Haleem M, 'Human Rights in Islam and the United Nations Instruments' in op cit Cotran and Sharif (n 274) 436.

³⁰⁵ op cit Al-Sulami (n 301) 36.

³⁰⁶ *ibid.*

³⁰⁷ op cit Johnston (n 293) 113–148.

³⁰⁸ Abou El Fadl K, 'Islam and the Challenge of Democratic Commitment' in op cit (n 292) 58–103.

However, there is one major conceptual divergence in the norms of human rights between Islam and Western liberalism. In the Western concept of human rights, liberalism means the protection of individuals' rights and liberties against the arbitrary use of the power of government. Sovereignty, therefore, is embodied in the people, in order to maintain this rule. In Islam, however, the government is legitimate only if it applies Sharia's doctrines. All Muslims shall obey a government that enforces the Islamic law, 'because it is facilitating the society that will lead to the perfection of humankind'.³⁰⁹ In this sense, sovereignty is the divine rules which are reflected in the Sharia.³¹⁰ And thus, individuals achieve their rights by obeying God through the government's enforcement of Sharia and not merely from a man-made legal document to protect them against the government.³¹¹

The rule of law in Islam means that Sharia (Islamic Law) is the constitutional provisions which must reign supreme over rulers and individuals alike.³¹² A tyrannous government can never overreach, theoretically, such supremacy. It is thus because Islamic law is determined by the Quran and Hadith, which are divine laws. Rulers cannot promulgate any laws but must simply apply the doctrines of the Quran and Hadith and the promulgated laws by the al-ijma³¹³ (الاجماع), the Ummah's consensus on unanimous legal decisions.³¹⁴ It has been argued that this system forms the first application of the principle of the separation of powers between the government and the legislative authority.³¹⁵

However, Muslims likewise Christians, Jews, or followers of any other religion do not understand or practice their religion all alike. They differ in their understanding, interpretations, aims and goals on how to apply the religion's textual sources. In fact, 'to speak of 'Islam' at large is misleading in view of the permanent and profound diversity of opinions among Islamic schools of jurisprudence'.³¹⁶ As a result, many Islamic states have exercised diverse levels of understanding of the practices of democracy. Therefore,

³⁰⁹ Price D, *Islamic Political Culture, Democracy and Human Rights: A Comparative Study* (Praeger Publishers 1999) 162.

³¹⁰ *ibid.*

³¹¹ See Mayer A, *Islam and Human Rights* (Westview Press 1991).

³¹² Huwaidi F, *Democracy and Islam* (Cairo Al-Ihram Press 1993) 113.

³¹³ Consensus is a source of the Islamic legislation after Quran and Hadith.

³¹⁴ *op cit* Al-Marzouuqi (n 302) 463.

³¹⁵ *op cit* Huwaidi (n 312).

³¹⁶ *op cit* An-Na'lm (n 294) 64.

numerous Islamic reformation scholars hold the view that Islam can accommodate and encourage pluralism.³¹⁷ However, there is a spectrum of view in this regard. Liberal approaches to Islamic constitutionalism compared to the conservatives, or in fact extreme, views of this debate are still in flux, in particular, with the appearance of Al Qaida and the Islamic State in Iraq and Syria (ISIS).³¹⁸

In more practical terms, according to national surveys in seven Arab countries in 2006-2007 it has been found:

[T]hat there is little or no incompatibility between Islam and democracy in the public mind and that a proper understanding of the reasons and ways that the Muslim Arab public think about governance and the political role of Islam is possible only if attention is paid to the particular political and societal contexts within which attitudes are formed.³¹⁹

A version of Islam that promotes the ideals of human dignity, justice and equality does not lack the tenets and practices of pluralism, however, it has been selectively used to maintain authoritarian rulers.³²⁰ In fact, ‘authoritarian and semi-authoritarian regimes in Muslim-majority states successfully use policies toward religion to restrict political competition and inhibit democratic transition’.³²¹

Through a combination of quantitative and qualitative cross-regional studies Alfred Stepan and Graeme Robertson argue that opposition to democratic development in the Middle East reveals an Arab more than a Muslim resistance.³²² It has been argued that the Arab world, ‘is trapped between autocratic states and illiberal societies, neither of them fertile ground for liberal democracy’.³²³ This hostile environment was due to a hostile relationship

³¹⁷ Wright A, *The British Political Process: An Introduction* (Routledge 2000) 223.

³¹⁸ See March A, *Caliphate of Law* <[https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law?cid=rss-security-caliphate_of_law-000000\[17/05/2015\]](https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law?cid=rss-security-caliphate_of_law-000000[17/05/2015])> accessed 25 October 2016.

³¹⁹ Tessler M, ‘Religion, Religiosity and the Place of Islam in Political Life: Insights from the Arab Barometer Surveys’ (2010) 2(2) *Middle East Law and Governance* 221–252.

³²⁰ Rehman J and Breau B (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martin Nijhoff Publishers 2007) 221.

³²¹ Sarkissian A, ‘Religious Regulation and the Muslim Democracy Gap’ (2012) 5(3) *Politics and Religion* 501–527.

³²² Alfred S and Graeme R, ‘An Arab More Than a Muslim Democracy Gap’ (2003) 14(3) *Journal of Democracy* 30–44.

³²³ Zakaria F, ‘Islam, democracy, and constitutional liberalism’ (2004) 119(1) *Political Science Quarterly* 1–20.

between the Arabic rulers and their political opponents. The dynamics of this tension produced a political climate filled with violence and extremists. Consequently, ‘the fundamental culture impediment to democracy lies in the failure of both Middle Eastern rulers and oppositions to forge a democratic solution to the question of national identity’.³²⁴ According to case studies of some Middle Eastern countries, including Kuwait, rulers, ‘tolerated, sustained, and even abetted religious, tribal, ethnic, and ideological cleavages rather than resolving them democratically’.³²⁵

Ultimately, Islam as a religion can accommodate any form of rights which might protect and increase the dignity of human beings.³²⁶ Furthermore, Muslim individuals do not reject any of the reforming thoughts which Western constitutionalism might provide to the improvement in their way of life. Suffice it to say that the right to democracy should not be subject to individuals’ religiosity or cultural interpretations:

[F]or those who are convinced that democracy is not a new religion for humanity, but that it provides the most efficient means to limit abuses of power and protect individual freedoms, enabling individuals to seek their own path to personal accomplishment, there can be a variety of approaches.³²⁷

More recently, although religion was perhaps ‘the most visible of the cleavages that exist in the Arab uprising to date’,³²⁸ the notion of the Arab Spring and what it proves or disproves about the ideas of Western constitutionalism is, in fact, challenging after its disappointing results.³²⁹ The Egyptian example, which ended with the imprisonment of a democratically elected president one year after the revolution, ‘has gone from being a beacon of hope for liberalizing change in the Middle East to a stark reminder of the potentially explosive nature of political reform’.³³⁰ It has failed to provide the evidence on

³²⁴ op cit Diamond and others (n 296).

³²⁵ ibid (n 296); op cit Al-Hajeri (n 27).

³²⁶ See Afifi M, ‘Political Democracy between Reality and Future Prospects: a comparative analytical and practical study between Islamic Sharia and Human Law (1999) 23(2) Kuwait University Journal of Law 123–211.

³²⁷ Ansary A, ‘Muslims and Democracy’ in op cit Diamond (n 296) 201.

³²⁸ Turner C, ‘Transitional Constitutionalism and the Case of the Arab Spring’ (2015) 64(2) *International & Comparative Law Quarterly* 267–291.

³²⁹ See Kurt W, ‘The Arab Spring: Why the surprising similarities with the revolutionary wave of 1848?’ (2012) 10(4) *Perspectives on Politics* 917–934.

³³⁰ op cit Turner (n 328).

whether constitutionalism is ready to be applied within such a climate of violent political struggle.³³¹ It is argued that, ‘a rush to closure on constitutionalism is unlikely to result in stable and enduring institutions of State’.³³² Indeed, the waves of democratisation in this part of the world might need more time and gradual progress. In order to obtain fair and clear judgement upon their capability to adopt the ideas of Western constitutionalism, Arab and Muslim societies ought to engage in ‘a long-term procedural process rather than a short-term means of ending conflicts’.³³³ As argued, ‘Islamic constitutionalists have yet to succeed not because they have borrowed too much from Western constitutionalism but because they have borrowed too little’.³³⁴ Therefore, a soft and steady reforming agenda, which aims to observe and transfer successful relevant policies, is the proposal of this thesis in chapter one. This process might take more time but, nevertheless, it would undoubtedly lead toward a more comprehensive, steady and long lasting notion of constitutionalism.

3.7 Conclusion

This chapter has explored four universal values in the body of legal and political international literature. The principles of democracy, human rights, rule of law and the separation of powers have proved essential features in most modern democracies. The main conclusions of these discussions reveal that the value of these principles is that they form the basic requirements to hold government to account and to empower people to have an effective role in this regard.

While the values of democracy, rule of law, human rights and separation of powers were identified as important in terms of political philosophy, they are not equal in terms of international law. There is mention of these subjects in international law, but the level of specification and enforcement of each value is different. In other words, they are international universal values, but they are not alike in terms of their system of enforcement. It can be clearly observed that the values of human rights have been identified, organised and protected firmly by an international legal system. Thus, any

³³¹ *ibid.*

³³² *ibid.*

³³³ *ibid.*

³³⁴ *op cit* Brown (n 168) 106.

violation of these rights can be identified according to an agreed set of global standards. In contrast, there are controversial views upon the models of democracy and the practices of the rule of law and the separation of powers. They are flexible to the extent of embracing various interpretations and different acceptable practices. They lack an organised and enforceable international system compared to the case with human rights. Consequently, there is no consistency within the practices of these values, unless they lead to the violation of human rights. It is difficult, therefore, to conceive democracy, in particular, as an international legal standard,³³⁵ in the same manner as these other values. Thus, apart from the common value of human rights, there is a challenge in using democracy, the rule of law and the separation of powers as standards in later chapters. However, the study is realistic in terms of expecting practicable standards to be derived from these broad terms which are more compatible with Kuwait.

Finally, the predominantly Western notions of constitutionalism are not in contradiction, in general, with the Islamic and Arabic cultures. The broad ambit of views in this spectrum proves that there is more than one specific answer for the aforementioned questions within the Islamic and Arabic perspective of constitutionalism. However, apart from the divergence of conditions within the Islamic and Arabic countries, Kuwait in particular does not lack the platform to adopt the global ideas of constitutionalism. In fact, the study proposition is that Kuwait's historical constitutional characteristics, which have been examined in chapter two, positioned it to accommodate a reasonable level of these universal values of constitutionalism. As discussed in chapter five, there are no distinct definitions of these values in the Constitution of Kuwait, neither is there a civil cultural clash with such principles. Ultimately, this thesis asks for greater recognition and more faithful adherence to the values that already exist in Kuwaiti society. The research aims to achieve this through its realistic soft transformation programme. Thus, based on the justifications this chapter has offered upon how and why these values are relevant to Kuwait, the study applies them as standards of measurement in its later examinations, in

³³⁵ Vidmar J, *Democratic Statehood in international Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013).

order to explore the application of these values within the governing system of Kuwait, and to set out the platform of its soft transformation agenda of reform.

After laying out the meanings of constitutionalism and its related ethical values, in the following chapter the study describes the strategies that have been applied to conduct the qualitative research.

Chapter Four

Fieldwork Design and Strategies

For a better understanding of the functioning of the controls over the Executive's powers, in addition to the two research methods outlined in chapter one,¹ fieldwork research was conducted in order to usefully answer the research questions from more practical perspectives. This chapter outlines the fieldwork methods and strategies. It also provides reflections on the research experience. The findings derived from this social research are reflected in the subsequent chapters.

4.1 Qualitative Research Method

There are diverse practices and uses of social research methods. In respect of fieldwork, initially, there are choices between qualitative and quantitative research methods. However, the choices between them should be justified appropriately based on their characteristics and strengths to investigate specific kinds of problems.² This study chose a qualitative research method for several reasons.

First, qualitative research aims to explore reality as experienced by people,³ and to research their views and the interpretations of their social world.⁴ This reality is difficult to tackle through quantitative methods that employ general measurements and statistical analysis which depend on a series of numerical data presented in tables, graphs or other forms of statistics.⁵ Such approaches lack focus on the knowledge of human beings in social situations.⁶ In contrast, qualitative methods seek to investigate the practical feel and the world views of members of a certain group in a way which cannot be achieved by quantitative research techniques.⁷

¹ See chapter one section 1.4.

² Denscombe M, *The Good Research Guide: For Small-Scale Social Research Projects* (3rd edn, Open University Press 2007).

³ Sarantakos S, *Social Research* (Macmillan 1993) 6.

⁴ Bryman A, *Social Research Methods* (5th edn, Oxford University Press 2015) 36.

⁵ *ibid* 149.

⁶ McCartan K and Robson C, *Real World Research* (4th edn, John Wiley & Sons 2016) 18.

⁷ *op cit* Bryman (n 4).

Second, this research sought to delve in-depth into the constitutional and political decision-making process,⁸ in order to examine the theory in action.⁹ The objective of this study was to analyse people's varying expertise about policy and practice in the constitutional and political system of Kuwait.¹⁰ Such a task 'that elicits tacit knowledge and subjective understandings and interpretations',¹¹ cannot be investigated by measuring numbers and statistics. While in a qualitative method, 'accounts and findings are presented verbally or in another non-numerical form'.¹² Thus, the flexibility of qualitative methods normally provides an easy approach for collecting and interpreting data, which helps to extract the findings that better answer the research's practical purposes and specific questions.¹³ Accordingly, the qualitative method seemed to be the most appropriate considering the nature of this research project.

4.1.1 Interview Design

The qualitative method utilises three types of data-driven strategies: (1) in-depth or open-ended interviews; (2) direct observations; and (3) focus groups.¹⁴ Interviews in particular, 'yield direct quotations from people about their experiences, opinions, feelings, and knowledge'.¹⁵ It is, therefore, a practical technique for collecting data, which allows access to various types of information from people.¹⁶ The interview, on a basic level, is a conversation with the purpose of, 'describing some external reality such as facts and events, or internal experience such as feelings and meanings'.¹⁷ It then operates at a deeper level when the researcher seeks to understand the world from the subjects' perspective.¹⁸ Therefore, the interview was more appropriate to the objectives and the resources of this research than other forms of qualitative methods. Another method is observation, but there

⁸ Marshall C and Rossman GB, *Designing Qualitative Research* (4th edn, Sage Publications 2010) 53.

⁹ Patton MQ, *Qualitative Research & Evaluation Methods: Integrating Theory And Practice* (3rd edn, Sage Publications 2015) 145.

¹⁰ Pawson R and Tilley N, *Realistic Evaluation* (Sage Publications 1997) 200.

¹¹ op cit Marshall and Rossman (n 8).

¹² op cit McCartan and Robson (n 6) 20.

¹³ op cit Patton (n 9) 145.

¹⁴ Gary D, *Doing Research in the Real World* (2nd edn, Sage Publications 2009) 184.

¹⁵ op cit Patton (n 9) 4.

¹⁶ op cit Denscombe (n 2) 189.

¹⁷ Silverman D, *Doing Qualitative Research: A Practical Handbook* (Sage Publications 2000) 154.

¹⁸ Kvale S, *Interviews: An Introduction to Qualitative Research Interviewing* (Sage Publications 1996) 130.

were no direct benefits to be gained, for the purposes of this study, from observing the way parliament, the Executive and the judiciary function. These are public events which anyone can observe. Furthermore, it was not practical to arrange a focus group discussion at the same time and in same place for the high profile subjects selected, as they are important, busy, professional people. Therefore, the study opted for the interview method.

The types of interviews differ based on the degree of structuring, ‘from well-organized interviews that follow a sequence of standard question formulations, to open interviews where specific themes are in focus but without a predetermined sequence and formulation of questions’.¹⁹ Structured interviews are based on a stricter procedure and more rigid guidelines, which offer less freedom for the researcher to make any adjustment to any of their elements in order ‘to generate answers that can be coded and processed quickly’.²⁰ In contrast, unstructured interviews have fewer strict procedures to follow. Instead, they offer a more flexible range for the interviewer to act freely in order to formulate questions that are able to produce rich and detailed answers.²¹ Semi-structured interviews lie somewhere in the centre, between these two forms, and contain elements of both of them.²² This form of interview can be closer to unstructured or structured interview forms depending on the research topics and purposes, resources and research objectives.²³ However, choosing from among these forms of methods depends on their characteristics and how much information they can produce in relation to the research objectives and purposes.

This research aimed to capture three characteristics in its fieldwork investigations. Firstly, the issue of comparability.²⁴ The research sought to compare, for example, different parliamentarians’ views. This type of comparison was needed in order to judge the depth of knowledge of those parliamentarians and the comparability of views. Another aim was to test the provisional hypothesis of the research against various interpretations among

¹⁹ op cit Kvale (n 18) 127.

²⁰ op cit Bryman (n 4) 467.

²¹ ibid.

²² op cit Marshall and Rossman (n 8) 105.

²³ op cit Sarantakos (n 3) 178.

²⁴ Silverman D, *Interpreting Qualitative Data: A Guide to the Principles of Qualitative Research* (4th edn, Sage Publications 2011) 376.

different categories of samples,²⁵ such as comparing the effectiveness of the controlling mechanisms in the eyes of a minister (controlled subject) and a parliamentarian and/or a judge (controller subject). In this case, the structured interview method appeared to be the most appropriate as all interviewees would answer the same pre-designed questions.

The next characteristic is depth.²⁶ The study aimed to gain a deep understanding of the constitutional provisions and practices from these important people. To do so, it was necessary to ask structured questions in order to analyse the data according to a set agenda; otherwise, applying an unstructured interview method may produce unequal answers or limited views, given the different experiences of the subjects. Some samples may be more interested in certain issues in depth, whilst others might hardly address them at all. Again, in this regard, it seemed that structured interviews would be helpful to achieve an even level of depth within the answers to all the questions.

Lastly, there is the issue of authenticity. The idea of this concept is about allowing the research subjects to speak about themselves freely and openly to explain their world in their words.²⁷ Thus, it is about capturing the emotions of the subjects by allowing them to speak about their world in their language, which, 'reflects their sense of core being'.²⁸ The research aimed to produce data that precisely reflects the lived experiences of participants. In order to meet such criteria, 'the qualitative researcher must also account for tacit knowledge that is revealed through nonverbal means and inferred from what is not spoken'.²⁹ As is argued, 'Words are poor representations of experience',³⁰ a reflection which urges the researcher to fully understand the deep meanings of participants' words instead of using his own words to speak on their behalf.³¹ Arguably, the unstructured interview method could help the researcher to act more freely, to some extent, to formulate

²⁵ op cit Silverman (n 24) 376.

²⁶ Yeo A and others, 'In Depth Interviews' in Ritchie J and others (eds), *Qualitative Research Practice: A guide for social science students and researchers* (2nd edn, Sage Publications 2013) 182.

²⁷ op cit Pawson and Tilley (n 10) 153.

²⁸ Franzese AT, 'Authenticity: Perspectives and Experiences' in Vannin P and Williams JP (eds) *Authenticity in Culture, Self, and Society* (Ashgate 2009) 87.

²⁹ Vanderstoep SW and Johnston D, *Research Methods for Everyday Life: Blending Qualitative and Quantitative Approaches* (Jossey Bass Imprint 2009) 194.

³⁰ *ibid.*

³¹ *ibid.*

questions during the conversation with the subjects that help to extract information of greater depth from them, rather than imposing an agenda of set questions which might generate, in some cases, artificial answers or unauthentic interpretations. However, on the ground that this study had a research structure to follow and a thesis to examine, the study proceeded predominantly in a 'detective' way. This entailed applying a set of structured questions. Also, this structure granted the researcher the ability to compare more easily between the various views of the interviewees. Comparability would take more analysis and, thus, be time consuming if interviews were to be unstructured.

Given these considerations, this research needed to employ a form that borrows elements from both methods of structured and unstructured interviews. The form of semi-structured interview therefore seemed to be more appropriate for the purpose of the research's socio-legal examinations. This style of approach is commonly referred to as in-depth, semi-structured interviewing.³² The rationale for choosing this type of interviewing technique was to allow flexibility in the structure of questions, which could help to gather more information, whilst at the same time maintaining its academically designed framework.³³

Finally, there is the issue of generalisability. The research needed to reflect on how generalisable its results would be. It worth stating that the study cannot claim absolute generalisability over its fieldwork findings. As Tamanaha argued, 'All human understanding is interpretation, and no interpretation is final'.³⁴ Thus, other samples might have different views than of those participating in this research. But equally, the selection of the samples was in a representative sense. They describe generically the experts of the research areas. They are not particularly eccentric or evidentially outliers from the related crowd in this qualitative survey. Thus, the data may reflect a general idea about the views of the experts in the study fields.

³² Mason J, *Qualitative Research* (Sage Publications 1994) 38.

³³ Haralambos M and Holborn M, *Sociology: Themes and Perspectives* (Collins Educational 1991) 737.

³⁴ Tamanaha BZ, *Realistic Socio-legal Theory: Pragmatism and a Social Theory of Law* (Oxford University Press 1997) 6.

4.1.2. Sampling Strategy

The sampling strategy depended on a ‘purposive sampling’ of selected participants.³⁵ With this technique, ‘the judgment of the investigator is more important than obtaining a probability sample’.³⁶ In other words, the researcher’s personal knowledge of the samples’ backgrounds played a key role in determining the most suitable participants. This method was useful in this study because it allowed the researcher to define the right people to ask, based on the belief that they had rich knowledge and experiences in connection with the chosen study questions.³⁷ Hence, the research included interviews with professional individuals who are considered experts in areas relevant to the research topics,³⁸ such as members of the ruling family, members of the National Assembly, ministers, political figures, constitutional experts, and members of non-governmental organisations. Table 4.1 provides a full description of their categories, numbers and the interviewees’ coding.³⁹ The total number of participants was 25. This quantity of samples was considered as sufficient in that it allowed a reasonable spectrum of contrasting views in order to enrich the project’s findings. At the same time, it maintained some flexibility for the researcher to recruit alternatives in case an interviewee declined.

³⁵ op cit McCartan and Robson (n 6) 281.

³⁶ op cit Sarantakos (n 3) 138.

³⁷ Creswell JW, *Research Design: Qualitative, quantitative, and mixed methods approaches* (Sage Publications 2003) 185.

³⁸ op cit Marshall and Rossman (n 8) 105.

³⁹ See Table 4.1.

Table 4.1 Survey Participants

Category	Number of Participants	Interviewee Coding
Ruling family members	2	A
Former ministers	3	B
Parliament members	5	C
Judges	3	D
Constitutional lawyers	3	E
Political group leaders	5	F
Activists of civil society institutions	4	G
Total	25	–

Given the sensitivity of the study topics and the controversial nature of political views, the research considered exploring the counter argument for each issue in order to make the findings of the research more productive and prevent the research from having a bias towards a particular view.

Ruling family members were selected from the two main branches of the Al-Sabah ruling family: Al Salem and Al Jabir. The samples were identified based on the contrasting political views that they are known to hold through public statements. This selection enabled the study to explore various political arguments which enriched the research outcomes. Former ministers were chosen in order to avoid the sensitivity of the political opinions of politicians currently in office, to ensure the credibility and validation of their assessment of the research's sensitive questions. The samples were selected to account for a suitable range of known political affiliations. Parliament members were recruited according to various political backgrounds, particularly those who have a vast experience

in using the methods of controlling the Executive's powers. Judges and constitutional lawyers were identified by their experience which is relative to the study's objectives, particularly those who have dealt with cases that are related to the study subjects. Political group leaders were selected from different ideological and political backgrounds. A single representative from each of the Islamists, tribes, liberals, Shiites and youth organisations were interviewed. Activists of civil society institutions were drawn from non-governmental organisations (NGOs), who are associated with public efforts to oversee government activities, such as the Kuwait Society for Human Rights, Kuwait Transparency Society, Kuwait Journalist Association and Kuwait Trade Union Federation.

The samples were identified, firstly, by looking at websites containing published sources, and newspaper reports. Officials and practitioners who, due to the nature of their jobs, do not have a media presence, such as judges, were identified through the personal knowledge and contacts of the researcher. This was based on his public relations as a politician and as a lawyer and, therefore, they were not personal relationships. In addition, the researcher's relatives and close friends, as well as former or current professional colleagues were excluded from the study, as their inclusion would jeopardise the research's credibility. These precautions mitigated any potential influence. Although some individuals were high-profile people, they were similar to many other practitioners or office holders in the Kuwaiti society who hold similar ideas. Therefore, the identification of any interviewee would not be obvious.

The access strategy depended on gaining an official letter to facilitate the access process. In some cases, the process of gaining access is a challenge for many qualitative researchers.⁴⁰ Thus, to assist the introduction, the researcher obtained an official information letter⁴¹ from the University of Leeds to facilitate access to some of the government departments such as the Ministry of Justice, the National Assembly and other relevant bodies.

⁴⁰ Epstein L and King G, 'Empirical Research and the Goals of Legal Scholarship: The Rules of Inference' (2002) 69 University of Chicago Law Review 1.

⁴¹ See Support Letter Appendix 5.

4.1.3 The Interview

The interviewer prepared an interview schedule (guide) for each category of the interviewees in order to list questions and issues to be explored in each interview. Seven versions of this schedule were designed on basis of the sample categories.⁴² The interview questions were designed to discuss all of the study objectives. The first section covered the interviewee's biography. The second was devoted to exploring the interviewees' understanding of the doctrine of constitutionalism and its related global values of democracy, the rule of law, human rights and the separation of powers. The third section focused on the powers of the Amir and the Executive. Here, participants were asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive. Another two sections sought to investigate the interviewees' evaluations of the parliamentary and judicial control mechanisms. The aim was to examine their assessment of the effectiveness of these mechanisms from a practical point of view. Finally, a set concluding questions were addressed to all of the samples for their further suggestions or comments.

This procedure was applied, 'to ensure that the same basic lines of inquiry are pursued with each person interviewed'.⁴³ Also, it helped the researcher to decide how best to use the limited time available in such situations.⁴⁴

Participants were contacted either via email or telephone, and each given a brief oral account of the research and its objectives. Then, a full written explanation (Information Sheet)⁴⁵ about the interview along with a consent form⁴⁶ were sent to each individual who had shown interest in participating in the research. The document outlined the purposes of the research, relevant ethical issues and what was required of the participants. To enable full reflection, participants were offered seven working days to decide whether or not to consent to participate.

⁴² See Interview Schedules Appendix 1.

⁴³ op cit Patton (n 9) 343.

⁴⁴ *ibid.*

⁴⁵ See Information Sheet Appendix 2.

⁴⁶ *ibid.*

Participants were requested to take part in the interview at a secure and safe location convenient for them. Normally, this would not be their workplace so as to aid anonymity and a relaxed conversational environment. They were advised to answer the interview questions on a voluntary basis, and were able to refuse at any point. The questions were designed in a clear and short form that did not exceed 25 substantive questions to be discussed within 60–90 minutes. The questions were open-ended so that interviewees were able to answer in their own words.⁴⁷ Every interview was conducted in a single session unless the participants requested further sessions.

Prior to any agreed session, the interviewer carefully read and understood the interview schedule. In addition, during the interview the interviewer listened prudently to the interviewees in order to ‘be skilful at personal interaction, question framing, and gentle probing for elaboration’.⁴⁸ Also, the interviewer took written notes during and immediately after the interview to highlight any important data.

A tape recording method was applied when the researcher obtained the consent of the interviewees to record the conversation. Otherwise, a note-taking method was used. Most of the interviewees agreed to participate in voice recorded sessions.

4.1.4 Data Analysis Strategy

The potential methods of qualitative analysis vary based on different considerations. However, ‘the aim of all methods is to obtain valid and reliable data which can be used as the basis for credible conclusions’.⁴⁹ With regard to the interview technique for this study, ‘the central task of interview analysis rests with the researcher, with the thematic questions he or she has asked from the start of the investigation and followed up through designing, interviewing and transcribing’.⁵⁰ The limited number of selected samples were experts in their fields, and thus, the study focused its analysis of the interview by applying an ‘on-the-line interpretation’ method to generate a truthful meaning of data, which allowed an ‘on-the-spot’ confirmation or disconfirmation of the interviewer’s interpretations by the

⁴⁷ op cit Patton (n 9) 353.

⁴⁸ op cit Marshall and Rossman (n 8) 102.

⁴⁹ Sapsford R and Jupp V, *Data Collection and Analysis* (2nd edn, Sage Publishing 2006) 97.

⁵⁰ op cit Kvale (n 18) 187.

interviewees.⁵¹ This type of analysis depends on an eclectic approach to generate dialogues between the interviewer and interviewees to clarify any misinterpretation of their views.⁵² Such a method depended on the personal skills of the researcher, rather than on technology programs.⁵³ Therefore, the data was interpreted and analysed mostly by the researcher himself instead of using computerised analytical software.

A number of software packages have been developed for carrying out a small amount of data analysis.⁵⁴ It is often referred to as computer assisted qualitative data analysis (CAQDAS).⁵⁵ One of the best known packages is NVivo.⁵⁶ However, such software packages are only available in the English language, whereas the data in this research was written in Arabic, the researcher's language. Also, the data in this research formed a very small set in comparison to the large scale data analysis projects that this software is normally designed for. Thus, the coding and retrieving of data in this research project was conducted manually. The researcher read and reflected a great deal on the generated data to search for key words in order to code and analyse the data. The data analysis strategy was based on the chapter headings and research objectives.⁵⁷ Accordingly, the researcher carefully read and understood the transcribed data, segmented its content into categories related to the research chapters, and highlighted each important item in a different colour and mark, in a topic coding,⁵⁸ which linked to the question that the data implied. And finally, the researcher reflected on, interpreted and theorised the research-generated data which, 'appeared to be theoretically important and meaningful and which related to the central question of the study'.⁵⁹

⁵¹ op cit Kvale (n 18) 189.

⁵² ibid.

⁵³ ibid 126.

⁵⁴ op cit Sapsford and Jupp (n 49) 255.

⁵⁵ op cit McCartan and Robson (n 6) 601.

⁵⁶ For more information on qualitative data analysis software see:

<http://onlineqda.hud.ac.uk/Intro_CAQDAS/what_packages_are_available/> accessed 1 October 2016.

⁵⁷ op cit Interview Schedules (n 42).

⁵⁸ Spencer L and others 'Analysis: Principles and Processes' in Ritchie J and others (eds), *Qualitative Research Practice: A guide for social science students and researchers* (2nd edn, Sage Publications 2013) 182.

⁵⁹ op cit Sarantakos (n 3) 215.

Such a traditional method,⁶⁰ nevertheless, enabled the researcher to code and analyse data according to the research plan. The data analysis strategy always depends on the detail of what any participant says and the purpose for which the researcher has interpreted the responses.⁶¹ By all means, these investigations sought to provide answers to the research questions in a thematic analysis approach.⁶²

4.1.5 Ethical Issues

This section discusses the ethical issues encountered while undertaking the interviews with the participants. In this regard, the research followed the guidelines of the University of Leeds Research Ethics Policy,⁶³ and the ethical codes of the British Sociological Association.⁶⁴ The researcher upheld these ethical standards during the field research in order to protect the rights of both participants and the University of Leeds. This fieldwork project was reviewed and approved by the Faculty Research Ethics Committee at the University of Leeds.⁶⁵ This section illustrates the processes of informed consent obtained from the participants, confidentiality and data protection strategies.

4.1.5.1 Informed Consent

One of the important ethical issues in fieldwork research with humans is informed consent.⁶⁶ This entails that the participants in a given research should have the right to be informed that they are subject to research and also about the nature of this research.⁶⁷ This means that the researcher must outline the research objectives, why the research is being undertaken and what it will involve.

The researcher ensured that the interviews were conducted in a manner in which all the participants had a complete understanding, at all times, of what the research concerned and

⁶⁰ op cit Mason (n 32).

⁶¹ Hammersley M, *Introduction to Qualitative Research* (Sage Publishing 2006) 370.

⁶² op cit Bryman (n 4) 570.

⁶³ For more details see University of Leeds Research Ethics Policy
<http://ris.leeds.ac.uk/download/downloads/id/research_ethics_policy> accessed 28 September 2016.

⁶⁴ <<http://www.sociology.org.uk/as4bsoce.pdf>> accessed 28 September 2016.

⁶⁵ see Appendix 4, Ethics Reference AREA 15-044 on 14 December 2015.

⁶⁶ Punch M, *The Politics and Ethics of Fieldwork* (Sage Publications 1986) 35.

⁶⁷ *ibid.*

the implications of their involvement. There were two informed consent forms, one in English and another in Arabic.⁶⁸ However, all participants were Kuwaiti citizens and the interviews were conducted in the researcher's mother tongue, which is Arabic. Therefore, the research did not involve special communication needs. The transcript was in Arabic and the researcher translated the quoted statements.

The participants were continually informed that they were volunteers and had the right to withdraw at any time up to one month after the interview. It is believed that one month was sufficient time for the participants to make a decision in light of their potential experience of decision-making.

4.1.5.2 Data Management Strategies and Confidentiality

One of the researcher's most important obligations was to secure and maintain the confidentiality of data and its proper management. Thus, the researcher aimed to take into consideration all possible procedures to obtain, manage and secure the research data. The researcher ensured proper data management with adherence to the policy of the Leeds University Information Security Management System (ISMS) on safeguarding data storage, backup and encryption. The research involved the recording and coding of data. Therefore, all the participants had to give their voluntary consent to allow the recording of the interview and the researcher explained the data confidentiality to the participants involved.

All participants were given assurances that their identities would be kept in a secure place, any mention of their views would be anonymous and their identities would not be disclosed to any third party. Also, they were not named in the research materials, but have been given coded names.⁶⁹ In addition, the researcher ensured the confidentiality and anonymity of the participants, and the participant's names, addresses, and/or any distinguishing personal or professional descriptions were not linked with the research materials. Also, none of the quotations extracted from the data indicate the source.

⁶⁸ see Appendix 3, Consent Letter.

⁶⁹ See Table 4.1, 129.

Laptops and portable devices were not used to store the data collected, except on a temporary basis during which encryption software was used. Information was stored on the University of Leeds' software system using remote access if necessary. Tapes/portable disks were wiped when the transfer to university servers had been completed and stored securely. For future studies, it is anticipated that the student will not have access to the university's computer system. Thus, the researcher aims to retain a copy of the data on an encrypted hard disc for three years. At the end of this period, this disc will be destroyed as, at that time, the data would be outdated in respect of any further research.

4.2 Reflections on the Fieldwork Experience

In this section, the study offers its reflections upon the chosen methods of the qualitative approach. It does not claim to deliver any original methodology in this regard, but rather to be reflective on the qualitative experience that has been delivered. It also aims to be totally open about the study experience by highlighting a number of critical although hidden issues in this area of research.⁷⁰ The aim is to address to what extent these methods were practically workable in the different cultures for which they were not designed.

Overall, the research obtained valuable data through its fieldwork. Experiencing the law in action was very useful to gain an understanding of the political and constitutional system of the Amir and the Executive's powers in Kuwait. In fact, parts of the fieldwork findings were contrary to some of the thesis' predictions. Generally, this qualitative research added an important value to the research project and facilitated the collection of a significant amount of information to support the research objectives.

One potential obstacle was that the requirements of the Institutional Ethical Review Board are, 'a uniquely Western practice'.⁷¹ Informed consent, for instance, which, 'is based on principles of individualism and free will [is also] a uniquely Western cultural assumption'.⁷² Applying these values in different cultures may present great challenges,

⁷⁰ op cit Punch (n 66) 21.

⁷¹ op cit Marshall and Rossman (n 8) 89.

⁷² ibid.

particularly for international students carrying out fieldwork in their own collectivist and hierarchical societies.⁷³

Participants in this research who refused to be interviewed using a tape recording device were more willing to express their critical views otherwise, while some of the interviewees, although only a small number, who agreed to a recorded interview, delivered conservative and diplomatic answers to some of the study's sensitive questions. After the interview, while the tape recorder was switched off, some of these samples expressed different bolder views. In this case, the interviewer had to ask the participant's permission to include 'off-the-record statements' in his report, otherwise such statements were ignored. Also, some of these samples, mostly officials, who refused to allow the interview to be recorded, also omitted to sign the informed consent letter. They agreed to participate on the condition that they would not engage in the signature of any formal documents. Despite the researcher's confirmation to the contrary, they considered that signing such a form would prove their engagement in the research and thus threaten their autonomy. Those who refused to sign the consent form were excluded, although they might have potentially provided quality data. In such event, easing the process of obtaining an informed consent letter from particularly high-profile samples might have enhanced the investigator's opportunities to gain more valuable findings.

Furthermore, access negotiation is another issue worthy of consideration.⁷⁴ In this qualitative research, the researcher utilised his personal contacts and communications skills as a lawyer, politician and a previous judge, to gain access in his home country. However, Kuwait is a small country where personal contacts play a key role in facilitating access. In large societies, such as China, Malaysia or Indonesia, this might be more complicated, particularly for those who are not sponsored by their local governments. Non-governmental and self-sponsored researchers in strict societies might experience problems in negotiating access. Therefore, it would be much more helpful if universities were able to make

⁷³ op cit Marshall and Rossman (n 8) 89.

⁷⁴ Robson C, *Small-Scale Evaluation* (Sage Publications 2000) 109.

arrangements with foreign governments to support and facilitate access for non-governmental research projects.

4.3 Conclusion

This chapter has offered an overview of the fieldwork methodologies. It has given full descriptions of the interviews' design, sample strategies, data analysis and data management. The study has also discussed the related ethical issues and confirmed its commitment to the relevant professional guidelines. Furthermore, the study has offered its reflections on the qualitative research experience for future studies. However, this chapter was devoted solely to discussing the methods and strategies adopted to conduct the fieldwork research. The findings of this qualitative research will be reflected in chapters five, six and seven.

In the following chapter, the study will begin the second part of its examination by analysing the effects of the constitutional powers of the Amir and the Executive on the system of controlling the government, both from theoretical and practical perspectives.

Chapter Five

Powers of the Amir and the Executive

5.1 Introduction

In previous chapters, the study has discussed the meaning of constitutionalism and its related ethical values of democracy, the rule of law, human rights and the separation of powers. These values were selected as essential standards in order to assess the system of controlling the Executive's power in Kuwait. Accordingly, the study seeks in this chapter to offer a brief analysis of the application of these values within the system of executive powers. However, due to the wide scope of these topics, the narrower purpose of this part of the study is to examine the constitutional powers of the Amir and the Executive in relation to parliament and the judiciary, which affect the practice of democracy and its relevant values. Thus, the study aims to focus on particular powers that are believed to hinder the mechanisms of parliamentary and judicial accountability required to control the government's works. Thus, as stated in chapter one, other forms of checks and balances will not be discussed in this study. For example, internal mechanisms of accountability, such as the Kuwaiti Audit Bureau,¹ or the Civil Service machinery in the UK governing system,² are outside the scope of this study. Also, external accountability mechanisms such as media and political parties, despite their political significance in performing effective control over government activities, will not be examined for the same reason. Further studies in this field are therefore recommended.

Despite some limited democratic practices in Kuwait, there are no distinct definitions of the aforementioned values in the Constitution. According to the constitutional provisions, the governing system in Kuwait is democratic; thus, the people are the source of all power.³ By a free, secret, and direct general elections, Kuwaitis vote for fifty representatives to act for various constituencies in the National Assembly (NA).⁴ Keen attention is also paid to

¹ State Audit Bureau Act 30/1964. For more information <<http://www.sabq8.org/sabweb/home.aspx>> accessed 8 October 2016.

² See Constitutional Reform and Governance Act 2010 Part 1, Civil Service Code <<https://www.gov.uk/government/publications/civil-service-code>> accessed 8 October 2016.

³ Article 6 of Constitution.

⁴ *ibid* Article 80.

compliance with the doctrines of the United Nations Universal Declaration of Human Rights 1948 (UNDHR).⁵ Thus, the Constitution of Kuwait acknowledges a list of basic principles of human rights such as: the right of equality,⁶ freedom of opinion and expression,⁷ freedom of the press,⁸ the right of association,⁹ and the right of assembly,¹⁰ to name just a few. However, the Constitution guarantees these freedoms in general terms but has left the details to be specified by law.¹¹ The principle of the separation of powers is also recognised in the constitutional document.¹² Furthermore, a relatively independent judiciary complies with some features of the rule of law.¹³

The political system of Kuwait does, however, lack significant democratic features. According to many writers, the governing system of Kuwait is neither a parliamentary nor a presidential governing system.¹⁴ It is a hybrid system that has borrowed mixed features from both systems with a tendency towards the presidential model.¹⁵ The general aim of the Constitution 'is to form a democratic system in which government is accountable while maintaining the power of the ruler'.¹⁶ The Amir, who is the head of state, comes to office through a hereditary system which is exclusive to the Al-Sabah family.¹⁷ However, his successor, who is nominated by the Amir, must first attain the confidence of parliament.¹⁸ Although the Amir's person is immune and inviolable from any type of accountability,¹⁹ he retains nevertheless vital executive powers which he exercises through his appointed

⁵ Explanatory Memorandum of the Constitution.

⁶ *ibid* Article 29.

⁷ *ibid* Article 36.

⁸ *ibid* Article 37.

⁹ *ibid* Article 43.

¹⁰ *ibid* Article 44.

¹¹ Brown N, *Constitution in Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2002) 56.

¹² *op cit* (n 3) Article 50.

¹³ *ibid* Article 163.

¹⁴ Al-Saleh O, *The Constitutional System and Political Institutions in Kuwait* (Pt one 2nd edn, Dar Alkotob Press 2003).

¹⁵ Al-Mouqatei M, *The Idler of the Constitutional System of Kuwait and its Political Institutions* (University of Kuwait Press 2014) 142.

¹⁶ Al-Hajiri A, 'Citizenship and Political Participation in the State of Kuwait: The Case of the National Assembly: 1963-199' (PhD thesis, University of Durham 2004) 66.

¹⁷ *op cit* (n 3) Article 4.

¹⁸ Al-Sayed H, 'The Hereditary System in the Gulf Cooperation Council Countries (GCC)' (2009) 33(10) *Kuwait University Journal of Law* 395-466.

¹⁹ Article 54 of Constitution.

Cabinet. Ministers, thus, bear the responsibility for their actions toward him and toward the NA.

Under Article 51 of the Constitution, legislative power is vested in the Amir and the NA. The Executive and the NA may suggest laws, but any legislation must be approved by the NA and gain the Amir's ratification. The latter has the right to reject bills, but the NA can overcome this veto by a two-thirds majority vote.²⁰ The NA is composed of fifty members elected by a general, direct, and secret ballot, as well as a cabinet appointed by the Amir whose members do not exceed a third of the elected members of the NA. They are thus ex-officio members of the NA in which 'they usually form a political block when voting in parliament's decision-making process'.²¹ Although individual ministers can be subjected to a vote of no confidence by the NA, the Prime Minister (PM) and the collective responsibility of the Cabinet as a whole are subject to the Amir's assessment.²²

As for the relation with the judiciary, the appointment of members of the judiciary must be through Amiri Decree. The government's control and supervision over the budget of the judiciary has been argued to affect its independence.²³ Also, parts of the Executive's powers are immune from any judicial accountability.²⁴

These predominant powers of the Amir and the Executive can have a significant impact on the effectiveness of parliamentary and judicial mechanisms to control the Executive's powers. The Amir, in particular, 'enjoys a greater degree of effective, as opposed to dignified, power than the remaining constitutional monarchs of Western Europe'.²⁵ However, it has been argued that these powers are a reflection of, 'the Kuwaiti version of democracy which was agreed and accepted between the ruler and the people of Kuwait during the discussions of the Constituent Assembly'.²⁶ Such powers, it is suggested, 'are needed to sustain a form of checks and balances between the powers of the state'.²⁷ The

²⁰ *ibid* Article 66.

²¹ Interviewee C2.

²² Article 58 of Constitution.

²³ Interviewee D2.

²⁴ Interviewee D1.

²⁵ Al-Remaidhi A and Watt R, 'Electoral Constituencies and Political Parties in Kuwait: an Assessment' (2012) 11(4) *Election Law Journal* 518–528.

²⁶ Interviewee A1.

²⁷ *ibid*.

balances between the branches of the state have been drawn carefully to ensure that neither power can exercise arbitrary powers, particularly in the absence of a political party system.²⁸ It might be true in theory, however, ‘these powers in practice have been applied for other purposes’.²⁹ The following sections will discuss these powers in order to assess their impacts on the system of controlling the Executive’s powers.

It should be noted that the terms ‘Executive’ and ‘Government’ can have various meanings in different jurisdictions. In this study, the executive is a collective term that includes the Amir and the Executive. The Government is the ministers and their officials.

5.2 The Role of the Amir and the Executive in the Parliamentary System

Previously, in chapter three, it was concluded that the participation of the people in their government is a key feature of democracy. However, the executive power in Kuwait is vested in the Amir and his appointed cabinet. Also, non-elected officials head all governmental bodies. Parliament, therefore, is unable to make any contribution to the government’s business. There is a strict application of the principle of the separation of powers between the NA and the government. Yet, the Executive acquires dominant powers that affect the function of parliament from various levels. Starting from the formation of parliament, its operational functions and its dissolution, the Executive plays a key role. In this regard, the study aims to find answers to Beetham’s questions, which were raised in chapter three as indices for the democratic audit.³⁰ These are: to what extent does the parliamentary system of Kuwait make the government accountable, and secondly, can such a system provide a platform to empower people to actively participate in the decision-making process.

5.2.1 Influencing the Electoral System

It has been argued that the representative model of democracy is the most efficient, practical and relevant approach to legitimise governing systems in modern politics. Many

²⁸ Interviewee B1.

²⁹ Interviewee C5.

³⁰ Beetham D, *Defining and Measuring Democracy* (Sage Publications 1994) 36.

commentators observe Kuwait's democratic system to be a representative one.³¹ The indices of democratic legitimacy, therefore, can be judged by answering the question as to how electoral systems can truly reflect the people's will.

In Kuwait, the only formal feature of popular rule is the people's participation in the general election of the NA.³² According to the Constitution, 'The System of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution.'³³ Voting, thus, is the process in which the people of Kuwait can exercise their sovereignty.³⁴ Under Article 80, members of the NA are, 'elected directly by universal suffrage and secret ballot in accordance with the provisions prescribed by the electoral law'.³⁵ In order to ensure equality among voters, the Constitution affirms that, 'All people are equal in human dignity and in public rights and duties before the law, without distinction to race, origin, language, or religion.'³⁶ Nevertheless, there are certain powers vested in the Executive which might affect the efficiency of the voting system.

5.2.1.1 The Design of the Electoral System

It has been argued that, 'the central problem in realizing genuine democracy in Kuwait was the determination of Al-Sabah to preserve its power'.³⁷ One of the important strategies the ruling family employed to maintain such power was to create a representative system which allows them to overcome any anti-establishment movements.³⁸

According to the Constitution of Kuwait, the voting system shall be arranged in accordance with the provisions prescribed by the electoral law.³⁹ Although the prerogative of legislation is an absolute right for the NA under the constitutional doctrines, there have

³¹ op cit Al-Saleh (n 14).

³² Al-Hamidah K, 'The Electoral Constituencies: Constitutional Bases and Legal Arrangements – An Analytical Comparative Study of the Law no (42 /2006)' (2010) 34(1) Kuwait University Journal of Law 61–176.

³³ Article 6 of Constitution.

³⁴ Al-Faili M, 'The Determination of the Voters' Base in Kuwait between Constitution and Law' (1998) 22(2) Kuwait University Journal of Law 77–103.

³⁵ Article 80 of Constitution.

³⁶ ibid Article 29.

³⁷ op cit Alhajeri (n 16).

³⁸ op cit Alhajeri (n 16).

³⁹ Article 80 of Constitution.

been many occasions when the Executive has exercised this prerogative solely by using Amiri Decrees under Article 71 of the Constitution. The Amir has used his prerogative powers on several occasions to amend the electoral law.⁴⁰ Most recent was the Amiri Decree in 2012 which amended the electoral law.⁴¹

Under Article 71 of the Constitution of Kuwait:

Should necessity arise for urgent measures to be taken while the National Assembly is not in session or is dissolved, the Amir may issue decrees in respect thereof which have the force of law, provided that they are not contrary to the Constitution or to the appropriations included in the budget law.

In October 2012, based on the former article, before calling for a new election, the Amir issued a decree that amended the electoral law immediately after dissolving parliament. The amendment reduced the right of voting to one vote for each voter, while the previous mechanism had allowed each voter to elect up to four candidates.⁴² Under this amendment, voters could only choose one candidate out of ten seats in each constituency. The opposition and the prime political groups urged Kuwaitis to boycott the ballot under the new law, but the elections went ahead. Former MPs and others challenged the decree at the Constitutional Court through electoral petitions. However, in 2012, the Constitutional Court argued against the supremacy of the legislature in favour of the State's national security.⁴³ The Court's argument was based on the Amir's right to amend electoral laws should the necessity arise, setting by this judgment, a new era in which the sovereignty of the Executive would overcome, when necessary, the supremacy of parliament.⁴⁴

Moreover, the current construction of the electoral districts in Kuwait causes major deficiencies within the electoral process.⁴⁵ The electoral districts are divided into five constituencies. Each voter only votes for one deputy out of the ten elected deputies for his district. Therefore, 'the relative impact of each vote equals ten percent of the weight of the

⁴⁰ Amiri Decrees 64/1980, 130/1986 and 20/2012 with regard to amending electoral law.

⁴¹ Amiri Decree 20/2012 with regard to amending electoral law.

⁴² Article 1 of Law no 42/2006 Regarding Reallocation of Electoral Constituencies.

⁴³ Constitutional Court verdicts 15/2012.

⁴⁴ This judgment will be discussed in more detail in chapter seven.

⁴⁵ *op cit* Al-Remaidhi (n 25).

representatives' number for each constituency'.⁴⁶ This proportional formula 'cannot guarantee to craft the preference of public opinion'⁴⁷ nor can it empower them to reach a collective vote that is capable of reflecting a majority choice. In addition, the electorates' numbers vary heavily in these constituencies although they equally offer the same number of seats. The actual allocation of seats for each constituency is ten.⁴⁸ The following table explains the size of the electorate in each constituency in the 2008 parliamentary elections.

Table 5.1 Distribution of Votes and Seats in 2008

District	Number of Votes	% of Total Votes	Actual seats allocation in of each constituency	% of mean number of voters (72,337)	Seat allocation based on an equal voting weight	Currently 'Over / Under' Represented
1	66,641	18.43 %	10 seats	92.13%	9	+1
2	41,365	11.44 %	10 seats	57.18%	6	+4
3	58,674	16.22 %	10 seats	81.11%	8	+2
4	93,711	25.91 %	10 seats	129.55%	13	-3
5	101,294	28.01 %	10 seats	140.03%	14	-4
Total	361,685	100.0 0%	50 seats	100.00%	50	10 Seats for each District

It is vividly apparent from this table that each of the fifth and fourth districts contain virtually double the number of voters compared to the third and second districts, respectively. The allocation of seats in this sense is not proportionate to the number of voters equally amongst all constituencies. As a result, competition between the candidates of these constituencies is not equivalent.⁴⁹ Candidates in the fourth and fifth constituencies may lose an election even though they achieved a higher number of votes than the winning candidates of the first, second and third constituencies. To further illustrate this point, the following table displays data from the 2012 general election in Kuwait.

⁴⁶ Interviewee G2.

⁴⁷ Interviewee C2.

⁴⁸ Article 2 of Law no 42/2006 Regarding Reallocation of Electoral Constituencies.

⁴⁹ op cit Al-Hamidah (n 32) 61–181.

Table 5.2 Distribution of votes per candidates in 2012

First District	#1	#2	#3	#4	#5	#6	#7	#8	#9	#10		
Abdul Dashti					9709							
Saleh Ashour						9622						
Ahmed Larry							8164					
Adel Aldamkhi								8090				
Adnan Abdul Samad									8012			
Abdullah Altrigi										7619		
Second District	#1	#2	#3	#4	#5	#6	#7	#8	#9	#10		
Jamaan Alherbish	8475											
Riad Aladsani		6401										
Mohammad Alsaqer			6198									
Ali Alrashed				6148								
MarzouqAlghanim					5667							
Hamad Almatar						5624						
Abdulrahman Alanjari							5537					
Adnan Almutawa								5064				
Khalid Alsultan									4778			
Abdullatif Alamiri										4643		
Third District	#1	#2	#3	#4	#5	#6	#7	#8	#9	#10		
Shaya Alshaya							8959					
Nabil Alfadl								8675				
Mohammed Aljawehl									8331			
Ammar Alajmi										7697		
Fourth District	#11	#12	#13	#14	#15	#16	#17	#18	#19	#20	#21	#22
Abdullah Fahad	7201											
Askar Alanzi		6998										
Mohammed tana			6728									
Mohammed Almusilim				6649								
Ahmed Alshuraiaan					6170							
Majid Moussa						5915						
Nawaf Sari							5556					
Mubarak Alhajraf								5408				
Daifallah Bouramiya									5063			
Turgi Saud										4990		
Thikra Alrashidi											4943	
Abdulrahman Albasman												4771
Fifth District	#11	#12	#13	#14	#15	#16	#17	#18	#19	#20	#21	#22
Ayeth Alotaibi	9712											
Faisal Alkandari		8177										
Alhumidi Alsubaie			8057									
Mohammed Alhuwailah				7487								
Madi Alhajri					5903							
Fahad Aldosari						4738						
Nasser Almarri							4724					

It can be seen that even though losing candidates in the fourth and fifth constituencies received as many as 9712 votes, this was insufficient to allow them a victory, whereas in the second constituency, a vote count as low as 4643 was sufficient. In the fourth constituency, a candidate who achieved 7201 votes, significantly higher than the winning candidates within other constituencies, registered as a losing candidate.

It has been argued that, ‘this perception affects the soundness of citizenship in the political and electoral representation system of Kuwait’.⁵⁰ The impact of these differences among the number of voters for these electoral constituencies can be understood noticeably in line with its diverse localised nature.⁵¹ Most of the tribes and Islamist groups’ candidates, who form the bulk of the opposition majority, come from the fourth and fifth constituencies. Therefore, ‘the nature of representatives does not reflect actual voters’.⁵² The importance of the calculation method of votes which are cast, and how they are translated into seats, ‘is evidence that the electoral system of Kuwait is unable to produce a representative Assembly that accurately reflects public opinion’.⁵³ Such an unbalanced allocation of seats contradicts the international standards of free and fair elections.⁵⁴ Nor can it comply with ‘the requirement of “universal and equal suffrage” provided in Article 25(3) of the International Covenant on Civil and Political Rights of 1966 (ICCPR)’.⁵⁵ The representation system does not enable the votes of all electors to carry an equal weight. It is difficult to claim, therefore, that voting has an equal value and effect amongst all citizens. Also, according to the Central Statistical Bureau, the total population of Kuwait in the same period was 3,268,431, although only 1,128,381 were Kuwaiti citizens.⁵⁶ The total number of men and women who were qualified to vote in the parliamentary election of 2012 was 439,715.⁵⁷ Nearly half of them opt to vote.⁵⁸ Such a huge gap between voters and the total

⁵⁰ Al-Wageyyan F, *Citizenship in Kuwait* (Strategic and Future Studies Center 2009) 53 cited in op cit Al-Remaidhi (n 25).

⁵¹ op cit Al-Hajiri (n 16).

⁵² Interviewee G2.

⁵³ Interviewee C1.

⁵⁴ op cit Al-Hamidah (n 32).

⁵⁵ op cit Al-Remaidhi (n 25).

⁵⁶ See <http://www.csb.gov.kw/Socan_Statistic_EN.aspx?ID=6> accessed 1 February 2017.

⁵⁷ Electoral Register List, Minister of Interior, Department of Elections Affairs.

⁵⁸ See <<http://www.electionguide.org/elections/id/1620/>> accessed 1 February 2017.

number of citizens who are disqualified from voting is related not only to those who decided not to bother to vote, but also to the limitation of voting to Kuwaitis by origin in accordance with the Nationality Law,⁵⁹ the number who are aged 21 and over, and the exclusion of all members of the armed forces and police from the right to vote. Thus, elections only reflect a small portion of public opinion. According to Article 25 of the ICCPR, which Kuwait ratified in 1966, the right, ‘to vote and to be elected at genuine periodic elections’⁶⁰ has become one of the indices to measure political equality amongst all citizens. However, the Kuwaiti government’s ratification of the ICCPR was accompanied by its reservations that voting should not extend to women⁶¹ and the previously mentioned military forces. In this regard, the United Nation’s Human Rights Committee declared that Kuwait’s ‘interpretative declaration’ was contrary to the ICCPR and therefore invalid.⁶²

In the UK, under the provisions of the Parliamentary Constituencies Act 1986,⁶³ it is the responsibility of the Boundary Commissions⁶⁴ to organise and update the electoral parity and boundaries of parliamentary constituencies once every five years:⁶⁵

For the purpose of the continuous review of the distribution of seats at parliamentary elections, there shall continue to be four permanent Boundary Commissions, namely a Boundary Commission for England, a Boundary Commission for Scotland, a Boundary Commission for Wales and a Boundary Commission for Northern Ireland.⁶⁶

These permanent machineries have been formed to provide a continual review of the distribution of seats in the electoral constituencies, and to maintain a degree of equality in the size of the electorate in all constituencies.⁶⁷ They are, ‘independent, non-political, and

⁵⁹ According to Kuwaiti Nationality Law 15/1959, an original Kuwaiti is a person who settled in Kuwait before 1920.

⁶⁰ International Covenant on Civil and Political Rights 1966 Article 25.

⁶¹ Women gained the right to vote in 2005 under Law 17/2005 Regarding the Political Rights of Women which amended Article 1 of the Electoral Law 35/ 1963.

⁶² See United Nations Human Rights Committee’s concluding observations, (UN Doc. A/55/40 2000).

⁶³ Parliamentary Constituencies Act 1986.

⁶⁴ Boundary Commission for England <<http://boundarycommissionforengland.independent.gov.uk/>> accessed 8 October 2016.

⁶⁵ Parliamentary Voting System and Constituencies Act 2011, Article 10.

⁶⁶ Parliamentary Constituencies Act 1986, Article 2 (2).

⁶⁷ *ibid* Part two.

impartial bodies⁶⁸ in order to ensure, ‘that the previous elections do not and should not enter into their considerations’.⁶⁹ However, the Commission only proposes recommendations in the form of draft orders to Parliament, which has the final decision upon the results.⁷⁰ In fact, the method of defining a constituency is always a political decision which, ‘can have very significant electoral and political consequences’.⁷¹ Therefore, a significant feature of the British electoral system is that it accepts, ‘some overall fluctuation in the number of constituencies and that different rules apply for the regions across Great Britain (England, Scotland, Wales and Northern Ireland)’.⁷² This controversial fluctuation was expressed in the the provisions of the Parliamentary Constituencies Act 1986, Schedule 2, and then became less variable by the amendment of the Parliamentary Voting System and Constituencies Act 2011.

Also, in its recent review,⁷³ the Boundary Commission, under the guidelines set out by the Parliamentary Voting System and Constituencies Act 2011, shall submit a report before 1 October 2018 that reduces the number of electoral constituencies to 600, all within, ‘no less than 95% of the United Kingdom electoral quota, and no more than 105% of that quota’.⁷⁴ Such a policy keeps the number of voters in each constituency approximately equal according to a mathematical formula, but also considering factors such as local community ties.⁷⁵

In addition, under Schedule 11 of the 2011 Act, there are public hearings to enable representations from the public, whether individuals or organisations, to be made about

⁶⁸ Bradley AW and Ewing KD, *Constitutional & Administrative Law* (Pearson 2011) 152.

⁶⁹ Boundary Commission for England, *Annual Report 2008/2009* (2009) 4.

⁷⁰ Blackburn R, *The Electoral System in Britain* (Macmillan Press 1995) 118.

⁷¹ Johnston RJ, *From Votes to Seats: the Operation of the UK Electoral System since 1945* (Manchester University Press 2001) 20.

⁷² *op cit* Blackburn (n 70) 116.

⁷³ Guide to the 2018 Review of Parliamentary Constituencies

<<http://boundarycommissionforengland.independent.gov.uk/wp-content/uploads/2016/07/2016-07-11-Guide-to-2018-review-Final-Version.pdf>> accessed 19 October 2016.

⁷⁴ Rules for distribution of seats Schedule 2 of the Parliamentary Voting System and Constituencies Act 2011.

⁷⁵ Constituency boundaries after 2015: Key issues for the 2015 Parliament

<<https://www.parliament.uk/business/publications/research/key-issues-parliament-2015/parliament-politics/constituency-boundaries/>> accessed 19 October 2016.

any of the proposals of the Boundaries Commission. Furthermore, if there is sufficient interest from the public, local inquiries will be ordered by the Boundaries Commission.⁷⁶

Such an arrangement provides an interesting example of the method of policy transfer, which is worth applying in the case of Kuwait's electoral review system. Three important features can be learned from such policy. First, it is much more specific about how these calculations are made than the situation in Kuwait. Second, there is an independent body which makes the calculations, and third, there is transparency in this system. All of these measures can have a vital impact by opening up the system, which will eliminate party political controversy and put control in the hands of the public.

Thus, in an attempt to apply Beetham's indices of legitimacy to audit Kuwait's electoral system, particularly with regard to his question of, 'how far is the appointment to legislative and governmental office determined by popular election, on the basis of open competition, universal suffrage and secret ballot',⁷⁷ the previous discussion reveals the shortcomings of the electoral system of Kuwait and its inability to achieve effective popular control.⁷⁸ The appointment of the government to office is not subject to a fairly devised electoral preference, and the selection of legislative members is subject to an imperfect electoral system.

5.2.1.2 The Executive's Supervision of the Electoral Process

There is no doubt that the Electoral Register (ER) forms one cornerstone to achieving free, fair and effective ballots. All voters and candidates should have an equal opportunity to exercise their electoral rights.⁷⁹ Most modern democracies, therefore, assign this vital role of compiling the ER to independent bodies to ensure a fair electoral outcome which reflects the preference of the people. In Kuwait, however, the Ministry of the Interior (MOI) is the authority by law which has the right to revise the ER annually.⁸⁰ This authority enables the

⁷⁶ Parliamentary Voting System and Constituencies Act 2011, schedule 11.

⁷⁷ See chapter three section 3.2.1.

⁷⁸ Raabe J, 'Principles of Representation Throughout the World: Constitutional provisions and electoral systems' (2015) 36(5) *International Political Science Review* 578–592.

⁷⁹ Zineddine M, 'Dialectic of Electoral Democracy and a Political: Reading of the Constitutionality of the Electoral System' (2009) 33(2) *Kuwait University Journal of Law* 345–360.

⁸⁰ Article 6 of Electoral Law no 35/ 1962.

Executive to control the ER by determining who has the right to vote and who has the qualifications to stand for election. In February of each year, the Electoral Department revises the ER to add and remove voters who have obtained or lost voting qualifications.⁸¹ Under the Electoral Law 1963, only Kuwaiti subjects by origin who are aged 21 or above can vote.⁸² Citizens who are overseas, military personnel and policemen cannot vote. Also, any persons convicted of a felony or dishonourable crimes are disqualified from voting.⁸³ As for parliamentary candidature:

A member of the National Assembly shall:

- (a) be a Kuwaiti by origin in accordance with the law;
- (b) be qualified as an elector in accordance with the electoral law;
- (c) be not less than thirty calendar years of age on the day of election;
- (d) be able to read and write Arabic well.⁸⁴

According to electoral law, the MOI reviews the candidates' applications before any election to ensure that they have obtained the required qualifications. Therefore, the Minister of the Interior has the power to accept and reject candidature applications. Although this power is monitored by an electoral court,⁸⁵ 'it can have a vital impact on the right to stand for election'.⁸⁶ Candidates who have been subjected to such rejection, 'spent most of their limited time in courts to challenge their rights to stand for election, which weakened their chances of winning'.⁸⁷ Thus, Beetham's question of, 'how independent of government and party control are the election and procedures of voter registration', has been clearly answered. Too much partisan political interference is possible in contrast to the situation in the UK. Firstly, there is no independent expert body to undertake this important role. The Executive predominantly supervises the electoral process alone. Secondly, there are no public consultations, the processes are decided and promulgated in closed official circles.

⁸¹ Article 8 of Electoral Law no 35/1962.

⁸² *ibid* Article 1.

⁸³ *ibid*.

⁸⁴ Article 82 of Constitution.

⁸⁵ Article 13 of Electoral Law no 35/1962.

⁸⁶ Interviewee C1.

⁸⁷ Interviewee E2.

5.2.2 Influencing the Operational Function of the Parliament

In Kuwait, the principle of the separation of powers is applied strictly, on paper, within the governing system. As stated earlier, this doctrine does not allow parliament to participate in any government business. Most importantly, it does not participate in the appointment of the government. The main functions of parliament in the constitutional system of Kuwait are the passing of laws and the control of the Executive's powers.⁸⁸ However, the government has utilised its emergency legislative power to amend the electoral laws, an essential role of parliament, in contrast to the principle of the separation of powers.

In other parliamentary systems, however, the principle of the separation of powers may not be applied firmly as is the situation in the UK Parliament. Under the British constitutional system, in the relationship between the executive and the legislature, there is 'nearly complete fusion'.⁸⁹ This constitutional relationship has been described by Bagehot as, 'the close union.'⁹⁰ However, the UK system still reflects some aspects of the principle of the separation of powers. Firstly, only ministers can enjoy membership of Parliament among all officials who hold a position in the Executive.⁹¹ Secondly, there is a level of control that Parliament commonly exercises over the Executive, which can reach the extent of a no confidence vote. However, arguably, the Executive can control the House of Commons' works in the case of having solid support of the House of Commons' members, which might hinder the government's accountability in Parliament.⁹² Thirdly, the power over legislation is a key feature of Parliament's sovereignty in the British constitutional system.⁹³ Therefore,

An important aspect of the fundamental principle of Parliamentary sovereignty is that primary legislation is not subject to displacement by the Crown through the exercise of its prerogative powers. But the constitutional limits on the prerogative powers of the Crown are more extensive than this. The Crown has only those prerogative powers

⁸⁸ op cit Al-Mouqatei (n 15).

⁸⁹ op cit Bradley and Ewing (n 68) 84.

⁹⁰ Bagehot W, *The English Constitution* (Paul Smith ed, Cambridge University Press 2001) 65.

⁹¹ Al-Mouqatei M, 'Government's Attendance to the Parliament Between the Right of Representation and the Required Quorums' (2008) 32(4) Kuwait University Journal of Law 443–464.

⁹² op cit Bradley and Ewing (n 68) 84.

⁹³ See *Gina Miller v The Secretary of State* [2016] EWHC 2768, for the importance of the supremacy of the supremacy of parliamentary sovereignty in the UK.

recognised by the common law and their exercise only produces legal effects within boundaries so recognised. Outside those boundaries the Crown has no power to alter the law of the land, whether it be common law or contained in legislation.⁹⁴

However, it is a principle that has been designed for a society which is different from today's democratic society of Britain.⁹⁵ This 300-year-old idea is, 'unable to curb the current expansion in the delegation of legislative power to the government.'⁹⁶

Britain demonstrates that it depends on detailed ideas about how to enforce its grand constitutional principles, such as parliamentary sovereignty. This is of significant importance. Simply announcing an important principle of fairness without providing detailed mechanisms for its provision and enforcement does not ensure that the intention will be reflected in reality. This is the general lesson to be learned from the UK's law and experience.

5.2.2.1 The Appointment of the Executive

According to the Constitution, executive power is vested in the Amir, the Cabinet, and the ministers.⁹⁷ However, the Amir exercises his powers through his ministers.⁹⁸ Following each general election, 'The Cabinet is re-constituted...at the beginning of every legislative term of the NA.'⁹⁹ The Amir, after the traditional consultations,¹⁰⁰ appoints the PM and also appoints ministers upon the recommendation of the PM.¹⁰¹ However, 'Ministers are appointed from amongst the members of the NA and from others. The number of ministers in all shall not exceed one-third of the number of the members of the NA.'¹⁰² Nonetheless, there has been a minimal application of this constitutional provision. In most governments, only one minister was chosen from the NA in order to fulfil this doctrine in a practice that

⁹⁴ *ibid.*

⁹⁵ Loveland I, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (6th edn, Oxford University Press 2012) 84.

⁹⁶ *op cit* Bradley and Ewing (n 66) 85.

⁹⁷ Article 52 of Constitution.

⁹⁸ *ibid* Article 55.

⁹⁹ *ibid* Article 57.

¹⁰⁰ Explanatory Memorandum of the Constitution.

¹⁰¹ Article 56 (1) of Constitution.

¹⁰² *ibid* Article 56 (3).

was called ‘Alwazeer Almu halel’ (الوزير المحلل), or the Validating Minister.¹⁰³ This practice was in contrast to the guidelines of the Explanatory Memorandum of the Constitution, and the intentions of those who framed the Constitution,¹⁰⁴ to enhance the selection of ministers from the NA, in order to transform gradually to a popular form of governance.

Thus, the Executive as a whole is non-elected, although ministers are selected from the NA and outside it.¹⁰⁵ Yet, the Constitution grants ministers the privilege of the NA’s membership. They form a third of parliament’s membership, which influences the process of the NA’s decision-making mechanism. It can be argued that such a privilege has touched the essence of parliament’s sovereignty. Whether it was in relation to the function of law-making or to making government accountable, most NA decisions tend to favour the government. On many occasions, the government easily acquired dominance in parliament due to the votes of ministers allied to a small supportive group of elected pro-government deputies. For example, the parliament is constructed of fifty elected members plus no more than sixteen ministers with a total of (49+16) sixty-five votes. Most of parliament’s important decisions need the approval of the majority (33 votes) of its members to be passed. With the support of only seventeen votes, this majority can be achieved easily by the government because of the supportive block of sixteen ministers plus pro-government members (16+17=33). Thus, by excluding the ministers’ votes from the previous example, it can clearly be concluded that decisions in such cases only needed the votes of a third of the elected deputies to be passed by the NA, even if the majority of the elected representatives voted against. Such decisions cannot be regarded as reflecting democratic ends.

This shortcoming implies that parliamentary decisions are mostly subject to the political arrangements which the government can easily engineer, but not the preferences of the elected members. As a result, such a situation hinders the practice of accountability as well as democratic governance as a whole. Therefore, in reference to Beetham’s indices of democratic audit,¹⁰⁶ the extent of an open and accountable government is difficult to sustain

¹⁰³ Al-Mouqatei M, ‘The Parliamentary Government in Kuwait’ (1998) 32(2) *The Lawyer Journal* 29–33.

¹⁰⁴ *ibid.*

¹⁰⁵ The government often used to minimise the selection of ministers from parliament to one minister only.

¹⁰⁶ *op cit* Beetham (n 30) 28.

under such predominant powers of the Amir and the Executive. Beetham argued that this criterion should measure the degree of the continuing popular accountability of government, either directly by the electorate or indirectly by political agents.¹⁰⁷ These powers of the Executive and its political superiority in the NA have enabled it to play a key role in the parliamentary decision-making process. Such a fact affects, and is usually indicative of, the popularity of the decisions of elected assemblies.

As a method of reform, the traditional consultations indicated in the Explanatory Memorandum of the Constitution should be organised by law. Under such proposed law, it is believed that an arrangement between the new elected Assembly and the Amir is capable of establishing a mutual understanding about the selection of the PM and his ministers. This arrangement empowers the NA to participate in the formation of government process and, thus, reflects its confidence in the new government. Such a suggestion is in harmony with the Explanatory Memorandum of the Constitution, which provides that the popular nature of the government system in the country requires the selection of ministers from amongst the NA members to be enhanced.

By contrast, in the UK, in theory, a minister does not have to be a member of either House of Parliament. However, in practice, ‘convention is that ministers must be members of either the House of Commons or House of Lords in order to be accountable to Parliament.’¹⁰⁸ Lord Diplock once argued, ‘the British constitution, though largely unwritten is firmly based on the separation of powers’.¹⁰⁹ However, in common law jurisdictions, the executive and legislature are closely entwined,¹¹⁰ which Bagehot viewed as the ‘efficient secret of the English constitution.’¹¹¹ Therefore, the PM and a majority of his or her ministers are Members of Parliament and are present in the House of Commons. Such ‘integration of powers is said to provide stability and efficiency in the operation of government’.¹¹² It has been described as ‘a system that intentionally promotes efficiency

¹⁰⁷ op cit Beetham (n 30) 28.

¹⁰⁸ Maer L, *Ministers in the House of Lords* (Briefing paper 05226, HC 11 August 2016).

¹⁰⁹ *Duport Steels v Sirs* [1980] 1 WLR 142.

¹¹⁰ Bagehot W, *The English Constitution (1867)* (e-book, Gutenberg)

<<http://www.gutenberg.org/ebooks/4351>> accessed 28 November 2016.

¹¹¹ Benwell R and Gay O, *The Separation of Powers* (Briefing paper, SN/PC/06053 HC August 2015).

¹¹² *ibid.*

over abstract concerns about tyranny'.¹¹³ Nevertheless, it is still possible for the Crown on the advice of the PM to appoint a minister from the House of Lords or even outsiders as ministers.¹¹⁴ Practice, nevertheless, shows that very few ministers have been appointed from outside of the House of Commons. There is no law which establishes this rule, but it seems wrong to do so because these people have not been elected. This culture has developed over the course of the twentieth century. Therefore, the UK may not have easy lessons to transfer as policy to Kuwait in this regard. The UK's political history and culture are distinct from Kuwait. Notwithstanding, it is important that this type of culture spreads in Kuwait. It is this idea that this study seeks to highlight and promote, as it is important for a good and accountable method of governance.

5.2.2.2 The Role of the Amir and the Executive in the Dissolution of Parliament

Dissolution is defined as the collective dismissal of parliament's members for the purpose of, at least theoretically, returning to the electorate to seek their judgement including on a running dispute between parliament and the government.¹¹⁵ Although dissolution is well defined, it may be used in a different manner depending on the nature of democracy applied. Historically, the prerogative of dissolution first emerged in England.¹¹⁶ Such a right 'was derived not from any modern constitutional or parliamentary document, but simply from judicial recognition over crown activities over many centuries past'.¹¹⁷ This powerful right was used by the monarch to recall Parliament for advice whenever a need arose.¹¹⁸ The prerogative of dissolution has witnessed heated debates among scholars in Kuwait and the UK regarding the Executive's practice of such a right.¹¹⁹ The length of time between elections can have a serious impact on controlling the performance of the

¹¹³ Krotoszynski R, 'The Separation of Legislative and Executive Powers' in Ginsburg T and Dixon R (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 248.

¹¹⁴ op cit Maer (n 108).

¹¹⁵ op cit Al-Saleh (n 14).

¹¹⁶ op cit Blackburn (n 70) 18; op cit Al-Saleh (n 14).

¹¹⁷ ibid (n 70).

¹¹⁸ Smith S and Brazier R, *Constitutional and Administrative Law* (12th edn, Longman 1997).

¹¹⁹ Blackburn R, 'The Prerogative Power of Dissolution of Parliament: Law, Practice, and Reform' [2009] Public Law 766-789; Al-Desaiem N, *The Right of Dissolution in the Parliamentary System* (PhD thesis, University of Cairo 2012).

government.¹²⁰ The aim of this section is to argue how such a prerogative could affect the control of the Executive's powers.

In modern democracies, the strength of the principle of the separation of powers shapes the type of governing system. The extent of this separation reflects the separation type, if it is a strict separation it is usually called the presidential system. The moderate separation of power, or the fusion of powers, is referred to as the parliamentary system or cabinet system. In this section, the study will consider brief examples of how dissolution is exercised in different democracies. However, a common feature of advanced democracies must be noted: the prerogative of dissolution normally lies in the hands of the people's representatives.

According to Article 83 of the Constitution of Kuwait, 'the term of the NA is four calendar years commencing with the day of its first sitting'.¹²¹ However, 'the Amir may dissolve the NA by a decree in which the reason for dissolution is indicated.'¹²² This exclusive right of the Amir has been assigned to the Executive to perform checks and balances versus parliament's power of a no confidence vote.¹²³ It has been argued that the Amir as head of both the legislature and the Executive performs as a neutral judge over the state's separated powers in such a case.¹²⁴ However, as long as the Amir rules by his ministries whilst the elected parliamentarians are questioning his policies, such neutrality is difficult to sustain. By way of proof, it may be useful in this regard to illustrate how the Executive exercises its constitutional powers. According to Article 52, 'executive power shall be vested in the Amir, the cabinet and the ministers, in the manner specified by the Constitution'.¹²⁵ As a result of the Amir's immunity, he 'shall exercise his powers through his ministers',¹²⁶ which requires that these powers must be exercised by an Amiri Decree based on the government's request.¹²⁷ Therefore, any Amiri decree should hold the Amir's signature as

¹²⁰ op cit Blackburn (n 70) 19.

¹²¹ Article 83 of Constitution.

¹²² Article 107 of Constitution.

¹²³ op cit Al-Mouqatei (n 15) 453.

¹²⁴ Al-Baz A, *The Public Powers in the Constitutional System of Kuwait* (University of Kuwait Press 2006) 185.

¹²⁵ Article 52 of Constitution.

¹²⁶ ibid Article 55.

¹²⁷ op cit Al-Desaiem (n 119).

well as the PM's and the concerned ministers' signatures, in order to enable parliament to audit governmental decisions.¹²⁸ Ministers, therefore, stand before parliament for their political accountability for those decrees instead of the Amir.¹²⁹ Therefore, some argue that other reasons drive the government to use the right of dissolution other than seeking the electors' opinions, which are, for example, to exclude parliamentary opposition.¹³⁰ In practice, after more than 50 years of Kuwaiti parliamentary experience, government practice over the prerogative of dissolution evidently shows that the government often uses this powerful right as a solution to politically manoeuvre when there is a potential no-confidence motion against one of its ministries.¹³¹

During the period from 2006, the year the current Amir came to office,¹³² until 2016, parliament was dissolved four times.¹³³ Most of the reasons behind the dissolution of these assemblies were, in fact, to counter parliamentary accountability actions against some of the cabinet's members.¹³⁴ Such a practice reveals the sensitivity of the government towards parliamentary accountability. Therefore, it has been argued that, 'parliament's members, who are exercising their function of control over ministers confidently, which could be used to force them to relinquish office, are usually faced with a collective solidarity, ministerial reshuffle or dissolution of parliament'.¹³⁵

By way of comparison, in the UK's parliamentary system, the power of dissolution is at the option of the PM although it must be issued by the Crown. Over the years, this prerogative has moved, due to the development of democracy, from the Crown to the elected politicians. Such a development has been regarded as a great democratic achievement. As Bagehot argued:

¹²⁸ Al-Tabtabaie A, 'Doctrine of the Adjoining Signature of Minister in the Parliamentary System' [1985] Kuwait University Journal of Law 11-77.

¹²⁹ *ibid.*

¹³⁰ *op cit* Al-Desaiem (n 119).

¹³¹ Alshafi E, 'Analytical Study on the Reasons of Dissolution' (in Arabic) <<http://alwatan.kuwait.tt/articledetails.aspx?Id=157426>> accessed 2 January 2017.

¹³² Sheik Sabah Al-Ahmad Al-Sabah.

¹³³ The NA of 2006, 2008, 2009 and 2013 .

¹³⁴ *op cit* Al-Desaiem (n 119) 297.

¹³⁵ Al-Remaidhi A, 'Individual Ministerial Responsibility in Constitutional System of Kuwait' (PhD thesis, University of Essex 2004).

A good, capable, hereditary monarch would exercise it better than a Premier, but a Premier could manage it well enough; and a monarch capable of doing better will be born only once in a century, whereas monarchs likely to do worse will be born every day.¹³⁶

The PM, who is head of the ruling party in most cases, chooses when and why to exercise the right of dissolving Parliament. Therefore, arguably, PMs might exercise this power to serve their own political agenda rather than in preference for democracy itself.¹³⁷

Many constitutionalists, as well as political figures, have argued about the proper length of time between two elections.¹³⁸ Although the heated competition between political parties provides clear evidence for democracy, nevertheless, some argue it could also create a much higher degree of collusion between them and, in that sense, it might be argued that this is characteristic of a market, rather than a democratic electoral competition.¹³⁹ In some cases, if the PM uses the right of dissolution improperly, for example, shortly after an election, as a political manoeuvre to use better timing to collect more votes, such action could lead electors to lose interest in voting in the parliamentary elections. In such circumstances, as some claimed, the head of state must be guided by his duty to protect the Constitution and, in particular, the principles of democracy and responsible government. In other words, as in other parliamentary systems, ‘he or she is responsible for the right of dissolution and should act as a guardian of the Constitution and a protector of parliamentary democracy’.¹⁴⁰

Such an argument raises considerable questions about whether there are any legitimate reasons why the head of state could refuse to hold an election. Or, is it not appropriate to encourage monarchs and heads of state to play a role beyond their neutrality? In relation to this argument, a formal request has been presented to the Parliament by the Secretary of State for Justice and Lord Chancellor, claiming that the right of dissolution gives the PM significant control over Parliament and proposing, therefore, for it to be made subject to

¹³⁶ op cit Bagehot (n 110).

¹³⁷ op cit Blackburn (n 119) 766–789.

¹³⁸ op cit Blackburn (n 70) 18.

¹³⁹ Watt B, *UK Election Law, a Critical Examination* (Glass House Press 2006).

¹⁴⁰ Cyr H, ‘The Dissolution of Parliament’ (Memo for Workshop on Constitutional Conventions, David Asper Centre for Constitutional Studies, University of Quebec, 3–4 February 2011).

the formal prior consent of the House of Commons.¹⁴¹ Nonetheless, the power of dissolution remains the decision of the elected PM and not of the Monarch. Such a prerogative has only been exercised by the absolute desire of the elected government and has never been challenged by way of judicial review.¹⁴²

Despite the fact that in the UK no dissolution has been refused since the last century, Rodney Brazier argues that, ‘It is beyond doubt that the sovereign can refuse a request for the dissolution of Parliament: the difficulty lies in identifying the situations in which such action would be constitutionally appropriate’.¹⁴³ Brazier holds the view that whenever a hung parliament is elected, politicians’ requests for dissolution might not be the right way to solve a political crisis, as they will normally act in accordance with their parties’ interests. He believes that the Queen (although his view was based on her personal qualifications),¹⁴⁴ ‘is ideally placed to moderate between any competing wishes of party leaders if they fail to reach a political agreement’.¹⁴⁵ He argues, ‘such a role of the monarch might enhance the neutrality of the head of state and stimulate politicians’ historical responsibilities’.¹⁴⁶

One question that needs to be asked, however, is whether it is a better practice for democracy to encourage the head of state or monarch to implement his or her discretion over the PM’s prerogative. Contrary to Brazier’s view, it has been argued that:

There are real and serious dangers, both to the integrity of our parliamentary democracy and to the future of the monarchy, in the effects which may be caused through academic theorising “talking up” the personal discretion and moderating role of the monarch. These professors are giving license and encouragement to the monarch of today and of tomorrow to intervene in difficult, sensitive and highly charged political situations. They are, in effect, inciting royal activism when none is necessary, appropriate or desirable.¹⁴⁷

¹⁴¹ <<http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>> accessed 2 January 2017.

¹⁴² op cit Blackburn (n 70) 21.

¹⁴³ Brazier R, ‘Government Formation from a Hung Parliament’ [1986] PL 387–406.

¹⁴⁴ See Blackburn R, ‘Queen Elizabeth II and the Evolution of the Monarchy’ in Qvotrup M (eds), *The British Constitution: Continuity and Change* (e-book, Bloomsbury 2013) 166.

¹⁴⁵ *ibid*; Bogdanor V, *The Monarchy and the Constitution* (Clarendon 1995) 75.

¹⁴⁶ *ibid*.

¹⁴⁷ Blackburn R, ‘Monarchy and the Personal Prerogatives’ (2004) Westlaw; Blackburn R, *King & Country: Monarchy and the Future King Charles III* (Methuen Publishers 2008).

There is one important example in which a head of state played a role which was allegedly seen to go beyond his neutrality. The 1975 Australian constitutional crisis, or what has been known as ‘the dismissal’, provided an important precedent of when a monarch might reject a PM’s advice of dissolution.¹⁴⁸ Sir John Kerr, the General Governor of Australia,¹⁴⁹ instead of accepting the request of the PM, Gough Whitlam of the Australian Labour Party, to dissolve a half-Senate¹⁵⁰ and call for a new election, dismissed the latter and appointed the opposition leader Malcolm Fraser. This was due to Whitlam’s governmental failure in securing a bill of supply. The General Governor, who was appointed by the British Monarch as her representative, rejected the PM’s advice on the political crisis between the House of Representatives and the Senate.¹⁵¹ For the first time in Australian constitutional experience, the head of state used his personal discretion to evaluate a PM’s request for dissolution. Kerr’s point of view was based on his judgement that the new PM was more able than Whitlam to solve the political crisis and to obtain senate approval for the government supply bill, which was what indeed occurred afterwards. However, whether the Governor General was right or wrong remains a thorny question. On the one hand, he solved the political crisis and maintained the country’s need for finance, but on the other hand, he rejected the advice of an elected PM by implementing his own discretion. However, Australian voters expressed their own views on these events. After the dismissal, Whitlam’s election campaign following the double dissolution sought the voters’ sympathy on what he called the illegitimacy of the dismissal. Nonetheless, the Liberal Party won the elections, enjoying the largest victory in Australian history.¹⁵²

In short, the right of dissolution in modern democracies works, usually, in favour of enabling democracy to function properly when politicians lack the ability to work together, or need political support. However, the exaggerated exercise of this right by politicians might contradict the right of people to vote for full-term representatives, and make their

¹⁴⁸ Marshall G and Bogdanor V, ‘Dismissing Governor-Generals’ [1996] PL 205–213.

¹⁴⁹ According to the Constitution of Australia, ‘the Governor-General appointed by the Queen shall be Her Majesty’s representative in the Commonwealth’.

¹⁵⁰ A double dissolution is a procedure permitted under the Australian Constitution to resolve deadlocks between the House of Representatives and the Senate.

¹⁵¹ The Australian Constitution adopted the bicameral parliamentary system of government.

¹⁵² <http://en.wikipedia.org/wiki/Gough_Whitlam> accessed 2 January 2017.

vital participation in elections a tool for political manoeuvre. For these reasons, the UK Parliament has passed the Fixed Term Parliaments Act 2011 to set a fixed date for the General Election, and make provisions to hold any premature elections only in restricted circumstances which requires enhanced parliamentary approval. Under this Act, the PM no longer has the prerogative to dissolve Parliament, neither does the Queen retain any residual power to do so. Only Parliament can dissolve itself automatically under the provisions stated in the Act.¹⁵³ Such vital legislation was the result of the Coalition Government Agreement of 2010 for stability and reform between the Conservative and Liberal Democrat parties.¹⁵⁴ Seemingly, politicians have begun to think about long-term perspectives, which is deemed to be a positive attitude towards stability in the volatile political environment.¹⁵⁵

An examination of the right of dissolution in Kuwait clearly shows that it is a governmental weapon which is, mainly, to be used when the government lacks support in parliament,¹⁵⁶ or ‘feels an inability to hold off its political responsibility towards parliament’.¹⁵⁷ Article 52 of the Constitution could provide an explanation as to why dissolution has been used for this purpose so far. As long as the Amir exercises his powers through his ministers, ‘no one can differentiate the real decision maker’.¹⁵⁸ Therefore, this dependency relationship makes the Amir, as head of the Executive, biased significantly on the side of his subordinate officials, which will grant the ministers the Amir’s support in the use of the right of dissolution.¹⁵⁹ This situation undermines the constitutional principle of the separation of powers, which might lead to the malfunction of the state’s powers and its necessary critical balance.¹⁶⁰ Therefore, granting an appointed executive the right to

¹⁵³ Under the Act, there are only two ways to hold an earlier election; if a motion of no confidence is passed and no alternative government is found, or if a motion for an early general election is agreed either by at least two thirds of the House or without division.

¹⁵⁴ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78978/coalition-agreement-may-2010_0.pdf> accessed 17 November 2016.

¹⁵⁵ Horne A and Kelly R, ‘Prerogative Powers and the Fixed-term Parliaments Act’ UK Const L Blog (19 November 2014) <<https://ukconstitutionallaw.org/2014/11/19/alexander-horne-and-richard-kelly-prerogative-powers-and-the-fixed-term-parliaments-act/>> accessed 19 October 2016.

¹⁵⁶ Interviewees C1 and C3.

¹⁵⁷ Interviewee C2.

¹⁵⁸ Interviewee B1.

¹⁵⁹ Interviewee C4.

¹⁶⁰ Interviewee C5.

dissolve an elected parliament contrasts with the constitutional principle of the separation of powers and hinders the accountability of the government towards parliament.

As one method of reform, the newly elected NA should, after each dissolution, form an inquiry committee to scrutinise the reasons behind the previous dissolution request. Such committee would examine whether the PM had exercised this right properly according to the Constitution's provisions. Thus, any misconduct may breach the PM's political responsibility toward the NA and hold him to account for any improper application of dissolution. It is believed that, in time, this exercise would require the PM to cautiously reassess its requests to dissolve the NA. Particularly, in the situation, which is common in Kuwait, that the PM who called for the dissolution was re-appointed. As in such event, his political responsibility would be questioned by the new NA upon any unconstitutional practice of dissolution.

Among the lessons which have been learned from the UK's parliamentary experience of the prevention of political interference through the use of the power of dissolution, is the issue of a fixed term act. Such policy represents an interesting idea to be transferred to Kuwait. However, the default rule in the UK, if there are any doubts in the political arena, is to dissolve Parliament and seek the people's opinion in a general election. But, if the electoral laws, as they are at present in Kuwait, are unfair, then this rule is also defective. Thus, what might work in Britain may not work in Kuwait until the latter amends its electoral laws.

5.2.3 The Limitations on Political Rights and Public Liberties

It should be noted that this study aims, in its attempts to discuss the system of controlling the Executive's powers, to shed some light on the civil and political human rights setting in Kuwait. In a democratic system, the protection of the liberties and rights of individuals is an essential platform in order to empower people to be able to set the limits of government actions. This section will outline briefly how the government in Kuwait is dealing with such critical responsibilities.

The Constitution of Kuwait, as stated in the introduction to this chapter, acknowledges a number of human political rights and freedoms, but has left the details to be specified by

law. Government domination over the decision-making process in the NA for decades has resulted in the passing of legislation which controlled political freedoms and public liberties.¹⁶¹ Most of these laws imposed limitations on the freedom of speech, freedom of the press, the right of association, and the right of assembly. Individuals who breached these arbitrary laws were criminalised and faced serious penalties. According to NGO reports, ‘several journalists, human rights defenders and members of the political opposition...were arbitrarily arrested and detained’.¹⁶² The criminalisation of peaceful dissent in Kuwait since 2011 was, in fact, a result of the massive popular movements that swept the region following the Arab Spring of 2011.¹⁶³ It was observed that:

Since 2011, in the face of increased criticism and amidst a volatile regional context, the authorities have taken a series of steps which have seriously eroded human rights, with the right to freedom of expression among the main casualties. The authorities have arrested, prosecuted and imprisoned perceived critics including human rights defenders, activists, journalists and lawyers using laws that criminalise peaceful dissent and breach Kuwait’s obligations under international law.¹⁶⁴

According to Amnesty International’s recent report on Kuwait, ‘The authorities continued to restrict the right to freedom of expression, prosecuting and imprisoning government critics and online activists under penal code provisions that criminalize comments deemed offensive to the Emir, the judiciary and foreign leaders.’¹⁶⁵ Further, in August 2014, following the Council of Cabinet adoption of the so-called ‘The Iron Vest Policy’¹⁶⁶ against those who threatened the national security of the state,¹⁶⁷ several political activists were deprived of their Kuwaiti nationality and many media institutions were shut down for reasons based on legal irregularity.¹⁶⁸

¹⁶¹ Amnesty International, ‘Annual Report on Kuwait’ (2015/2016) <<https://www.amnesty.org/en/countries/middle-east-and-north-africa/kuwait/report-kuwait/>> accessed on 8 October 2016.

¹⁶² *ibid.*

¹⁶³ Davidson C, *Powers and Politics in the Persian Gulf Monarchies* (Hurst & Company 2011) 4.

¹⁶⁴ Amnesty International, ‘Research Briefing’ (MDE 17/2987/2015) <<https://www.amnesty.org/en/documents/mdel7/2987/2015/en/>> accessed 8 October 2016.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ <http://www.bbc.com/arabic/middleeast/2014/08/140812_kuwait_citizenship_revoke> accessed 8 October 2016.

¹⁶⁸ *op cit* Amnesty International (n 161).

The government also controls the functioning of NGO agencies. According to the law organising their functions, NGOs are prevented from engaging in politics.¹⁶⁹ Under this law, the government dissolved many agencies claiming that they had criticised the official authorities.¹⁷⁰ The space for freedom, it is argued, in recent years, has become, ‘very tight particularly after the hit of democracy following the dissolution of the 2012 Parliament. Now, there is no true control over the Executive powers’.¹⁷¹ In fact, the majority of the parliamentarians, politicians, lawyers, and activists in civil society institutions interviewed confirmed that Kuwait is witnessing a significant retreat in political freedoms and public liberties. Many criticisms were raised by international human rights bodies, however, the government’s usual response was that such measures, ‘were justified by the need to protect public order and national security’.¹⁷² Thus, by using legal provisions the government has managed to aggressively crack down on free speech in order to stifle political dissent.¹⁷³ Such practices contradict the values of constitutionalism and its related ethical values of the rule of law and protection of the civil and political freedoms required in a constitutional democracy.¹⁷⁴

In the UK as in Kuwait, to some extent, human rights are recognised in legal codes. Kuwait even incorporates these rights in its Constitution. But, once again, the main differences between the two countries are in terms of the details and mechanisms to enforce these rights. Indeed, concerns should not only be directed to the way human rights are stated in the legal system but also to the mechanisms by which they are enforced in practice. This is the lesson from the UK’s law and experience. Most importantly for the purposes of this study, there are better specifications relating mainly to mechanisms within the Human Rights Act 1998 (HRA) which incorporates the principal provisions of the civil and

¹⁶⁹ Article 6 of the Law of Organising Institutions of Civil Society no 24/1962.

¹⁷⁰ Interviewee G3.

¹⁷¹ Interviewee G2.

¹⁷² United Nations, ‘The third periodic report of Kuwait on 21 and 22 June 2016, The Human Rights Committee Review’ <<http://ccprcentre.org/ccprpages/kuwait-absence-of-ngos-at-review-of-kuwait-highlights-precarious-human-rights-situation>> accessed 8 October 2016.

¹⁷³ Human Rights Watch, ‘Report on Kuwait’ <<https://www.hrw.org/middle-east/n-africa/kuwait>> accessed 8 October 2016.

¹⁷⁴ See Gearty C, ‘Citizenship and Freedom of Expression’ in Blackburn R (ed), *Rights of Citizenship*, (Mansell 1993) 271.

political rights of the European Convention on Human Rights (ECHR) into UK law.¹⁷⁵ In addition to the international protection provided under the European Court of Human Rights (ECtHR),¹⁷⁶ the enforcement system of human rights is also applied in Parliament itself. One mechanism is to require reasons to be given in parliament for any potential departure from rights in the government bills. Under section 19, the government is bound to put the two Houses and the public on notice of a possible breach of the HRA and ECHR in any bill.¹⁷⁷ Therefore, a minister in charge of a bill who believes that there is a potential breach of the provisions of the Convention must deliver a declaration of incompatibility with the HRA. In addition, there is a Joint Committee on Human Rights.¹⁷⁸ The main function of this Committee is to scrutinise legislation on human rights grounds.¹⁷⁹ It is also entitled to conduct thematic inquiries and ‘to choose its own subjects of inquiry and seek evidence from a wide range of groups and individuals with relevant experience and interest’.¹⁸⁰

Furthermore, there is an independent Commission on Equality and Human Rights established by the Equality Act 2006.¹⁸¹ The commission’s duty is to challenge discrimination, promote equality of opportunity and protect human rights.¹⁸² Finally, under section 3 of HRA, there is a duty on the courts to interpret UK legislation in a way which is compatible with the Convention.¹⁸³ However, human rights are ‘contested concepts, which are capable of being interpreted and understood in different ways.’¹⁸⁴ Therefore, judges are required ‘to “read in” legislation additional words that are necessary to make the measure compatible with the Convention, or to “read down” legislation by restricting

¹⁷⁵ O’Cinneide C, ‘Human Rights and the UK Constitution’ in Jowell J and others (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015) ch 3.

¹⁷⁶ *ibid.*

¹⁷⁷ Oliver D, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003) 118.

¹⁷⁸ Hunt M, ‘The Joint Committee on Human Rights’ in Horne A, Drewry G and Oliver D (eds), *Parliament and the Law* (Hart Publishing 2013) ch 9.

¹⁷⁹ Ewing K, ‘The Parliamentary Protection of Human Rights’ in Ziegler K and others (eds), *Constitutionalism and the Role of Parliaments* (e-book Bloomsbury 2007) ch 14.

¹⁸⁰ see <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/>>.

¹⁸¹ This Act has been amended by the Equality Act 2010 which combines all of the equality legislation in Great Britain and provides comparable protection across all equality strands.

¹⁸² See <<https://www.equalityhumanrights.com/en>>.

¹⁸³ *ibid* 113.

¹⁸⁴ *op cit* O’Cinneide (n 175) 68.

the scope and effect of broad language to avoid incompatibility.¹⁸⁵ Therefore, ‘if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.’¹⁸⁶ In such event, under section 10 of the Act, the minister concerned has the power to take remedial action and ‘may by order make amendments to the legislation as he considers necessary to remove the incompatibility.’¹⁸⁷ Ultimately, the control of these breaches of the law cannot be enforced except through professional and fully independent judges. The following section assess the status of the judges’ independency in Kuwait.

The general idea which could be taken forward from the UK’s experience is that the responsibility for the protection of human rights is imposed on all branches of government.¹⁸⁸ Under a specially designed human rights code, there is an internal comprehensive legal system that invites parliament, the executive and the judiciary each to play specific roles in this regard. Also, there is an international protection scheme to further enhance the protection of human rights against violation by public authorities. Protection of these rights is performed by international bodies capable of enforcing the remedies over state members.

These detailed procedures and instruments in the UK have been founded on the basis of translating the meaning of human rights from ‘on paper’ into practice ‘on the ground’. All of which represents lessons which can be learned from the UK on how to enforce these important values, moving from merely stating declarations of rights into practical and enforceable living freedoms.

5.3 The Role of the Amir and the Executive in the Judicial System

In previous chapters, the study has discussed the important role of the rule of law in maintaining and securing human rights and democratic governance. The effectiveness of this value depends heavily on the extent of the independent status which the judiciary is

¹⁸⁵ op cit O’Cinneide (n 175) 114.

¹⁸⁶ Human Rights Act 1998 s 4 (2) .

¹⁸⁷ ibid.

¹⁸⁸ Hunt M and others, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

required to uphold.¹⁸⁹ As rightly argued, ‘A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all’.¹⁹⁰

Indeed, the independence of the judiciary, ‘is a central component of any democracy and is crucial to the separation of powers, the rule of law, and human rights’.¹⁹¹ As Lord Steyn commented, ‘the Judiciary can effectively fulfil its role only if the public has confidence in the courts, even if sometimes wrong, it acts wholly independently’.¹⁹² Both personal and institutional independence, therefore, should be designed in a manner that ensures the fulfilment of the judges’ role of securing the Constitution and its values.¹⁹³ Therefore, Article 1 of the United Nations Basic Principles on the Judiciary emphasised that, ‘the independence of the Judiciary shall be granted by the state and enshrined in the Constitution or the laws of the country’.¹⁹⁴

The Constitution of Kuwait sought to comply with the international standards of constitutionalism.¹⁹⁵ Article 163 affirmed that, ‘judges are not subject to any authority. No interference whatsoever is allowed with the conduct of justice. Law guarantees the independence of the Judiciary and states the guarantees and provisions relating to judges and the conditions of their irremovability’.¹⁹⁶ However, it has been argued that this constitutional text is excessively weak, as it does not ensure the irremovability of judges but refers to the law to guarantee it.¹⁹⁷ Therefore, the independence of the judiciary is left to the field of legislation in order to be specified. The field of legislation in the legal system

¹⁸⁹ Gamal Eldin M, ‘Democracy and Human Rights in the Constitution of Kuwait’ (1998) 2(2) Kuwait University Journal of Law 16.

¹⁹⁰ The French Declaration of the Rights of Man and of the Citizen (1789)
<http://www.newworldencyclopedia.org/entry/Declaration_of_the_Rights_of_Man_and_of_the_Citizen>
accessed 25 October 2016.

¹⁹¹ Barak A, *The Judge in a Democracy* (Princeton University Press 2008) 76.

¹⁹² Steyn J, ‘The Case for a Supreme Court’ (2002) 118 LQR 382, 388 cited in *ibid* Barak (n 191) 77.

¹⁹³ *op cit* Barak (n 191) 80.

¹⁹⁴ Basic Principles on the Independence of the Judiciary (United Nations Res no. 40/32/ November 1985)<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> accessed 25 October 2016.

¹⁹⁵ Al-Jumah K, ‘The Principle of Judicial Independence in the Covenant on Civil and Political Rights and Kuwait’s Constitution: A Comparative Study’ (2008) 32(1) Kuwait University Journal of Law 113–206.

¹⁹⁶ Article 163 of Constitution.

¹⁹⁷ Al-Shaikh E, *The Limits of the Constitutional Judiciary Independence in Terms of Controlling the Constitutionality of Legislations: A Focus Overview on the Egyptian and Kuwaiti Systems* (Dar Al-Nahda Press 2009) 57.

of Kuwait, as has been discussed previously in this chapter, ‘has given great authority to the Executive in this regard’.¹⁹⁸ This authority enabled the Executive to maintain its influence on the judiciary’s independence from various aspects.¹⁹⁹ Appointments to the judiciary, transfers and promotions are the mandate of the Supreme Judicial Council (SJC) under Article 168 of the Constitution. Although this Council is involved in the appointment of judiciary members, this mandate must be, ‘according to the advice of the Ministry of Justice’ (MOJ).²⁰⁰ Also, all senior judges and other official members of this Council, ‘owe their positions to ministerial appointments’.²⁰¹ According to the legal system of appointment of the judiciary in Kuwait,²⁰² the Minister of Justice is allowed to play an influential role in determining the holders of judicial offices.²⁰³ Accordingly, the independence of the judiciary is subject to a significant challenge to empower judges to perform their role in securing effective legal accountability over the government’s works.²⁰⁴

In addition, the Minister of Justice holds a key role in determining the function of the judiciary.²⁰⁵ The Minister can attend and suggest the agenda of the SJC’s meetings.²⁰⁶ Moreover, the decisions of the SJC are not valid until they are ratified by the Minister.²⁰⁷ This role empowers the Minister to control the function of the courts and the logistical need to exercise their judicial tasks.²⁰⁸ As a result of such authority, the SJC has become an advisory body subordinated to the Minister of Justice.²⁰⁹ Thus, it has been argued that these predominant powers of the Executive infringe the state’s commitment to the international

¹⁹⁸ Brown B, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 1997) 157.

¹⁹⁹ op cit Al-Jumah (n 195).

²⁰⁰ Article 17 Law no 23/1990 in Regard to Organising the Judiciary.

²⁰¹ Brown N, *Constitutions in a Nonconstitutional world: Arab Basic Laws and the Prospects for Accountable Government* (1st edn, State University of New York Press 2001) 151.

²⁰² Law no 23/1990 in Regard to Organising the Judiciary.

²⁰³ op cit Brown (n 198) 158.

²⁰⁴ See Malleon K and Russell P (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press 2006).

²⁰⁵ op cit Al-Jumah (n 195).

²⁰⁶ Article 17 of Law no 23/1990 in Regard to Organising the Judiciary.

²⁰⁷ ibid.

²⁰⁸ op cit Al-Jumah (n 195).

²⁰⁹ ibid.

conventions in regard to its responsibilities to maintain and support the independence of the judiciary.²¹⁰

A further concern about the independence of the judiciary is related to the criticism regarding the reliance on foreign judges.²¹¹ According to the records of the Ministry of Justice, nearly half of the judicial personnel are Egyptian.²¹² Based on the Judicial Cooperation Convention between Kuwait and Egypt,²¹³ the Egyptian Supreme Council provides the Egyptian judges for four years of service overseas. However, if any judge prefers to stay longer, he must lose his judicial rank in Egypt in order to remain in service in the foreign country. Such a fact raises concerns about the contract renewal conditions between the judge and the Ministry of Justice, and how far such a judge can perform his duty of independence towards the government.²¹⁴

Moreover, ‘the Law Organising the Judiciary of 1990²¹⁵ forbids the courts from examining acts of sovereignty but does not define the term’.²¹⁶ Most writers believe such a limitation contradicts the standards of the rule of law and therefore raises the issue of unconstitutionality on the grounds that it restricts the right to resort to the courts.²¹⁷

Nonetheless, it has been argued that the legal and judicial system of Kuwait is distinguished from other Gulf States, due to, ‘its history as [involving] an assertive parliament, a viable associational life, and constitutional development, it probably provides the most fertile ground in the Gulf for the emergence of liberal legality’.²¹⁸

It should be noted that local literature in Kuwait suffers a huge shortage in this field. Many jurists prefer to avoid delving into such sensitive subjects, which proved to be a challenge for this study to research references in this spectrum. Historically, the judiciary has played a weak role in the essential constitutional and legal issues which have arisen in the country

²¹⁰ op cit Al-Jumah (n 195).

²¹¹ op cit Brown (n 198) 160.

²¹² Statistics of Ministry of Justice, ‘2016 Judicial Report’ (Library of Ministry of Justice of Kuwait).

²¹³ Judicial Cooperation Convention Between Kuwait and Egypt 1977, and its amendments.

²¹⁴ op cit Brown (n 11) 151.

²¹⁵ Article 2 Law no 23/1990 in Regard to Organising the Judiciary.

²¹⁶ op cit Brown (n 11) 151.

²¹⁷ *ibid.*

²¹⁸ op cit Brown (n 198) 158.

until recent years.²¹⁹ Although it has been claimed that such, ‘political meekness is wholly due to the Executive’s domination’,²²⁰ this role has become more fundamental after the Constitutional Court’s verdicts in 2012.²²¹ The study will address the record of the judiciary in Kuwait in more detail in chapter seven and then ask the question: is the Kuwaiti judiciary capable of looking over the Amir’s and the Executive’s shoulders?²²²

5.4 Conclusion

In an attempt to answer the research question considered in this chapter, this part of the study has assessed the constitutional powers of the Amir and the Executive in relation to parliament and, to some extent the judiciary, which affect the values of constitutionalism. The study argues that the powers of the Amir and the Executive challenge the political and legal accountability system in Kuwait. Through its dominant legislative power, the Executive has been able to design the electoral system in such a way that it controls the formation of the NA and prevents the production of powerful assemblies. In fact, ‘The reason behind manipulating the electoral system was the panic from the emergence of an uncontrolled parliament’.²²³

Furthermore, in most of the advanced democracies in the world, the Executive is either elected by the people directly or formed by a majority decision in parliament. In Kuwait, the Amir’s absolute right to choose the PM and ministers, without following an agreed understanding with parliament, creates a gap of confidence between the two branches of the government. Therefore, the assumption from this type of relationship is that the accountability of government is, in practice, challenging the Amir’s government. As a result, the Amir’s prerogative of the power of dissolution has mostly been used to counter voting against the government or one of its members. Such a paradoxical relationship imposes great challenges on the constitutional doctrine of the separation of powers.

²¹⁹ op cit Brown (n 198) 158.

²²⁰ op cit Brown (n 11) 151.

²²¹ See chapter one, section 1.4.

²²² See Government Legal Department, *The Judge Over Your Shoulder: A Guide to Good Decision making* (2016)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538447/160708_JOYS_final.pdf> accessed 30 January 2017.

²²³ Interviewee G2.

Next, the constitutional system grants ministers membership of the NA without the need to be elected. This affects parliament's decision-making process. Such powers enable the government to overcome any motion of accountability. The Executive also seizes critical powers, which affects the quality of the independence of the judiciary. These powers, therefore, affect the system of controlling the Executive by legal mechanisms, particularly in a society that is already under strict and limited political liberties. Such a feature requires reforms to the constitutional system in order to support the controlling agencies in exercising effective control. In the coming chapters, the study will examine such mechanisms and outline the extent to which the predominant powers of the Amir and the Executive have influenced their effectiveness.

Chapter Six

Controlling the Executive by Parliamentary Mechanisms

6.1 Introduction

To qualify as a democracy, ‘those who govern must be accountable, or responsible, to those whom they govern’.¹ As apparent in chapter three, the accountability of the government is a crucial element in democracy because it promotes openness, effectiveness and public participation, and reduces corruption and the domination of power.² In addition, accountability embraces, ‘a means of safeguarding the liberty of subjects, of protecting them against unnecessary or arbitrary constraints on their actions’.³

Political responsibility as a mechanism is enforced ultimately through elections, because the people are the ultimate arbitrators of political choice. However, in day-to-day politics, political responsibility is enforced principally through parliament. This is particularly so in a representative model of democracy such as Kuwait where people practise their control only through their representatives. In such a limited political participation system, the quality of the electoral system plays a key role in determining the quality of political responsibility.

The purpose of this chapter is to examine the political responsibility of the government in Kuwait towards the National Assembly (NA). It consists of two major sections. Firstly, it examines how to control the Executive’s powers through parliamentary mechanisms. Secondly, it analyses the impact of these mechanisms on the political responsibility of ministers. The prime aim of this examination is to identify the defective aspects that prevent the NA in Kuwait from playing its expected role in controlling the Executive. In addition, the study seeks to draw on selected United Kingdom laws and experiences where necessary to distil the policies and mechanisms that can systematically be transferred to Kuwait in order to improve the system of controlling the Executive.

The system of government accountability has both internal and external dimensions. The internal dimension is where ministers are accountable to the government as a

¹ Bradley AW and Ewing KD, *Constitutional & Administrative Law* (15th edn, Pearson 2011) 102.

² Oliver D, *Constitutional Reform in the UK* (Oxford University Press 2003) 48.

³ Lively J, *Democracy* (ECPR Press 2007) 100.

whole, and to the Prime Minister (PM) in particular, and also where officials are accountable to their seniors. The external dimension is where ministers and officials are accountable to parliament, the courts, political groups, the media and other external pressure forces.⁴

This study aims to focus on the government's external accountability toward parliament, as this is more consistent with the objectives of controlling the Executive using parliamentary mechanisms. This chapter will examine the parliamentary mechanisms to control the Executive's powers in Kuwait. These mechanisms include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the PM.

Among the key aims of external accountability are to ensure political responsibility over the Executive's activities, and that its entire works are exercised according to both the law and the public interest. In contemporary constitutional debates, discussions have been held about the Executive's right to mislead parliament.⁵ In Kuwait, there is no explicit manner of conduct which compels ministers to provide accurate information to parliament while, in the UK, it is now agreed that such a practice is no longer accepted. According to the UK Ministerial Code:

- b. Ministers have a duty to parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;
- c. It is of paramount importance that ministers give accurate and truthful information to parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead parliament will be expected to offer their resignation to the Prime Minister.⁶

To achieve this mandate, the UK Parliament performs the accountability of the government, 'through a variety of mechanisms, such as the Select Committee system, parliamentary questions, oral and written statements, debates in both houses and the Parliamentary Commissioner for Administration'.⁷ Through such mechanisms, the UK Parliament can investigate the government's policies and control the conduct of its

⁴ Pyper R, 'Ministerial Responsibility and Next Steps Agencies' in Giddings P (ed), *Parliamentary Accountability: A Study of Parliament and Executive Agencies* (Macmillan Press 1995) 29.

⁵ See for example Tomkins A, 'A Right to Mislead Parliament?' (1996) 16 *Legal Studies* 63.

⁶ Cabinet Office *Ministerial Code* May 2010, para 1.2.

⁷ Cabinet Office, *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government* (1st edn, 2001); op cit Bradley (n 1) 279.

works in order to choose whether to attribute blame or to uphold confidence. However, there are certain preconditions to enable any parliament's function of holding the Executive accountable. Access to information and technical assistance is essential for parliament's members to succeed in their mandate.

In the following sections, the study will examine the corresponding system of parliamentary mechanisms to control the Executive in Kuwait. The next chapter will focus on judicial accountability.

6.2 The Parliamentary Accountability System of the Executive in Kuwait

According to the Constitution of Kuwait, 'every minister is responsible to the NA for the affairs of his ministry'.⁸ In return for the privilege of dissolution, which is constitutionally preserved to government, the Constitution of Kuwait granted the members of the NA a set of mechanisms to fulfil their function of scrutiny to control the Executive. Although the Constitution provided such mechanisms, they are governed by the conditions prescribed by normal legislation. These controlling mechanisms are intended to achieve a balanced relationship between these two branches of the state.⁹ Parliamentary accountability is applied through indirect and direct methods.¹⁰

Indirect methods are achieved through the NA's practice of its legislative privilege. The Constitution of Kuwait, Articles 134 to 138, restricts the government in matters concerning taxation, the expenditure of public funds, conducting public loans, and the rules concerning the protection, administration and disposal of state properties.¹¹ Through its legislative privilege, the NA is able to enact laws that control and influence the extent of the bureaucrats' dominance. Despite the importance of such a right in controlling the Executive's powers, time and space considerations prevent the study from further examination of these specialised areas.

The direct control methods enable the NA's members to hold ministers to account

⁸ Article 101 of Constitution.

⁹ Al-Saleh O, *The Constitutional System and Political Institutions in Kuwait and the Methods of Reforms* (Pt one 2nd edn, Dar Al-kotob Press 2003) 708.

¹⁰ Al-Saleh O, 'Parliamentary Control of Administration's Works in Kuwait: A Theoretical and Practical Study' (1981) 1(4) Kuwait University Journal of Law 14.

¹¹ Al-Sayed A, *Ministerial Responsibility in the Contemporary Legal Systems and in Islamic Systems* (Dar Al-Nahda Al-Arabia 2010) 292.

directly, either individually or collectively, concerning their executive activities.¹² Such mechanisms vary from expressing wishes, submitting questions, requesting general debates, and setting up inquiry committees to submitting interpellation to ministers and the PM.¹³ Direct control of parliament over the Executive's work is also applied through the annual examination and approval of the State Budget. According to the Constitution, 'the budget shall be discussed in the NA part by part. None of the public revenues may be allocated for a specific purpose except by law'.¹⁴

In the following sections, this chapter focuses its examination on the direct methods of the parliamentary system of controlling the Executive, as they are most relevant to this study's objectives. In addition, the study examines the implications of such mechanisms on ministerial responsibility in relation to the NA.

6.2.1 Parliament's Direct Mechanisms of Control

The mechanisms of the parliamentary accountability system relating to the Executive vary in their importance and strength, ranging from merely expressing wishes to government with regard to public matters, to addressing interpellations to ministers and the PM that might lead to them being discharged from office.¹⁵ All of these powers are coded in the constitutional texts.

The role of party political machinery in providing a significant impact on controlling the Executive cannot be ignored. Thus, it should be noted at the outset that, with the absence of a legal platform for political parties in Kuwait, the function of parliamentary accountability in policing the operations of the Executive may be considered less effective. In the coming sections the chapter discusses political parties under a separate heading.

6.2.1.1 Parliamentary Wishes and Requests

The NA has the right to raise its views and wishes regarding specific public matters through non-binding requests to the government. According to the Constitution:

¹² op cit Al-Saleh (n 10).

¹³ *ibid.*

¹⁴ Article 140 of Constitution.

¹⁵ op cit Al-Saleh (n 10).

The NA may express to the Government wishes regarding public matters. If the Government cannot comply with these wishes, it shall state to the Assembly the reasons therefore. The Assembly may comment once on the Government's statement.¹⁶

Although the government is not legally bound to accept these wishes, such a weak mechanism might hold political significance in the case where recommendations are issued as a result of a General Debate in the NA.¹⁷

Upon a request signed by five members, the NA may discuss any subject of general interest with a view to securing clarification of the government's policy and to exchange views thereon. Additionally, all other members have the right to participate in the discussion.¹⁸ Such sessions allow open dialogue between the government and the members of the NA about the matters being discussed.¹⁹ The NA, in the aftermath of these discussions, may issue non-binding recommendations that reflect its views in relation to the required actions. The importance of such a method lies in its role of driving the focus of public opinion on these matters, which, in turn, might impose public political pressure on the government to comply with the NA's recommendations.²⁰ However, the NA has been criticised for being unable to deliver binding resolutions in the aftermath of its discussions on public matters, which is deemed to be a regular practice of elected assemblies in democratic systems elsewhere.

In the UK's parliamentary tradition, 'debates are designed to assist MPs and lords to reach an informed decision on important subjects. The decision is often expressed in a vote called a 'division', for or against (Aye or No).²¹ Even individuals may initiate such debates to influence government and Parliament by creating e-petitions: 'If the petition gets at least 100,000 online signatures, it will be considered for debate in the House of Commons'.²² In fact, statistics show a decline in political participation in key aspects

¹⁶ Article 113 of Constitution.

¹⁷ op cit Al-Saleh (n 9).

¹⁸ Article 112 of Constitution.

¹⁹ Guoniam M, *The Parliamentary Controlling Methods over the Governments Works in the Parliamentary System* (Dar Al-Nahda Al-Arabia Press 1998) 170.

²⁰ op cit Al-Saleh (n 9).

²¹ Barnett H, *Constitutional and Administrative Law* (9th edn, Routledge 2011) 304; United Kingdom Parliament, *Debating* <<http://www.parliament.uk/about/how/role/debate/>> accessed 9 January 2017.

²² <<https://petition.parliament.uk>> accessed 9 January 2017.

of UK formal politics over the past 50 years.²³ Accordingly, many efforts have been focused on exploring new arrangements for citizens to communicate and engage in the parliamentary process.²⁴ The participatory form of democracy represented by the individuals' e-petitions empowers citizens to perform a method of direct democracy, which allows them to participate, informally, in setting the political agenda in Parliament. For example, as evidence of a participatory form of democracy in regard to the initiation of debates, the UK Parliament in 2016 considered an e-petition, known as the 'Trump Petition' to ban Donald Trump from visiting the UK for debate in Parliament, after reaching more than half a million signatures by individuals.²⁵ These participation debates, which explore public opinion, offer a flavour of participatory democracy. Within a global digital era, it is acceptable, 'to frame this communication paradigm in political theory; the fundamental concept is that a modern democracy is perceived to be strong only when underpinned by a participative citizenry'.²⁶ The idea of the e-petitions mechanism, despite the effectiveness of its outcomes in the UK, is worth transferring to Kuwait. It could have a great deal of impact in politicising the public, and in keeping a check on politicians and shifting their political agenda. In particular, where there are no formal mechanisms by which people can engage in party politics.

6.2.1.2 Parliamentary Questions

In accordance with the Constitution of Kuwait, each member of the NA, 'may put to the PM and to ministers questions with a view to clarifying matters falling within their competence'. The Parliamentary Question (PQ) is an instrument submitted by the NA's members to ministers to clarify matters falling within the ministers' authority.²⁷ The key function of PQs is to enable NA members to obtain information and track any misconduct of government officials.²⁸ Thus, questioning is considered, 'a mechanism

²³ 'Trends in Political Participation' (Research briefing, post note 498, June 2015)
<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/POST-PN-0498#fullreport>>
accessed 9 January 2017.

²⁴ Missingham R, 'E-parliament: Opening the door' (2011) 28(3) *Government Information Quarterly* 426–434.

²⁵ <<https://petition.parliament.uk/petitions/114003>>.

²⁶ op cit Missingham (n 24).

²⁷ op cit Al-Saleh (n 9).

²⁸ Al-Tabtabaie A, *Parliamentary Question* (University of Kuwait Press 2006).

used to impose parliamentary accountability on the Government'.²⁹ However, it does not enable the NA's members to ask for official documents.³⁰ According to the Constitutional Court, government officials are bound to answer PQs that correspond to constitutional requirements; however, they are under no obligation to provide any supporting documents.³¹ Many parliamentarians criticised this judgment, which legitimised the government's frequent evasion of uncovering evidence regarding officials' malpractice.³²

Nevertheless, the significance of the answers that are provided by the ministers in reply to the PQs is in the fact that they are official statements. As Adonis argued, the information achieved through questions has further authority because it is official.³³ According to the NA's statistics, since the first session of the NA in 1963 until the Thirteenth Legislative Term of 2009–2012, a total of 22,674 questions have been submitted.³⁴ Among these questions, 3339 questions were submitted in the last term of 2009–2012, at a rate of 6 questions per day. Ministers provided 2798 answers. Of these 2518 answers delivered to the questioning members, 163 were submitted to the General Assembly, 10 answers were claimed as confidential matters, ministers denied their jurisdiction in the subject matter in relation to 35 questions, and 22 ministers claimed that the questions exceeded the limits set out by the Constitutional Explanatory Decision³⁵ and, thus, refused to provide answers. This term was described, therefore, as the most active legislative term of the NA's history in its function of accountability.³⁶

The NA's Standing Orders Act 1963³⁷ has codified all procedures regarding PQs by Articles 121 to 132. According to these provisions, a question should be written in

²⁹ Wiberg M (ed), 'Parliamentary Control in the Nordic Countries: Forms of Questioning and Behavioral Trends' in *Jyväskyla*: The Finnish Political Science Association (1994) cited by Cole M, 'Accountability and Quasi-government: The Role of Parliamentary Questions' (1999) 5(1) *The Journal of Legislative Studies* 77–101).

³⁰ Al-Enezi S, 'Constitutional Limits of the Parliamentary Question in Terms of Content, Competence and Purpose' (2010) 34(3) *Kuwait University Journal of Law* 251.

³¹ Constitutional Court Explanatory Decision no 3/2004.

³² Al-Nibari A, *Al-Taleea newspaper* (20 April 2005) 1674.

³³ Adonis A, *Parliament Today* (Manchester University Press 1990) 92.

³⁴ Archive of National Assembly, Department of Information and Documentation <<http://search.kna.kw/web/Retrieval/GeneralSearch.aspx?tid=1>> accessed 8 January 2017.

³⁵ Constitutional Court Explanatory Decision no 3/2004 11 April 2005.

³⁶ The Statistical Statement of General Assembly of Kuwait National Assembly (Analytical Study November 2012) <<http://www.kna.kw/achieve/13-4/16.pdf>> accessed 8 January 2017.

³⁷ Standing Orders Act 1963 of National Assembly.

proper wording, and signed by its provider (not exceeding one member). Oral questions are only allowed in two cases: during general debates and the budget debate.³⁸ Otherwise, questions must always be written.³⁹ The question's answer should be scheduled in the next session of the NA unless the minister concerned asks for a deferment of up to two weeks. The questioner alone has the right to comment once upon the answer.⁴⁰ However, most constitutional jurists argue that the subjects of the PQs must not seek information related to the Amir's personal powers,⁴¹ matters of a judicial nature or the government's foreign policy.⁴² In accordance with this argument, the Constitutional Court, upon a governmental request to interpret Article 99 of the Constitution,⁴³ affirmed that a PQ seeking information regarding the government's foreign relations with other governments is not permissible.⁴⁴ Accordingly, for example, on 5 March 2006 the Minister of Foreign Affairs, Sheik Dr Mohammad Al-Sabah, refused to answer a PQ regarding the government's reactions towards the Danish government regarding an insulting cartoon that was published in a Danish newspaper, the *Jyllands-Posten*, against Prophet Mohammad (PBUH).⁴⁵ The Court's argument in this regard was that the government's foreign affairs are matters beyond the NA's ability to assess. A discussion of sensitive information cannot be exposed to the public domain. The Court asserted that internal governmental policies are subject to NA control, but the government's foreign policies are left for the Amir alone to handle through his ambassadors and chancellors. The Court claimed that this is a firm application of the principle of the separation of powers.⁴⁶

The majority of parliamentarians interviewed assured that the Constitutional Court played an influential role in determining the substance of the PQs.⁴⁷ In a democracy, it is unacceptable that matters relating to the government's foreign policy are regarded as beyond the competence of the NA to oversee. In modern democracies this is a normal

³⁸ *ibid* Article 128.

³⁹ *op cit* Al-Tabtabaie (n 28) 101.

⁴⁰ Article 99 of Constitution.

⁴¹ *op cit* Al-Tabtabaie (n 28).

⁴² *op cit* Al-Enezi (n 30) 255.

⁴³ Constitutional Court Explanatory Decision no 3/1982.

⁴⁴ Constitutional Court Explanatory Decision no 3/2004 11 April 2005.

⁴⁵ Database of Department of Information, National Assembly, <<http://search.kna.kw/web/Retrieval/DocumentsView.aspx?DocIDs={23453D5E-EB51-4CC5-B1AB-B5B385C6D020}&dc=1.>> accessed 8 January 2017.

⁴⁶ *op cit* (n 35).

⁴⁷ Interviewees C1, C2, C4, and C5.

practice of parliaments.⁴⁸ Also, in Kuwait, there is no legal basis which supports the Court's argument that these matters are beyond the NA's controlling role.⁴⁹

There is no legal obligation on ministers to provide an answer to PQs.⁵⁰ Nevertheless, the 'ministers' commitment to provide answers depends on the political momentum of the issue under investigation and the political weight of the questioner'.⁵¹ The questioner may alter his question to an interpellation,⁵² which attracts serious attention from the ministers toward answering these questions. Only the question's provider may comment on the minister's reply,⁵³ which makes this mechanism function as a private conversation channel between a minister and the questioning member. However, the question may not be transferred to an interpellation in the same session in which it is allocated for the minister concerned to respond.⁵⁴

The first half hour of each session is allocated for submitting PQs and the ministers' answers.⁵⁵ It is evident that the small amount of time allocated for PQs does, in fact, affect this important mechanism in delivering sufficient outcomes. In addition, access to information is essential for the NA members to investigate the Executive's operations and enable them to ask urgent questions. The fact that Kuwait has no legislation that enforces the right to obtain information regarding the Executive's activities imposes serious limitations upon the role of PQs in Kuwait.⁵⁶ Freedom to obtain information and its role in making the Executive accountable will be discussed in the next sections of this chapter.

Under the rules of the UK House of Commons,⁵⁷ parliamentary questions must, 'relate to a matter for which the minister addressed is responsible as a minister'.⁵⁸ There are no limitations on the subjects of PQs. MPs can therefore table any question as long as

⁴⁸ See Chilcot Committee of Inquiry upon the War on Iraq in the House of Commons, chapter six.

⁴⁹ This Verdict will be assessed further in chapter seven.

⁵⁰ Desouqi R, *The Executive Dominance over the Parliament's Works* (Munshaat Al-Maaref Press 2006) 126.

⁵¹ Interviewee C4.

⁵² See section 6.2.1.4.

⁵³ op cit Standing Orders (n 37) Article 125.

⁵⁴ ibid Article 127.

⁵⁵ ibid Article 129.

⁵⁶ See section 6.2.1.3.

⁵⁷ Rogers R and Walters R, *How Parliament Works* (7th edn, Pearson Longman 2006) chapter 9.

⁵⁸ House of Commons Information Office, *Parliamentary Questions* (Factsheet, HC, 2010) 3 <<http://www.parliament.uk/documents/commons-information-office/p01.pdf>> accessed 16 October 2016.

they, 'have a factual basis for which the tabling member is responsible'.⁵⁹ In contrast to the situation in Kuwait, this method has enabled MPs (as long as PQs follow the admissibility rules)⁶⁰ to examine the Executive's works, even the government's foreign policies.

In the Standing Orders of the House of Commons in the UK, there are three common types of PQs: Questions for Oral Answer in the Chamber with Notice, Questions for Written Answer, and Urgent Questions in the Chamber (formerly Private Notice Questions).⁶¹ However, Cole in his paper *Accountability and Quasi-Government: The Role of Parliamentary Questions* observed that, 'The culture and rules of the House of Commons combine to prevent PQs playing a major role in holding these bodies accountable'.⁶² However, most of the literature reviewed in this regard has been mainly concerned with the time allocated for PQs, but not with their importance.⁶³

Oral questions in the UK are submitted by MPs and answered by ministers on the floor of the House of Commons. This form of questioning is limited because the timetable for oral questions is limited. However, they are seen as more important than written questions by many MPs in the context of holding ministers to account, while written questions are more important for obtaining official information.⁶⁴ According to Standing Orders,⁶⁵ oral questions will be taken in the first hour of business from Mondays to Thursdays. In practice, there are many more MPs who want to ask questions than there is time to answer them. Therefore, a rota system has been agreed by the government and opposition parties for ministers to appear once in a five-week cycle, on a particular day of the week, to provide answers.⁶⁶ Topical questions are discussed in the final quarter of each oral question session. MPs are not required to submit their questions in advance in this form of questioning; rather, it allows questions to reflect recent developments. The aim of this questioning is to explore whether a

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Cole M, 'Accountability and quasi-government: The role of parliamentary questions' (1999) 5 *The Journal of Legislative Studies* 1 77–101.

⁶² *ibid.* 98.

⁶³ Chester DN and Bowring N, *Questions in Parliament* (Clarendon Press 1962) 270; Martin S and Rozenberg O (eds), *Roles and Function of Parliamentary Questions* (Routledge 2012); Rozenberg O and Martin S, 'Questioning Parliamentary Questions' (2011) 17 *Journal of Legislative Studies* 394–404.

⁶⁴ Norton P, *Parliament in British Politics* (2nd edn, Palgrave Macmillan 2013) 123.

⁶⁵ Standing Orders of the House of Commons, s (21) (1);(2)

⁶⁶ *op cit* Factsheet (n 58).

minister would make a statement on his departmental responsibilities.⁶⁷ However, this mechanism of accountability has more of a political objective.⁶⁸ Questioning MPs are not always information-seekers, rather they may also use the question as a, ‘means of raising issues and criticizing (or praising) ministers’.⁶⁹ The ultimate form of account giving is PM’s Questions (PMQs), which are also on a rota of once a week between 12 noon and 12.30 pm each Wednesday when Parliament is in session.⁷⁰ This form of questioning is a highly political event whereby the PM provides answers to any question regarding any government operations, especially questions from the Leader of the Opposition.⁷¹

Most questions in the UK’s Parliament are written. They are used by MPs to achieve a form of account by seeking more detailed information from the government than an oral question would allow. According to the statistics of the House of Commons, in the parliamentary session of 2007–2008, a total of 57,000 written questions were submitted, although this decreased to 43,237 in the session of 2013–2014.⁷²

The main types of written parliamentary question are:

Ordinary written questions: these do not have to be answered on a specific date; Named Day questions: these must receive an answer on the date specified by the member tabling the question. Oral questions which were not reached in the Chamber. These are automatically converted into written questions. Oral questions that are transferred to another department are also converted into written questions.⁷³

In addition, under a special criteria laid down in the rules of the House, MPs may put an urgent question to ministers only if such a question were judged to be urgent and of

⁶⁷ Sandford M, ‘Parliamentary Questions: recent issues’ (House of Commons Background Paper, May 2015) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04148>> accessed 8 January 2017.

⁶⁸ Salmond R, ‘Parliamentary Question Times: How Legislative Accountability Mechanisms affect Mass Political Engagement’ (2014) 20(3) *Journal of Legislative Studies* 321–341.

⁶⁹ *op cit* Norton (n 64) 122.

⁷⁰ Kelly R, *Prime Minister’s Questions* (HC SN/PC/05183 February 2015).

⁷¹ *op cit* Norton (n 64) 122.

⁷² *ibid.*

⁷³ *op cit* Sandford (n 67).

public importance.⁷⁴ However, ministers may refuse to provide answers, ‘on the grounds of national security, disproportionate cost,⁷⁵ or commercial confidentiality’.⁷⁶

In summary, PQs empower MPs to practise direct control over the government’s activities, which allows them to react efficiently towards citizens’ claims of official maladministration. In this sense, it also enables individuals and NGOs, who write to MPs, to practise a form of participatory democracy through MPs who in return redirect what they raise to the concerned official. Therefore, it is regarded as the control mechanism most often applied among the NA members.⁷⁷

Two general lessons could be drawn from the UK’s law and experience in this regard. Firstly, the Kuwaiti legislature should be more activist as is the case in the UK legislature. Thus, improvements should involve expanding the time allocated for PQs, as well as allowing more time for the NA members to benefit from the advantages this would provide.⁷⁸ Moreover, allowing oral and urgent questions in the system of PQs in Kuwait would improve this important mechanism. Oral questions could act as a dynamic forum between the NA members and ministers, particularly if discussions were open to all other members to participate. Such a mechanism would be more effective if it were applied on a regular basis, similar to the rotation system in the UK. Adopting a system of urgent questions also enables members to follow up new political events. This would enhance their political activism instead of the slow process of written questions which might make the answers of ministers, to some extent, outdated. In doing so, it is believed that such normal and embedded measures would make ministers more routinely accountable without the need to put them under formal challenges by other political controlling mechanisms. And finally, publishing PQs and ministers’ answers in an open source, such as the NA’s website, to reach out to a broader audience will allow researchers and interest groups to reflect upon them. This will empower people to oversee the accountability process.

Second, another lesson for ministers is to be more open and to agree on freedom of information, bound by a code. Kuwaiti ministers should be bound by a ministerial code

⁷⁴ *ibid.*

⁷⁵ Currently stands at £850.

⁷⁶ *op cit* Sandford (n 67).

⁷⁷ Interviewee C4.

⁷⁸ *op cit* Al-Tabtabaie (n 28).

similar to the Ministerial Code in the UK⁷⁹ to provide sufficient and accurate answers to make this mechanism more useful. Such an, ‘institutional framework is important because it shapes ministers’ behaviour and induces them to act in a way that otherwise they would not’.⁸⁰ Thus, as there is no equivalent in Kuwait to the UK’s Ministerial Code, this study aims to consider the transfer of such an important policy to Kuwait, in order to apply the guidelines of this code to ministers as criterion which measures their actions towards PQs, and defines explicitly the political responsibility of violating ministers.

6.2.1.3 Accountability Through Committees of Inquiry

The NA members exercise their control of the Executive through the Standing Committee system during the legislation process. According to the Standing Orders Act, each bill should be reviewed by the committee concerned before voting on the bills. Under Article 43, the Assembly shall, within the first week of the annual session, form the following standing committees: the Committee of Petitions and Complaints (composed of five members), the Committee of Interior Affairs and Defence (five members), the Committee of Financial and Economic Affairs (nine members), the Committee of Legislative and Legal Affairs, (seven members), the Committee of the Affairs of Education, Culture and Guidance (five members), the Committee of Health, Social Affairs and Labour (five members), the Committee of Foreign Affairs (five members) and the Committee of Public Utilities (composed of seven members). In addition, the Assembly has the right, in each session, to form a provisional (ad hoc) committee as required. The members of the committees are elected by normal majority. Each member must join at least one committee, but no more than two.⁸¹ Any proposed legislation must be forwarded to the relevant committee for review. At the end of their work, the committee releases a report that states their views and amendments upon the drafted bill. Through this system, parliament exercises its control of the government by examining the process of legislation. In addition to this function, committees may discuss any issue referred by the NA. On many occasions, the NA has referred various inquiry requests to the committee concerned. For example, on 25 January 2000, six

⁷⁹ Cabinet Office, *Ministerial Code* May 2010 para 1.2

⁸⁰ op cit Norton (n 64)154.

⁸¹ Article 45 of Standing Orders of National Assembly

members submitted a request to form an inquiry committee to investigate the government's purchase of 48 American cannons (Paladin M109A6) contrary to the comments of the Public Audit Bureau's advice to cancel this deal. The NA assigned the Committee for Protecting Public Funds to conduct the required investigations.⁸²

According to Article 54 of the Standing Orders Act, the functions of these committees are confidential. However, each NA member can attend meetings subject to the committee's approval, but he has no right to participate in discussions. However, all members should have access to final reports. In addition, Article 46 of the Standing Orders Act permits the committees to invite one or more of the government's or the NA's experts for consultations. The Article is silent about consulting other independent experts. Accordingly, committees of inquiry are incapable of inviting specialist professionals who are able to provide deep insight upon matters within their fields of experience. It has been said that the financial scheme of consulting foreign experts⁸³ in other committees of the NA, 'cannot afford to recruit high profile professionals'.⁸⁴

This study will not discuss the whole system of investigative committees in Kuwait. The major concern of these committees is reviewing draft laws and supervising policies of the administration. The scope of this research is broad enough and will not focus on the administration and policy process of the Executive and, thus, the scrutiny role of these standing committees will be left for future research. The study is concerned with committees of inquiry or 'Investigative Committees' as some commenters describe them.⁸⁵ The significance of this type of committee is that it was highlighted in the Constitution by a separate article that imposed an obligation on all ministers and officials to provide it with all the testimonies, documents and data required.⁸⁶ Under Article 114 of the Constitution:

The National Assembly at all times has the right to set up committees of inquiry or to delegate one or more of its members to investigate any matter within its competence. Ministers and all government

⁸² Department of Information and Documentation, National Assembly <<http://www.kna.kw/achieve/9-2/17.pdf>> accessed 30 January 2017.

⁸³ Experts are rewarded with 250 KD (five hundred pounds sterling) per week.

⁸⁴ Interviewee C5.

⁸⁵ Al-Mouqatei M, 'Parliamentary Investigation in Kuwait, the Scope and Restrictions: Critical and Analytical Study in Accordance with the Kuwaiti Constitution' (2013) 1 Kuwait International Law School Journal.

⁸⁶ Article 114 of Constitution.

officials must produce testimonials, documents, and statements requested from them.⁸⁷

Through this mechanism, the NA directly investigates specific governmental activities.⁸⁸ This method enables the NA members to scrutinise the facts beyond the information provided by the ministers' answers to PQs.⁸⁹ In addition, in contrast to PQs, committees of inquiry provide a multilateral approach, where parliament as a whole practises its control over the government in relation to specific issues and in depth.⁹⁰ Several commentators justify this mechanism as the natural right of elected assemblies, which does not need to be coded in constitutional texts.⁹¹ The Constitutional Court also emphasised this suggestion on the occasion of a governmental request to interpret Constitutional Article 114.⁹²

The Constitution, under Article 114, obliges ministers and all government officials to provide testimonials, documents and all other required statements upon the request of the inquiry committee. Under this constitutional provision, all governmental officials, including ministers, are bound to provide the NA's inquiry committees with all their requirements and to attend meetings upon their request.⁹³ In addition, it is argued that according to the standing orders,⁹⁴ witnesses who refuse to attend the committee's formal requests, attend but refuse to answer, or provide fake testimonies, are subject to criminal prosecution through the Minister of Justice upon the request of the NA. Al-Mouqatei adds that these exceptional powers are of a judicial investigational nature, in which denying them is regarded as denying a court order and thus violating Article 142 of the Kuwaiti Criminal law, which criminalised declining (with no acceptable reason) the request of judicial authorities for attendance.⁹⁵ Thus, he argued that each official who denies such requests should be subject to criminal prosecution, upon the request

⁸⁷ *ibid.*

⁸⁸ Abo Yonis M, *Parliament Control on Government's Works in Egyptian and Kuwaiti Systems*, (Dar Al-Jammaha Al-Jadedah 2002) 108.

⁸⁹ *op cit* Al-Mouqatei (n 85) 51–91.

⁹⁰ *op cit* Yonis (n 88).

⁹¹ *op cit* Al-Saleh (n 9); Al-Jamal Y, *The Constitutional System of Kuwait* (University of Kuwait Press 1970); Hasan A, *Principles of the Constitutional System of Kuwait* (Dar Al-Nahda Al-Arabiya 1968).

⁹² Constitutional Court Explanatory Decision 2/1986 on 14 June 1986, for more details see chapter seven.

⁹³ *op cit* Al-Mouqatei (n 85) 71.

⁹⁴ Article 9 and 147 of Standing Orders of National Assembly.

⁹⁵ Article 142 of the Criminal Law no 16/1960.

of the NA. Others suggest that this is subject to the decision of the Minister of Justice upon the request of the NA.⁹⁶ However, under the constitutional provisions, ‘no crime and no penalty may be established except by virtue of law’.⁹⁷ Given that the criminal law of Kuwait⁹⁸ does not identify an applicable criminal offence, it is difficult to support this claim. In addition, such an argument proposes that parliament acts within judicial powers, which contrasts with the constitutional principle of the separation of powers under Article 50 of the Constitution.⁹⁹

Next, Article 9 of the standing orders provided these powers for a ‘Committee of Determining the Validity of NA Membership’. This committee was assigned to review the electoral petitions before the enactment of Law no 14/1973 which assigned this task to the Constitutional Court.¹⁰⁰ Thus, it could be argued that the uniqueness of this committee is that it was competent to exercise a judicial function, which justifies its exceptional powers. Therefore, it cannot be assumed that this authority is available to other parliamentary committees. Finally, this committee is entitled only to ask the Minister of Justice to undertake criminal prosecution according to his discretion. This reveals the problematic nature of this article, as potentially there could be a case where the Minister of Justice, or one of his officials, is the person violating this article. This argument has not yet been tested in a court of law, therefore, the committees’ ability to force officials to attend its sessions and/or to provide official data is still a theoretical assumption.

In the UK, according to the Osmotherly rules:

Where a Select Committee indicates that it wishes to take evidence from a particular named official, including special advisers, the presumption should be that ministers will agree to meet such a request. However, the final decision on who is best able to represent the minister rests with the minister concerned and it remains the right of a minister to suggest an alternative civil servant to that named by the committee if he or she feels that the former is better placed to

⁹⁶ op cit Hasan (n 91) 369.

⁹⁷ Article 32 of Constitution.

⁹⁸ Criminal Law of Kuwait no 16/1960.

⁹⁹ Article 50 of Constitution: ‘The system of Government is based on the principle of separation of powers functioning in co-operation with each other in accordance with the provisions of the Constitution. None of these powers may relinquish all or part of its competence specified in this Constitution’.

¹⁰⁰ Article 1 of Law no 14/1973 of Establishing the Constitutional Court, for more details see chapter seven.

represent them. In the unlikely event of there being no agreement about which official should most appropriately give evidence, it is open to the minister to offer to appear personally before the committee.¹⁰¹

However, Parliament did not agree to these rules, which were considered to be internal governmental instructions that Parliament had never accepted.¹⁰² Thus, a joint committee, appointed to review the UK Government's Green Paper on Parliamentary Privilege,¹⁰³ recommended that, 'Wilful failure to attend committee proceedings or answer questions or produce documents should be made criminal offences, applicable to members and non-members, punishable in the courts by a fine of unlimited amount or up to three months' imprisonment'.¹⁰⁴

According to the Standing Orders,¹⁰⁵ the method of committees of inquiry in Kuwait is governed by the terms set out as follows. Firstly, requests for inquiry committees must be written and signed by at least five NA members.¹⁰⁶ Secondly, the subjects of inquiry must be within the NA's competence in relation to its legislative function or to the politically and financially controlling role of the Executive's procedures.¹⁰⁷ This means that only the work of the ministries and public institutions fall within the control of inquiry committees. In its explanatory verdict, the Constitutional Court in Kuwait also confirmed that, 'the nature of the inquiry committees' power is originated from the nature of the parliamentary system which enables the NA to scrutinize only the operations of the Executive and of public institutions'.¹⁰⁸ Scrutinising matters regarding private activities, such as the business matters of private institutions are, therefore, out of their control.¹⁰⁹ It is thus because committees of inquiry, according to Article 114 of the Constitution, are entitled only to investigate, 'matters within its competence'.¹¹⁰ Therefore, investigations on matters related to private activities such as banks and private financial institutions, for example, are not allowed. This argument has been

¹⁰¹ Cabinet Office, *Departmental Evidence and Response to Select Committees* July 2005, para 44.

¹⁰² Liaison Committee, *Select Committee Effectiveness, Resources and Powers* (HC 2012–2013, 697-I).

¹⁰³ House of Commons, *Parliamentary Privilege* (Green Paper, Cm 8318, 2012).

¹⁰⁴ Kelly R, *Select Committees: evidence and witnesses* (Commons Briefing Paper, HC SN06208 June 2016).

¹⁰⁵ Articles 8, 9, 151 and 174 of Standing Orders Act 1963 of National Assembly.

¹⁰⁶ *ibid* Article 147.

¹⁰⁷ *op cit* Al-Mouqatei (n 85) 70.

¹⁰⁸ Constitutional verdict no 2/1986 on 14 June 1986.

¹⁰⁹ *op cit* Al-Mouqatei (n 85) 71.

¹¹⁰ Article 114 of Constitution.

criticised because the operation of these institutions can have effects that bring substantial consequences to society and the national economy, which should be sufficient justification for parliament to control their businesses. In contrast, in the UK, because of the financial service industry's crucial role in the economy, there has been a Parliamentary Committee on Banking Standards constituted from the two Houses of Parliament to:

[C]onsider and report on professional standards and culture of the UK banking sector, taking account of regulatory and competition investigations into the LIBOR rate-setting process, lessons to be learned about corporate governance, transparency and conflicts of interest, and their implications for regulation and for Government policy and to make recommendations for legislative and other action.¹¹¹

Additionally, this rule excludes any subject of a judicial nature or concerning the Amir's personal constitutional powers.¹¹² Thirdly, inquiry committees may not reach any decisions at the end of their reporting conclusions, but must present their final reports to the NA, which has the ultimate authority to act.¹¹³

On many occasions, the NA has formed inquiry committees to investigate political and financial scandals. For example, in the legislative term of 2006–2009, although it was a short session due to an early dissolution, twenty-two committees of inquiry were formed.¹¹⁴ From the eighth legislative term of 1996–1999 until the thirteenth of 2009–2012, a total of 27 inquiry committees were formed.¹¹⁵ The most momentous committees were as follows.¹¹⁶

On 11 March 1986, the NA formed a committee of inquiry composed of one member, Hamad Al-Joan, to inspect the Central Bank's records in order to examine the bank's responsibility for the financial crisis known as the Al-Manakh Crisis (أزمة المناخ) and to

¹¹¹ Parliamentary Commission on Banking Standards, *Changing Banking for Good* (2013–14, HL 27-I, HC 175-I); also see <http://www.parliament.uk/documents/commons-committees/treasury/Statement_by_former_Members_of_PCBS.pdf> accessed 3 February 2017.

¹¹² op cit Hasan (n 91) 370.

¹¹³ *ibid.*

¹¹⁴ Statistics of National Assembly, Department of Information and Documentation, National Assembly.

¹¹⁵ Archive of National Assembly, Department of Information and Documentation <<http://search.kna.kw/web/Retrieval/GeneralSearch.aspx?tid=1>>. accessed 30 January 2017.

¹¹⁶ Al-Abeidan F, *Parliamentary Committees of Inquiry* (Library of National Assembly) <http://www.kna.kw/clt/run.asp?id=750#sthash.37xsSNK9.dpbs>. Accessed 30 January 2017.

explore the governmental measures taken to deal with its effects.¹¹⁷ The government opposed the formation of this committee, arguing that the records of the Central Bank contained secret information related to individuals and banking secrets which were protected by law.¹¹⁸ The government sought the advice of the Constitutional Court in its request to explain the powers of parliamentary committees in this regard. On 14 June 1968, the Court affirmed parliament's right to investigate the Central Bank's records, recognising that its authority, under Article 114 of the Constitution, to form inquiry committees includes overseeing all the required official documents which fall within its function of control as a governmental institution.¹¹⁹

On 22 November 1992, a number of MPs submitted a request to form a committee of inquiry to investigate the reasons behind the Iraqi invasion of Kuwait on 2 August 1990 and to scrutinise the government's actions toward the Iraqi threats made before the invasion. However, the government opposed the request and managed to influence the NA to vote to form a Committee for Exploring Facts instead. On 1 December 1992, the Assembly, therefore, formed a Committee for Exploring Facts composed of nine members. This committee worked for almost three years investigating various governmental documents and records and met many ministers and officials, including the Crown Prince and the Prime Minister, Sheik Saad Al-Abdullah Al-Sabah. On 14 August 1995, the committee submitted its report, providing important conclusions, among them the government's misconduct in its responsibility to protect the homeland, and suggested a number of measures to improve the safety of the state.¹²⁰

Next, on 12 January 2011, the NA formed a Committee of Inquiry to investigate the death of a Kuwaiti citizen, Mohammad Gazzai Al-Maimoni, who was held in custody in a police department. The Minister of the Interior, Sheik Jabir Al-Khalid Al-Sabah, claimed during the NA's session that the cause of death was normal, and denied that the victim had been tortured. However, during the committee's investigations, police officials confirmed that torture had taken place, and outlined the inadequate conditions

¹¹⁷ <<http://www.nytimes.com/1982/12/25/business/kuwait-in-bailout-effort-after-market-collapses.html>>. accessed 30 January 2017.

¹¹⁸ According to Article 28 of the Central Bank Act 1986: Each official of the Central Bank shall not provide any information related to the Central Bank's affairs, clients, and activities.

¹¹⁹ Constitutional Court Explanatory Decision no 2/1996.

¹²⁰ See the full report in Arabic <<http://www.kna.kw/clt/run.asp?id=1757#sthash.nJuQBwGI.dpbs>>. accessed 30 January 2017.

of prisoners in custody in police departments. On 6 February 2011, the Minister of the Interior, in his second statement, acknowledged the torture claiming full responsibility for the ‘tragic accident’, and left office.¹²¹

However, the committees’ system of membership depends on the political strength of the NA.¹²² Ironically, the government votes on the selection of the members of these committees. Supported by the votes of a small number of pro-government members, ‘The Government can decide and control the agenda and the outcomes of these committees’.¹²³

In the UK, select committees exist in both Houses of Parliament and jointly.¹²⁴ In the House of Commons,¹²⁵ they are primarily concerned with observing the work of each government department in terms of spending, policies and administration.¹²⁶ The Committee of Public Accounts or Environmental Audit¹²⁷ may look at any governmental department.¹²⁸ In addition, the Liaison Committee, which draws together all the chairmen of select committees, has various administrative functions and an investigative role, which grants its reports great political impact.¹²⁹

The core function of these committees is that they are, ‘tasked with scrutiny of the Government or of forms of government legislation’.¹³⁰ They have been considered therefore, ‘the principal mechanism through which the House of Commons holds the Executive to account’.¹³¹ The findings of the committees are reported to the Commons and published online on Parliament’s website. Such transparent processes enable a broader audience to reflect upon the findings, which maintains a public overview of Parliament’s functions. In most cases, the government replies to the committee’s report

¹²¹ <<http://www.kna.kw/research/hasad13/01.pdf>>. accessed 30 January 2017.

¹²² Interviewee C5.

¹²³ Interviewees C4.

¹²⁴ See Blackburn R and others (eds) *Parliament: Function, Practice and Procedures* (2nd edn, Sweet & Maxwell 2003) 569.

¹²⁵ op cit Barnett (n 21) 332.

¹²⁶ Kelly R, ‘Select Committees: Powers and Functions’ in Horne A, Drewry G and Oliver D (eds), *Parliament and the Law* (Hart 2013) 161.

¹²⁷ <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/>>. accessed 30 January 2017.

¹²⁸ <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/>>. accessed 30 January 2017.

¹²⁹ op cit Norton (n 64).

¹³⁰ Liaison Committee, *Select Committee Effectiveness, Resources and Powers* (HC 2012–13, second report).

¹³¹ Liaison Committee, *Rebuilding the House: Select Committee Issues* (HC 2009–10, 272-I) 26–28.

within 60 days, unless it requests an extension. In practice, the select committee recommendations have played an influential role in which consequences have worked to, ‘shape behaviour in Whitehall in a positive direction’.¹³² It was observed that nearly, ‘40% of committee recommendations were accepted by government, and roughly the same proportion went on to be implemented’.¹³³ However, a number of concerns were observed regarding, ‘the co-operation they receive from government, about the limitations of their powers, and about the resources that are available to support them’.¹³⁴

In the House of Lords, there are five specialist committees that concentrate on five specific areas: The European Union Committee, the Science and Technology Committee, the Communications Committee, the Constitution Committee and the Economic Affairs Committee. In addition, there are ad hoc committees, which are set up by the House for issues outside these areas, such as the Digital Skills Committee.¹³⁵

One of the important features of the UK select committee system is the independence of the committees’ membership arrangements.¹³⁶ In contrast to Kuwait, there is a large degree of independence from the government in the committees’ composition, and it is for parliament to decide the formulation of the committee membership.¹³⁷ Otherwise, there is no point in having a scrutiny committee when it is curtailed or influenced by the government. Based on recent reforms to institutionalise the political parties in parliament, ‘the main parties developed a notable infrastructure that provided the means for backbenchers to discuss issues of common concern and to convey their views to party leaders’.¹³⁸ There is a formula which requires that the committees’ membership, including chairmanship, has to reflect the parties’ strength and that some important committees, such as the Committee of Public Accounts and the Public Administration Committee, should always be chaired by a member of the official Opposition.¹³⁹ All

¹³² op cit (n 130) Fox R and others.

¹³³ ibid; Benton M and Russell M, ‘Assessing the Impact of Parliamentary Oversight Committees: the Select Committees in the British House of Commons’ (2013) 66(4) *Parliamentary Affairs* 772.

¹³⁴ ibid; Brazier A and Fox R ‘New Mechanisms of Independent Accountability: Select Committees and Parliamentary Scrutiny of the Intelligence Services’ (2015) 68(2) *Parliamentary Affairs* 314–331.

¹³⁵ <<http://www.parliament.uk/business/committees/committees-a-z/lords-select/>>. accessed 30 January 2017.

¹³⁶ Bradley A and Ewing K, *Constitutional and Administrative Law* (15th edn, Longman 2011) 210.

¹³⁷ op cit Norton (n 64) 127.

¹³⁸ op cit Norton (n 64) 136.

¹³⁹ This formula was suggested by The Reform Committee *Reforming the House* (HC 2008–2009, 1117) and endorsed in a resolution of the House in March 2010 (HC Deb March 2010, vol 506, col

parties, especially opposition parties,¹⁴⁰ must be present on every committee,¹⁴¹ whilst, ‘ministers, opposition frontbench spokesmen and party whips do not normally serve on most select committees’.¹⁴²

Therefore, the UK government does not dominate the select committees, and that has a number of effects. It means that they are independent in choosing their own agenda and their findings are often contrary to the government’s desires, even sometimes on major political issues. For example, on 2 December 2015 the Conservative government, led by PM David Cameron, won a motion in the House of Commons to carry out military action in Syria against ISIL.¹⁴³ Two months before that motion, there was a report from the Select Committee of Foreign Affairs, which has a clear majority of conservative MPs and a conservative chairman (6 out of 11), opposing the motion and describing it as, ‘a distraction from the much bigger and more important task of finding a resolution to the conflict in Syria’.¹⁴⁴ Obviously, such policies strengthened the function of these committees of holding the Executive to account.

In the UK, there are three ways to constitute an inquiry committee. They can be constituted by prerogative powers – the Queen can appoint an inquiry committee; under the statutory power of the Inquiries Act 2005,¹⁴⁵ or they can be established on the authority of government. Parliament does not constitute such committees, but can perform any investigations through its parliamentary committees’ system. Furthermore, parliament can put pressure on government to form a governmental inquiry committee and debate its findings in the House. For instance, the Chilcot Committee of Inquiry (The Iraq Inquiry)¹⁴⁶ was formed in July 2009 to investigate, ‘the United Kingdom’s involvement in Iraq, including the way decisions were made and actions taken, to establish as accurately and reliably as possible what happened, and to identify lessons that can be learned’, and also to report to Parliament if any crimes were committed or

1095); Colin Turpin, and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 619.

¹⁴⁰ For more details see Blackburn (n 124) 477.

¹⁴¹ Rogers R and Walters R, *How Parliament Works* (7th edn, Pearson Longman 2006) chapter 10.

¹⁴² House of Commons Information Office, *Brief Guide to Select Committees* (HC 2011)

<<https://www.parliament.uk/documents/commons-information-office/Brief-Guides/Select-Committees.pdf>> accessed 19 October 2016.

¹⁴³ <<http://www.parliament.uk/business/news/2015/december/mps-debate-motion-on-isil-in-syria/>>.

¹⁴⁴ Foreign Affairs Committee, *The Second Report on the Extension of Offensive British Military Operations to Syria* (HC 457).

¹⁴⁵ Inquiry Act 2005.

¹⁴⁶ See <<http://www.iraquinquiry.org.uk/>>.accessed 30 January 2017.

mistakes were made.¹⁴⁷ This committee represents an example of an effective method of accountability, which comprises both aspects of law and politics, and which derived its authority from its members' and advisers' expertise, supported by the evidence of its witnesses. Under section 10 of the Inquiry Act 2005, judges can also be appointed to the inquiry panel.¹⁴⁸ Such a feature gives a sense of independency to these bodies. These independent committees and the standard of information they produce¹⁴⁹ are believed to enable them to conduct their business more professionally, notwithstanding the complications of the political affiliation bonds which often affect the parliamentarians' preferences.

The UK system of select committees also grants some of them the power to appoint specialist outside advisers, 'either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference'.¹⁵⁰ Often, academics are appointed to assist, particularly on specific inquiries within their field.¹⁵¹ This method supports the committee members who are able to consult experts in their field of practice, which enhances the MPs' understanding of the issues under scrutiny.¹⁵² For example, by reviewing the reports of the Constitutional Select Committees and its associated evidence¹⁵³ it can be seen that this evidence-gathering produces a higher level of professional support.¹⁵⁴ In this sense, the committee system has a participative aspect. The system of evidence-gathering and witnesses utilised by the committees creates a broad forum, by calling upon experts who write for, or join, voluntarily or by a temporary recruitment system, the committees' meetings, and participate in its discussions.¹⁵⁵ This type of powerful engagement can be viewed as a

¹⁴⁷ *ibid.*

¹⁴⁸ Inquiry Act 2005 s10.

¹⁴⁹ For the Committee's members see <<http://www.iraqinquiry.org.uk/people.aspx>>. accessed 30 January 2017.

¹⁵⁰ House of Commons Standing Orders No 139 (b).

¹⁵¹ Requa M, 'Truth, Transition and the Inquiries Act 2005' [2007] *European Human Rights Law Review* 404; Gay O, *Investigatory Inquiries and the Inquiries Act 2005* (Briefing paper SN02599 HC 2009).

¹⁵² Pedersen H and others, 'Who Gives Evidence to Parliamentary Committees? A Comparative Investigation of Parliamentary Committees and their Constituencies' (2015) 21(3) *Journal of Legislative Studies* 408–427.

¹⁵³ See <<http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/publications/>>. accessed 30 January 2017.

¹⁵⁴ Le Sueur A and Caird J, 'The House of Lords Select Committee on the Constitution' in Horne A and others (eds), *Parliament and the Law* (Hart 2013) 281.

¹⁵⁵ *op cit* Norton (n 64) 129.

high form of participatory democracy.

In summary, this study has identified four important features of the UK's system of select committees which are helpful in achieving control of the Executive by this particular mechanism. Firstly, the comprehensive nature of the committee system is thorough and active as every subject is covered by specific committee. Despite the challenges upon its limited resources, limited time and the personal motivations of its members, 'the current formulation of core tasks has helped move select committees towards a more systematic form of scrutiny'.¹⁵⁶ Secondly, the generation of transparency is helpful. A great deal of information is generated from experts who enhance a committee's understanding of the issues under examination. Thirdly, the government is obliged by convention to reply within a time limit (60 days) on the committees' queries.¹⁵⁷ Finally, and most importantly, the nomination of committee members and the chairmanship must always reflect a degree of independence from the government in order to improve the core task in controlling the government. These features are seen as appropriate for transfer to Kuwait in order to improve control of the Executive's powers.

To conclude, Committees of Inquiry in the Kuwaiti parliamentary system are crucial mechanisms for scrutinising the work of the Executive. However, they are still inward looking and constitutional investigative panels, which are assigned only to report their conclusions to the NA. Therefore, the final judgment on their findings is left for the whole assembly. Ultimately, the NA members, including the 16 members of the Executive, the ministers, are the ultimate authority in forming a committee's membership and assessing its findings. Ironically, this status enables the Executive to exercise influence using the solidarity voting of ministers to elect pro-government members in order to control any potential outcomes that oversee its propriety. In addition, adequate staff and resources must be assigned to support the function of these committees. And, most importantly, the capacity to recruit outside experts must be developed to enhance the ability to obtain a comprehensive understanding of the complex nature of the Executive's technical works. Another critical development would be to enable committees to reach a broader audience by removing the

¹⁵⁶ op cit Brazier and Fox (n 134).

¹⁵⁷ op cit Rogers and Walters (n 57) chapter 10.

confidentiality which surrounds their activities and empowering affected groups and experts to have a say in related issues.

6.2.1.4 Parliamentary Interpellations of Ministers

The mechanism of the interpellation of ministers is regarded as the most serious method in the parliamentary system of Kuwait in providing the means to control the work of the Executive and to make it accountable.¹⁵⁸ It has been observed as, ‘one of the major supervisory constitutional instruments exercised by the Kuwait NA.’¹⁵⁹ The Constitution of Kuwait was keen to include, as a significant feature of the parliamentary system, the motion of ministerial responsibility.¹⁶⁰ Under the Constitution’s provisions, ‘every member of the NA may address the PM and ministers with interpellations regarding matters falling within their competence’, which might lead to a decision of ‘no confidence’.¹⁶¹ However, according to Article 102 of the Constitution:

The PM shall not hold any portfolio: nor shall the question of confidence in him be raised before the NA. Nevertheless, if the NA decides, in the manner specified in the preceding Article, that it cannot co-operate with the PM, the matter shall be submitted to the Head of State. In such a case, the Amir may either relieve the PM of office and appoint a new cabinet or dissolve the NA.¹⁶²

Therefore, it has been suggested that the interpellations submitted to ministers aim to raise the individual responsibility of a particular minister, while interpellations submitted to the PM seek to address the collective responsibility of the government.¹⁶³

This section will focus on the procedural and objective conditions of interpellation according to Kuwaiti law, court rulings and parliamentary precedents. The implications of interpellations in relation to ministerial responsibility will be the subject of the next section.

¹⁵⁸ Al-Remaidhi A, ‘Individual Ministerial Responsibility in Constitutional System of Kuwait’ (PhD thesis, University of Essex 2004).

¹⁵⁹ Othman S, ‘Parliamentary Control of the Executive: Evaluation of the Interpellation Mechanism, Case Study Kuwait National Assembly, 1992-2004’ (2006) 29(36) *Journal of South Asian and Middle Eastern Studies* 44.

¹⁶⁰ Al-Mouqatei M, ‘Ministers Interpellation in the Kuwaiti Parliamentary System: Critical & Analytical Study in Light of the Kuwaiti Constitutional System & Parliamentary Precedents’ (2002) 26(3) *Kuwait University Journal of Law* 5–151.

¹⁶¹ Article 100 of Constitution.

¹⁶² Article 102 of Constitution.

¹⁶³ Nassar J, *Interpellation as a Method of Parliamentary Control over Government’s Work in Egypt and Kuwait* (Dar Al-Nahdah Press 1999) 38.

Interpellations of ministers have been recognised as involving an intensive parliamentary question that enables the NA members to investigate whether a particular minister has conducted his ministerial responsibilities according to both the law and public interest.¹⁶⁴ In practice, this form of accountability has gained significant momentum in Kuwait's political life.¹⁶⁵ However, a number of interviewees highlighted that this mechanism was also used in a negative form.¹⁶⁶ Due to the design of the electoral systems, which are always formed based on religion and kinship bonds,¹⁶⁷ ministers who refused to comply with MPs' personal agendas have been under political attack.¹⁶⁸

On many occasions interpellations have reflected high political tension between the two branches of the state. From 1963 to 2013, 78 interpellations were submitted to ministers.¹⁶⁹ With nine of these, the ministers resigned following interpellations addressed to them. The cabinet resigned on the occasion of seven interpellations, and parliament was dissolved five times for the same reason.¹⁷⁰ Among these interpellations, 17 occurred in the Thirteenth Legislative Term 2009–2012, which embraced three requests to interpellate the PM. The first request to interpellate the PM was tabled for debate on 29 May 2006. The members of the NA, Ahmad Al-Saadon, Ahmad Al-Mulaifi and Faisal Al-Muslim, submitted a request to interpellate the PM, Sheik Nasir Al-Sabah, regarding a governmental request submitted to the Constitutional Court to explain a parliamentary bill to amend the electoral law. The interpellators considered such a request as an indication of the government's intention to obstruct the NA's amendments to the electoral system. This bold development to interpellate the PM was not welcomed by the government, which sought to dissolve parliament on 21 May 2006 before the hearing day of the interpellation.¹⁷¹ After the subsequent elections, a majority of the NA members adopted the same bill and the

¹⁶⁴ op cit Al-Mouqatei (n 160) 11.

¹⁶⁵ Interviewee A1.

¹⁶⁶ Interviewees A1, B1, B2, G1, G2, and G3.

¹⁶⁷ Interviewee D2.

¹⁶⁸ Interviewee B1.

¹⁶⁹ Database of Department of Information, Kuwait National Assembly
<<http://search.kna.kw/web/Retrieval/DocumentsView.aspx?DocIDs={23453D5E-EB51-4CC5-B1AB-B5B385C6D020},&dc=1>>. accessed 30 January 2017.

¹⁷⁰ The statistics of the National Assembly, Department of Information and Documentation
<http://www.kna.kw/research/all_interpullations-v8.pdf>. accessed 30 January 2017.

¹⁷¹ op cit (n 170).

government voted in favour of the new Act. In a further example, on 15 November 2009, three members submitted a request to interpellate the PM, Sheik Nasir Al-Mohammad Al-Sabah, regarding alleged misconduct of his office's expenses, in addition to claims of cheques issued from his personal account for NA members.¹⁷² Another two interpellations submitted to the PM in the same term led the government to accept these new challenges, and therefore the PM stepped on the interpellation bench for the first time in Kuwait's parliamentary history on 8 December 2009.¹⁷³ However, the NA voted against a request for a 'Declaration of Non-cooperation' of the PM. Such developments revealed the significance of this mechanism in shaping the new features of parliamentary accountability of the Executive in Kuwait.

There are two different aspects that distinguish the mechanism of interpellation from that of parliamentary questions. Firstly, while the subject of a PQ should be explicitly about a specific matter, the subjects of interpellation might relate to general matters regarding the misconduct of a minister. Therefore, in PQs, under Article 125 of the Standing Orders Act, no other MP has the right to discuss the answers of ministers to PQs except for the MP who raised the question. In contrast, in interpellation debates, all members have the right to participate in discussions about the subjects. Secondly, there are no further actions applied after PQs while, after an interpellation debate, a motion of no confidence may be submitted.¹⁷⁴ Therefore, the nature of this method is accusatory of a minister's conduct of power, with the possible consequence being a motion of no confidence.¹⁷⁵

In the traditions of the UK Parliament, the closest procedure to the system of interpellation is arguably 'impeachment'. The first application of this method was in relation to Lord Latimer in 1376 and the most recent was against Lord Melville in 1806.¹⁷⁶ This ancient method is explained in the report of the Joint Committee on Parliamentary Privilege in 1998–99, as follows:

All persons, whether peers or commoners, may be prosecuted and tried by the two Houses for any crimes whatsoever. The House of

¹⁷² *Al-Anba Newspaper* (16 November 2009) <<http://www.alanba.com.kw/ar/kuwait-news/parliament/77061/16-11-2009>>. accessed 30 January 2017.

¹⁷³ op cit Database of Department of Information (n 169).

¹⁷⁴ op cit Al-Mouqatei (n 160) 20.

¹⁷⁵ Comments of Al-Sharif A, 'Interpellation of Ministers: An Assessment A panel discussion held by The Journal 9 December 2000' (2001) 25(2) (suppl) Kuwait University Journal of Law 9.

¹⁷⁶ Gay O, *Impeachment* (Commons Briefing Paper, SN02666 HC 2011).

Commons determines when an impeachment should be instituted. A member, in his place, first charges the accused of high treason, or of certain crimes and misdemeanours. After supporting his charge with proofs the member moves for impeachment. If the accusation is found on examination by the House to have sufficient grounds to justify further proceedings, the motion is put to the House. If agreed, a member (or members) is ordered by the House to go to the bar of the House of Lords. There, in the name of the House of Commons and of all the commons of the United Kingdom, the member impeaches the accused person.¹⁷⁷

Any judgment must be reserved to the Commons, which has the right to pardon the accused any time before the announcement of the judgment. The accused provides the Lords with his written answers which are communicated to the Commons, which has the right to reply. After examination, the Lords pronounces its judgment unless the Commons pardons the accused. An impeachment is not subject to pardon by the sovereign.¹⁷⁸

However, alternative procedures have been established in modern politics to sustain the scrutiny of the Executive, such as parliamentary questions and inquiries by select committees and independent committees of inquiry. The growth of the doctrine of political responsibility and the, ‘resignation of the cabinet following a successful vote of censure against a minister, resulted in the disuse of impeachments in modern times’.¹⁷⁹ It was argued that, ‘a power that is not exercised tends, over time, to become unexercisable’.¹⁸⁰ Although impeachment might now be regarded as virtually obsolete given the growth of the doctrine of collective ministerial responsibility, and other effective methods of accountability such as select committees, nevertheless, a recent attempt made by the former MP Adam Price led to the possible impeachment of the PM, Tony Blair, over his record in misleading Parliament in the Iraq war of 1991. Price and other MPs declared an intention to table a motion to impeach Tony Blair on 25 November 2004 under the title of: ‘Conduct of the Prime Minister in Relation to the War against Iraq’.¹⁸¹ However, the motion was not debated in the House for political

¹⁷⁷ HL Paper 43-1, HC 214-1 para 16, fn 71, cited in *ibid*.

¹⁷⁸ *ibid*.

¹⁷⁹ Gay O and Powell T, *The Collective Responsibility of Ministers: An Outline of the Issues for a Discussion of the Issues* (Commons Research Paper RP04/82 HC 2004).

¹⁸⁰ Vermeule A, ‘The Atrophy of Constitutional Powers’ (2012) 32(3) *Oxford Journal of Legal Studies* 421–444.

¹⁸¹ ‘MPs plan to impeach Blair over Iraq war record’ *The Guardian* (26 August 2004).

reasons, but Tony Blair resigned as PM and as a Member of Parliament in 2007.¹⁸² Due to the sensitive and wide ranging nature of the issue, Parliament preferred instead to form an independent inquiry.¹⁸³

Under the legal system of Kuwait, the National Assembly does not practise any judicial powers, nor can it function as a court of law towards peers and ministers, as with the British system of impeachment. Articles 100 and 101 of the Constitution and Articles 133 to 145 of the Standing Orders Act specified the functional conditions of this mechanism.¹⁸⁴ According to these provisions, the judicial rulings and the parliamentary precedents, the function of the interpellation of ministers in Kuwait is governed by the following terms.

6.2.1.4.1 The Procedural Requirements

The submission of an interpellation request must be written in proper language that does not harm the dignity of the person or damage the state's national interests. In addition, matters of interpellation must be in relation to specific, detailed actions; broad topics are not allowed. Because of the accusatory nature of interpellations, it has been asserted that ministers have the right to comprehend precisely the alleged accusations and to be allowed to prepare their defence in relation to them.¹⁸⁵ No more than three members must sign the interpellation request.¹⁸⁶ Al-Mouqatei observed that the Constitution of Kuwait encourages political lobbying by allowing more than one member to submit interpellations for ministers.¹⁸⁷ In this case, such interpellations normally receive greater political significance through the contribution of diverse political groups than a single interpellation.¹⁸⁸

It has been claimed that any breach of such conditions enables the speaker of the NA to practise his political controlling role in supervising the proper practice of interpellation according to the relevant governing provisions.¹⁸⁹ However,

¹⁸² op cit *Impeachment* (n 168).

¹⁸³ For the list of the Iraq Inquiry Committee members see <<http://www.iraqinquiry.org.uk/people.aspx>>. accessed 30 January 2017.

¹⁸⁴ Articles 100 and 101 of Constitution and Articles 133 to 145 Of Standing Orders Act 12/1963 of National Assembly.

¹⁸⁵ op cit Nassar (n 163) 10.

¹⁸⁶ Article 134 of Standing Orders of National Assembly.

¹⁸⁷ op cit Al-Mouqatei (n 160) 25.

¹⁸⁸ Interviewee G2

¹⁸⁹ See comments of Al-Assar in op cit Sharif (n 175) 17; Nassar (n 163) 11.

parliamentary practice does not recognise that speakers should exercise such privileges without resorting to the collective voting of MPs. In addition, many governmental attempts have tried to influence the Constitutional Court in interpreting the constitutional provisions that govern the practice of the interpellation of ministers.¹⁹⁰ However, the NA members have opposed most of these requests. On some occasions, the government has succeeded in submitting its requests, ‘which opened the door for the courts to review and comment upon parliament’s practice of its mechanisms of control’.¹⁹¹ For instance, on 27 January 1982, an interpellation was submitted against Abdul Rahman Al-Awadhi, the Minister of Health, relating to corruption claims over the treatment of individuals abroad. The interpellator initially submitted PQs to the minister asking him to provide the official records in order that he could scrutinise the patients’ names and their types of illness. The Minister denied this request based on protecting the individuals’ rights of privacy and secrecy.¹⁹² As a result of the Minister’s reluctance, the interpellator converted his question into an interpellation. Therefore, the cabinet submitted an explanatory request for the Constitutional Court to explain Article 99 of the Constitution relating to the right of the NA members to investigate such confidential matters. The Court decision was that, ‘the constitutional right of the NA’s members in controlling the Executive’s operations is not absolute but is restricted by other relevant constitutional rights such as individuals’ rights of privacy’.¹⁹³ As a result of this verdict, the NA dismissed the related interpellation.

This practice of consulting the courts about parliament’s business, although it may arise from justified motives, as previously discussed, in practical terms ‘drags the judiciary into the political arena by enabling the courts to review and comment upon the legislature’s activities, which affects the principle of the separation of powers’.¹⁹⁴ In addition, such judgments might introduce new conditions to the practice of parliament’s control mechanisms, which are not coded by law.¹⁹⁵

¹⁹⁰ Interviewee G1.

¹⁹¹ Interviewee E3.

¹⁹² Minutes of National Assembly meeting 19 October 1981 Library of National Assembly

¹⁹³ Constitutional Explanatory Verdict no 1/1982.

¹⁹⁴ Interviewee D2.

¹⁹⁵ Al-Mouqatei M, *The Trends of Kuwaiti Constitutional Judiciary* (University of Kuwait Press 2000) 125.

Moreover, it has been suggested that the interpellation of any minister should not extend beyond the business of a particular ministry if he were to hold other ministerial posts.¹⁹⁶ Due to the limitation of the number of cabinet members, the number of ministers in all shall not exceed one-third of the number of members of the NA.¹⁹⁷ Thus, on many occasions, some ministers have held more than one ministerial office. Under Article 134 of the Standing Orders Act, no interpellation shall be submitted unless for the PM, or to no more than one Minister. Therefore, it was argued that ministers who hold various offices obtain multiple legal characters; accordingly, the principle of the Individual Responsibility of Ministries requires that matters of interpellation should not hold them accountable beyond the responsibilities of a single office.¹⁹⁸

Nevertheless, parliamentary precedents show that, on 6 November 2000, an interpellation against Adel Al-Subaih, the Minister of Electricity and Water and the Minister of Housing Affairs, was submitted and discussed in the NA.¹⁹⁹ In addition, on 18 November 2009, the NA approved and discussed an interpellation submitted against Fadhil Safar, the Minister of Municipality Affairs and the Minister of Public Works, concerning matters relating to both ministries. Additionally, there was the interpellation of Sheik Ahmad Al-Fahad Al-Sabah, the Minister of Housing and the Minister of Development Affairs on 15 May 2011, which resulted in his resignation. Finally, there was the interpellation of Rola Dashti, the Minister of State for National Assembly Affairs, the Minister of Planning and the Minister of Development Affairs on 10 November 2013, which also resulted in her resignation. Ultimately, in parliamentary traditions, a vote of ‘no confidence’ in a minister, even concerning a particular office, normally results in his or her resignation from all other ministerial posts.

Interpellations submitted to a minister that involve the same subjects, or those that are tightly linked to each other, may be combined subject to the consent of the PM, the related minister or the consent of the NA, without debate.²⁰⁰ However, on 22 May 2012, the government withdrew from the NA session, just before voting on the combination of two linked interpellations submitted against the Minister of Finance, Mustafa Al-

¹⁹⁶ op cit Al-Mouqatei (n 160) 43.

¹⁹⁷ Article 56 of Constitution: ‘The number of Ministers in all shall not exceed one-third of the number of the members of the National Assembly.’

¹⁹⁸ see comments of Al-Mouqatei in op cit Sharif (n 175) 17.

¹⁹⁹ Minutes of National Assembly meeting 20 November 2000 Library of National Assembly.

²⁰⁰ Article 137 of the Standing Orders of National Assembly.

Shamali, by separate members.²⁰¹ The government's argument was that the interpellations were not linked to each other and, therefore, its withdrawal prevented the NA from continuing the voting process.²⁰² Such an incident reveals the weakness in the functional operation of the NA in a way that requires the attendance of the government to validate the NA meetings.

Another limitation concerns ministers' responsibilities towards the activities of previous cabinets. It has been argued that each minister is responsible for the conduct of ministerial work that occurred after his appointment; any pre-appointment activities, whether conducted by him in a previous cabinet or by another minister who had previously held the same office, are beyond his ministerial responsibility.²⁰³ Others oppose this claim, suggesting that ministers are responsible even for the previous work of former cabinets, in case the new minister does not act appropriately in respect of the previous misconduct of the former minister.²⁰⁴ In a similar context, the Constitutional Court also affirmed that, 'the works of former ministers which were conducted in a reasonable previous period can be the subject of parliamentary control towards new ministers'.²⁰⁵ The political responsibility of ministers is also not limited to their ministries' operations, but extends to cover other independent departments and institutions which fall within the ministers' supervision.²⁰⁶ It is not accepted in a democracy that official bodies would act outside of parliament's accountability. Therefore, it was argued that the PM is responsible for any independent governmental institution which lacks direct ministerial supervision.²⁰⁷

6.2.1.4.2 Interpellation Debate

Interpellation shall not be discussed before the passage of eight days from submission, unless in the case of necessity, and subject to the approval of the interpellated minister.

²⁰¹ Minutes of National Assembly meeting 22 May 2012, Library of National Assembly.

²⁰² According to Article 116 of Constitution: 'The Cabinet shall be represented in the sittings of the Assembly by the Prime Minister or by some Ministers.'

²⁰³ *op cit* Nassar (n 163) 39.

²⁰⁴ *op cit* Al-Mouqatei (n 160) 43.

²⁰⁵ Constitutional Court Explanatory verdict no 1/1986.

²⁰⁶ *op cit* Abo Yonis (n 88) 168.

²⁰⁷ *ibid.*

However, ministers have the right to adjourn the appointed interpellation session for two weeks. Any further adjournment is subject to the NA's approval.²⁰⁸

The debate starts with the interpellator explaining his interpellation within no more than an hour and a half (three hours if there are multiple interpellators), and then the minister responds within an equal timescale. The debate will not end until a minimum of three members have spoken for and against the interpellation.²⁰⁹ Although the sittings of the NA should be public, they may be held in secret at the request of the government, the Speaker of the NA, or upon the request of ten members; the discussion of such a request should also be carried out in a secret sitting.²¹⁰ Practically, interpellation debates have been generally exercised in open sessions. However, from 2006 until 2012, the government has asked for secret sessions on six occasions. It has been observed that the government's requests for confidential hearings have been inflated, particularly for interpellations addressed against PM.²¹¹ Four out of six of the approved confidential sessions were allocated to discuss interpellations addressed to PM.²¹² Professor Al-Mouqatei, in an article published in a local newspaper,²¹³ asserted that according to the principle of transparency in the state's work, such confidentiality does not mean people should not oversee the work of their representatives in the NA. Confidentiality, he argues, means that the NA should allocate special records for such secret sessions, which must be available in the future for the public to review their contents. Rightly, transparency in the works of the state's branches has been promoted as an aspect of legitimacy and good governance.²¹⁴ Therefore, it has been suggested that, 'Parliament shall provide information about the background, activities and affairs of members, including sufficient information for citizens to make informed judgments regarding their integrity, probity and potential conflicts of interest'.²¹⁵ In fact, transparency in

²⁰⁸ Article 135 of Standing Orders on National Assembly.

²⁰⁹ *ibid* Article 136.

²¹⁰ Article 94 of Constitution and Article 69 of Standing Orders.

²¹¹ Minutes of Meetings of National Assembly, 2009 and 2010 Library of National Assembly.

²¹² Sessions took place on 15 November 2009, 30 May 2010 and 30 November 2010 addressed against PM Sheik Nasir Al-Mohammad Al-Sabah and on 22 May 2011 addressed against PM Sheik Jabir Al-Mubarak Al-Sabah.

²¹³ *Al-Qabas Newspaper* (8 February 2010)

<http://www.alqabaskw.com/Qabas_new/Articles.aspx?ArticleID=575536&date=20032015&isauthor=1>.

²¹⁴ See <<http://worldjusticeproject.org/open-government-index/dimensions>>. accessed 30 January 2017.

²¹⁵ Declaration on Parliamentary Openness 2012<<http://www.openingparliament.org/declaration>>. accessed 30 January 2017.

such cases strengthens the capacity of people to access information regarding the conduct of their representatives. Moreover, in this sense, it empowers citizens to efficiently control parliament's decision-making process, which improves parliament's accountability.

Ultimately, to assess the effectiveness of this method in the context of accountability in the Kuwaiti system of government, it is important to stress that, as long as Kuwait lacks effective routine mechanisms of government accountability, interpellation will be necessary until such detailed mechanisms are formed.

6.2.2 Political Responsibility

Ultimately, if responsibility is indicated according to the information contained within the account, accountability requires those who are responsible to be blamed.²¹⁶ This is the essence of political accountability. In the Kuwaiti constitutional system, parliament does not play any role in the appointment of the government's officials.²¹⁷ However, it has the authority to remove ministers and to declare its inability to cooperate with Prime Ministers. This authority is implemented only as result of the interpellation of ministers. No other parliamentary control mechanism allows parliament's members to exercise such authority. Therefore, this study will focus on the impact of interpellation on the political responsibility of ministers as well as other mechanisms.

Under the Constitution's provisions, a request for a vote of no confidence against a minister must be submitted by at least ten NA members. However, 'Withdrawal of confidence from a minister shall be by a majority vote of the members constituting the Assembly excluding ministers. Ministers shall not participate in the vote of no confidence.'²¹⁸ This means that even members who abstain or are absent are considered to be opposed to a vote of no confidence, as long as they did not participate in the voting process.²¹⁹

In the next sections, the thesis will examine the direct impact of the interpellations of ministers on their political responsibility toward the NA. However, these impacts significantly differ between interpellations submitted to ministers and those which are

²¹⁶ Flinders P, *The Politics of Accountability in the Modern State* (Ashgate 2001) 12.

²¹⁷ Except for appointing the Chief of the Public Audit Bureau.

²¹⁸ Article 101 of Constitution.

²¹⁹ op cit Al-Saleh (n 9) 724.

addressed to PM. In the former, the individual responsibility of ministers is followed, while the latter raises the collective responsibility of the whole Cabinet.

6.2.2.1 Declaration of Non-Cooperation with the Prime Minister (Collective Responsibility of Ministers)

According to the Constitution, the PM does not hold any portfolio; nor shall the question of confidence in him be raised before the NA. Nevertheless, if the NA decides that it cannot co-operate with the PM, the matter then is submitted to the Head of State. In such a case, the Amir may either relieve the PM of office and appoint a new cabinet, or dissolve the NA. However, in the event of dissolution, if the new Assembly decides by the required majority vote that it cannot co-operate with the said PM, he shall be considered to have resigned as from the date of the decision of the Assembly in this respect, and a new cabinet shall be formed.²²⁰ However, this method of accountability was suspended in practice from the promulgation of the Constitution of Kuwait in 1962 until 2006. This was due to the old unconstitutional practice of appointing the Heir Apparent as PM.²²¹ Parliamentarians were greatly embarrassed to interpellate the future Amir of the state.²²² In 2006, the connection between these two offices became detached.²²³ The first attempt to interpellate a PM was on 29 May 2006 as mentioned earlier.²²⁴ The Amir dissolved the parliament as a result of this interpellation. However, the attempts to interpellate the PM continued in the following parliament. Therefore, the first request of NA members to declare non-cooperation with the PM was submitted on 8 December 2009. In fact, the interpellation addressed against the PM was regarded with great political tension,²²⁵ because this post is selected directly at the Amir's sole discretion.²²⁶ Therefore, in practical terms, 'the collective responsibility of the Government is systematically protected'.²²⁷

²²⁰ Article 102 of Constitution.

²²¹ Al-Mouqatei M, 'The Constitutional Status of the Royal Family in Kuwait' (2012) 36(3) Kuwait University Journal of Law 91.

²²² Interviewee C2.

²²³ Sheik Nasir Al-Mohamad Al-Sabah was appointed as a Prime Minister while Sheik Nawaf Al Ahmad Al-Sabah is the Heir Apparent.

²²⁴ op cit Al-Mouqatei (n 221).

²²⁵ Interviewee C1.

²²⁶ Article 56 of Constitution.

²²⁷ Interviewee C1.

In the British constitutional system, the concept of parliamentary accountability is deemed the cornerstone of the accountability system of government.²²⁸ It is thus because it is performed by the most representative body in the state: the Parliament. The premise of this concept is based on the principle of the individual and collective responsibility of ministers to Parliament.²²⁹ Collective responsibility, in particular, enables Parliament to hold the government as a whole to account, while individual responsibility provides the House with the ability to focus on the responsibilities of a particular minister without the need to hold the government collectively to account. However, it has been argued that the inclusion of the collective responsibility of government is under challenge in the legal and political system in Britain and has become rather limited.²³⁰ This is because Parliament, as an institution, is expected to both supply and maintain government, while also being required to hold it to account.²³¹ Practically, therefore, ‘the party machine’, as Low commented,²³² has always intervened in case of a serious attack against the government in order to sustain the departmental chief.²³³ Rightly, Tomkins observes:

What we have come to mean when we say that the Government is accountable to parliament is that the Government is accountable to a group of politicians, the majority of whom are members of the same political party as that which forms the Government.²³⁴

In today’s politics, it is very rare that a government lacks the ability to achieve an overall majority against a vote of ‘no confidence’. The last practice of a motion of ‘no confidence’ was called by opposition MPs in Parliament in March 1979 against James Callaghan’s Labour government. This motion was marginally passed by 311 votes against the 310 MPs who opposed it. The following parliamentary election on May 1979 was won by Margaret Thatcher’s Conservative Party.²³⁵

There are a number of reasons for this inherent limitation in terms of the effectiveness

²²⁸ Woodhouse D, *Ministers and Parliament: Accountability in Theory and Practice* (Clarendon Press 1994) 3.

²²⁹ Blackburn R, *King & Country: Monarchy and the Future King Charles III* (Methuen Publishing 2008).

²³⁰ *ibid.*

²³¹ Tomkins A, *Public Law* (Oxford University Press 1983) 92.

²³² Sidney L, *The Governance of England* (GP Putnam 1920) cited by Finer S, ‘The Individual Responsibility of Ministers’ (1956) 34(4) *Public Administration* 377–377.

²³³ *ibid* Finer (n 232).

²³⁴ *op cit* Tomkins (n 231) 164.

²³⁵ See <<https://www.gov.uk/government/history/past-prime-ministers/james-callaghan>>.

of parliamentary accountability in the UK. The first reason is related to the electoral system. Over the past century, UK governments have won elections with a clear party majority, in which such a majority was reflected in Parliament. However, not all of these electoral majorities reflected popular support. Rather, the impact of the nature and working of the first-past-the-post voting system was:

[T]o produce the least number of parties in the House of Commons: whatever the voting pattern, the usual result is for one party to receive an overall majority of seats, a second party to secure a substantial number of seats and form the opposition, and all other parties to be squeezed out of any substantial presence in the Commons.²³⁶

In addition, the impact of the geography of power in the electoral system has led to a state of disproportionality.²³⁷ It is extremely rare, therefore, that parties achieve the same proportion of seats as they do of the votes through this electoral system.²³⁸ The recent parliamentary general election of 2015 might support this argument. For example, the two major parties, the Conservatives and Labour, occupied 563 out of 650 seats in the House of Commons, an absolute majority for the former with 331 seats, and 232 seats for the latter, based on 11,334,567 votes and 9,347,304 votes respectively. In contrast, the comparison between the results of the Scottish National Party (SNP) and the United Kingdom Independence Party (UKIP) shows a remarkable position. With only 1,454,436 votes, the (SNP) secured 56 seats. UKIP achieved more than double the votes, at 3,881,099 votes; nevertheless, they won only a single seat.²³⁹

Many argue that disproportional representation is a price worth paying to secure, ‘a strong government with clear mandates and majorities’.²⁴⁰ According to the UK election statistics: 1918–2012, throughout the 25 UK general elections since 1918, ‘on fifteen occasions the Conservatives won the most seats while Labour won the most seats on ten occasions. In four general elections no party secured an overall majority of seats’.²⁴¹ These facts might explain why it is difficult for such governments to lose the

²³⁶ Blackburn R, *The Electoral System in Britain* (Macmillan Press 1995) 18; Al-Desaiem N, ‘The Right of Dissolution in the Parliamentary System’ (PhD thesis, University of Cairo 2012) 399.

²³⁷ Johanston R and others (eds), *From Votes to Seats: The Operation of the Electoral System since 1945* (Manchester University Press 2001) 199.

²³⁸ *ibid.*

²³⁹ See BBC <<http://www.bbc.com/news/election/2015/results>>. accessed 30 January 2017.

²⁴⁰ *op cit* Johanston (n 237).

²⁴¹ McGuinness F, Cracknell R and Taylor M, *UK Election Statistics 1918-2012* (Commons briefing paper, RP12-43, 2012).

confidence of Parliament, because of the combination of parliamentary majority and the discipline that exists within parties, which gives governments protection against collective responsibility.

The second reason behind the limited practice of collective responsibility might be related to the diminished role of the House of Lords over the course of the last century.²⁴² Historically, the House of Lords was more independent, whereby it performed a rather important check on government. However, due to the membership system, the House is dominated by the peers recommended by the PM of the day.²⁴³ The House has become, over time, a secondary House in Parliament. Such a fact seems paradoxical for democracy. As a result of the absence of an independent representative authority, it is suggested that, ‘the House lacks the legitimacy to resist government effectively’.²⁴⁴

A third reason is that the government might lose a wide variety of votes but still not be treated as having lost the confidence of Parliament. The form and applicability of confidence motions has no set rules. They are founded by convention rather than by law. Thus, the question of what figure is regarded technically as a vote of no confidence in the British parliamentary system is worth explaining in this regard. A confidence motion is a political manoeuvre that directly examines whether the confidence of Parliament in the government of the day should exist:

No other parliamentary event *requires* such an outcome, and suggestions that various other important occasions, such as the Queen’s Speech or the second reading of the Finance Bill, are tantamount to confidence motions, remain speculative. [Therefore], not all motions are stated in the terms, ‘That this House has (no) confidence in Her Majesty’s Government’; some refer to (no) confidence in particular policies.²⁴⁵

After the enactment of the Fixed Term Parliaments Act 2011 (FTPA),²⁴⁶ a vote of no confidence has to be an explicitly worded motion. Thus, the wording of a no confidence motion has to be precise, and motions that are criticising or censuring

²⁴² op cit Blackburn (n 124) 638.

²⁴³ Shell D, ‘The House of Lords: Time for a Change?’ (1994) 47(4) Parliamentary Affairs 721–737.

²⁴⁴ *ibid.*

²⁴⁵ Kelly R, *Confidence Motions* (Commons briefing paper SN02873 HC 2013).

²⁴⁶ The Fixed-Term Parliaments Act 2011.

the government would not qualify.²⁴⁷ In addition, under FTPA a vote of no confidence does not always lead to the dissolution of Parliament. There are only two ways to hold an earlier election, 'If a motion of no confidence is passed and no alternative government is found or, if a motion for an early general election is agreed either by at least two thirds of the House or without division.'²⁴⁸ Therefore, it is possible for a parliament to continue although a motion of no confidence has been passed against the government of the day. Article 2 of the FTPA allows a period of 14 days for the House of Commons to agree upon forming a new government, otherwise early election is triggered automatically by virtue of the Act.²⁴⁹

As a result, it is widely agreed that individual ministerial responsibility rather than collective responsibility has attracted much more practical constitutional and political significance, 'so that the theoretical power residing in parliament to bring about the dismissal of a minister if he offends is not a very effectual check upon the conduct of any member of the supreme joint responsibility'.²⁵⁰ Therefore, it has been regarded as, 'the constitutional mechanism by which parliament claims to fulfil its function of controlling and scrutinizing the Executive, and therefore permeates the procedures and language of the legislature'.²⁵¹

Evidently, there are two general lessons which can be drawn from the UK experience with regard to the political responsibility of ministers. First, it is important that ministers should conduct their work within a system that provides solid political support to enable them to exercise their ministerial duties in a stable political environment. Second, both collective and individual responsibility of ministers are required in order to sustain an effective system of accountability. Notwithstanding, focusing on the routine mechanisms of control imposed on ministers is believed to reflect a better and more accountable system of governance.

However, although the collective responsibility of the government in Kuwait is systematically protected, individual responsibility of ministers is also difficult to

²⁴⁷ Norton P, 'The Fixed-Term Parliaments Act and Votes of Confidence' (2015) *Parliamentary Affairs* 1–16.

²⁴⁸ Fixed Term Parliaments Act 2011, Article Two, subsection 1(a).

²⁴⁹ op cit Norton (n 247).

²⁵⁰ Cole M, 'Accountability and Quasi-government: The role of Parliamentary Questions' (1999) 5(1) *Journal of Legislative Studies* 77–101.

²⁵¹ Woodhouse D, *Ministers and Parliament: Accountability in Theory and Practice* (Clarendon Press 1994) 4.

achieve due to other reasons. The following section discusses these problematic situations.

6.2.2.2 The Vote of Ministerial No Confidence (Individual Responsibility of Ministers)

According to Article 101 of the Kuwait Constitution:

If the Assembly passes a vote of no-confidence against a minister, he is considered to have resigned his office as from the date of the vote of no-confidence and shall immediately submit his formal resignation. The question of confidence in a minister may not be raised except upon his request or upon a demand signed by ten members, following a debate on an interpellation addressed to him. The Assembly may not make its decision upon such a request before the lapse of seven days from the presentation thereof.

Withdrawal of confidence from a minister shall be by a majority vote of the members constituting the Assembly, excluding ministers, who do not participate in the vote of confidence.

To assess the application of individual political responsibility of ministers in Kuwait, one must recognise the sensitivity of the Kuwaiti Government, in the period before the Iraqi invasion of Kuwait in 1990, toward the NA's attempts to call ministers to account. During this period, 1963–1990, parliament was dissolved unconstitutionally twice,²⁵² both incidents of which occurred as a consequence of parliament applying its functions of accountability.²⁵³ The Government's behaviour towards parliamentary accountability may pertain to two important considerations. Firstly, based on the NA members' lack of experience, the quality of most interpellations of this period were described as being based on less important subjects.²⁵⁴ Except for the interpellation of the Minister of Justice, Sheik Salman Al-Sabah, in 1985 regarding claims of using public funds for his personal interests, which resulted in his resignation, and the interpellation of the Minister of Oil and Finance, Abdul Rahman Al-Ateeqi, in 1974 due to accusations of misconduct regarding his responsibilities for maintaining and

²⁵² In 1976 and 1986.

²⁵³ Tétreault M, *Stories of Democracy: Politics and Society in Contemporary Kuwait* (Columbia University Press 2000) 67.

²⁵⁴ op cit Al-Remaidhi (n 158).

developing the states' oil reserves,²⁵⁵ the subjects of most interpellations were characterised as shallow.²⁵⁶ Secondly, the government's immature experience with parliamentary mechanisms of control created much of a political climate of tension upon the accountability of ministers.²⁵⁷ At this early stage, NA members' attempts to bring ministers to account, fuelled by an unstable regional environment, was largely viewed by the government as a threat to the State's stability.²⁵⁸

However, after the liberation of the country in 1991, and as result of the new arrangements between the people of Kuwait and the Al-Sabah ruling family in Jeddah toward the government's commitment to parliamentary opposition leaders for more democratisation,²⁵⁹ the application of parliamentary mechanisms of accountability radically progressed to a serious level of effective control. The government also showed more tolerance towards the NA's constitutional tools of accountability.

It might be true, to some extent, to assume that the mechanism of interpellation was a crucial instrument to apply the individual political responsibility of ministers.²⁶⁰ Evidence shows that this method has affected the way in which ministers conduct their ministerial operations. For example, according to an analytical study, interpellations submitted to ministers of education in Kuwait have proved to develop the quality of management in education.²⁶¹ Ministers were keen to respond to the criticisms that were raised within interpellations to make the required reforms, which resulted in changing many negative policies and regulations.²⁶²

Others argue that due to the absence of a political party system in Kuwait, most of the interpellations were derived from the personal agendas of the NA members.²⁶³ Thus, in a system that exempts the PM from bearing political responsibility for the wrongdoings

²⁵⁵ Department of Documentation and Information, National Assembly, <<http://www.kna.kw/clt/run.asp?id=190#sthash.p7bVpfx.zxlEVot.dpbs>>. accessed 30 January 2017.

²⁵⁶ op cit Al-Remaidhi (n 158).

²⁵⁷ op cit Nassar (n 163) 131.

²⁵⁸ Baaklini A and others, *Legislative Politics in the Arab World: The Resurgence of Democratic Institutions* (Lynne Rienner Publishers 1999) 184.

²⁵⁹ Roberts D, 'Kuwait' in Christopher Davidson *Power and Politics in the Persian Gulf Monarchies* (Hurst & Company 2011) 95.

²⁶⁰ Interviewee C3.

²⁶¹ Al-Enazy M, 'The Impact of Parliamentary Interpellation of Ministers of Education on Educational Management' (2012) 4(10B) *Childhood and Education Journal*.

²⁶² The minutes of the Constituent Assembly.

²⁶³ Interviewee B1.

of his ministers, the individual political responsibility of ministers is abused for personal motivation and marginal issues.²⁶⁴ According to the Constitution:

Deliberations of the Council of Ministers (COM) are secret. Resolutions are passed only when the majority of its members are present and with the approval of the majority of those present ... Unless they resign, the minority has to abide by the opinion of the majority.²⁶⁵

According to this Article, ministers must approve their policies in the COM before implementing them. Despite the result of the COM's vote on these policies, all ministers should abide by its decisions. Nevertheless, 'The PM does not hold any portfolio; nor shall the question of confidence in him be raised before the NA.'²⁶⁶ He is responsible only for presiding, 'over the meetings of the COM and supervises the co-ordination of work among the various ministries'.²⁶⁷ Under such a setting, the PM has been able to override many interpellations addressed against him on the basis that they were linked to the responsibility of a particular minister.²⁶⁸ Consequently, it could be argued that under this system the PM became immune to any misconduct of his ministers' policies, although such policies were approved in advance in the COM.

As a result of this legal condition and of the political tensions surrounding the declarations of non-cooperation against the PM, the main focus of parliamentary accountability was on the individual responsibility of ministers. In many scenarios, if the PM faces serious challenges over one of his ministers, 'the usual practice was to sacrifice the minister under attack, to move the minister to another ministry or, to force him to resign, even if he was a virtuous person'.²⁶⁹ This practice allowed the government as a whole to maintain its doubtful confidence. Eventually, a former minister argued, 'They don't care how good you are, but how good the NA's members are with you'.²⁷⁰ Therefore, ministers were forced to act individually to sustain the confidence of the NA members,²⁷¹ and thus each minister is also forced to follow his

²⁶⁴ Interviewee A1.

²⁶⁵ Article 128 of Constitution.

²⁶⁶ *ibid* Article 102(1).

²⁶⁷ *ibid* Article 127.

²⁶⁸ Interviewee A1.

²⁶⁹ Interviewee C2.

²⁷⁰ *ibid*.

²⁷¹ Interviewee B1.

own personal agenda.²⁷² On some occasions, the ministers manipulated regulations to provide benefits to the NA members in order to please them and maintain their offices.²⁷³ On other occasions, the ministers' agenda operated against another ministerial colleague in order to evade drawing attention to themselves.²⁷⁴

Despite all the attempts, the records of parliamentary history have never registered a successful motion of no confidence against a minister. This is because government would never wait until the situation has reached the stage in which NA members would declare a successful vote of no confidence. In some cases, it has been claimed that, 'the Government often considers an attack on a particular minister as an attack on itself as a whole, therefore, different tactics are used to help its ministers evade political responsibility, namely collective solidarity, ministerial reshuffle and dissolution of parliament'.²⁷⁵ On many occasions, the NA's serious attempts to control the Executive and hold it accountable were confronted by dissolution of the NA, in a practice that contradicts the express provisions of the Constitution, which reveals an attempt to amend the theory of dissolution in Kuwait's rigid Constitution.²⁷⁶

Furthermore, a large number of ministers who were forced to resign following interpellations were then appointed directly as special advisers to the Amir. This practice reveals the government's support of its members even though they were politically disregarded.²⁷⁷ To this extent, the NA is unable to activate the most important feature in democratic theory: political responsibility.

6.3 Support Mechanisms

This section discusses important elements that are necessary to support parliaments in controlling the Executive's powers. It is notable that in the previous sections of this chapter, the study has outlined the importance of the technical advice required in the context of inquiry and select committee functions.²⁷⁸ This section will focus briefly on

²⁷² Interviewee B2.

²⁷³ *ibid.*

²⁷⁴ Interviewee B1.

²⁷⁵ *op cit* Al-Remaidhi (n 158).

²⁷⁶ Al-Mouqatei M, 'A Study of the Kuwaiti Constitutional Experience' (PhD thesis, University of Warwick 1987) 370.

²⁷⁷ Interviewee G1.

²⁷⁸ See section 6.2.1.3.

access to official information as an essential requirement for accountability. Second, it will discuss the role of the Ombudsman as a supporting technical mechanism for parliament. Finally, it will address the role of the political parties in improving the system of government accountability.

6.3.1 Accountability and Access to Information

It has been argued that, ‘an important control mechanism is the ability of parliament to hold the Executive authority accountable and, importantly, information regarding the Executive’s actions or inactions is critical for the smooth operation of democracy’.²⁷⁹ In fact, ‘the ability to ensure the effective acquisition of relevant information is essential to parliament’s key tasks of engaging in meaningful and effective debate, and of scrutinizing the work of the Executive’.²⁸⁰ Therefore, according to the World Justice Project (WJP) Rule of Law Index:²⁸¹

An open government – conventionally understood as a government that is transparent, accessible, responsive, and participatory – is a necessary component of a system of government founded on the rule of law. An open government provides access to information, empowers people with tools to hold the Government accountable, and fosters citizen participation in public policy deliberations. Openness helps improve public service delivery, enhances government legitimacy amongst the population, and encourages citizens to collaborate with their government and monitor its performance.

In this way, access to information empowers MPs and citizens to hold the government’s institutions to account. It promotes openness, accountability and trust regarding public administration.²⁸² In Kuwait, access to official information is a very difficult process.²⁸³ The government does not offer, nor is it obliged to provide, official information except under judicial orders. In fact, ‘the NA’s members, journalists and NGO’s activists, in particular, are struggling to obtain information that reveals official maladministration’.²⁸⁴

²⁷⁹ op cit Cole (n 250) 77–101.

²⁸⁰ Tomkins A, ‘A Right to Mislead Parliament?’ (1996) 16 *Legal Studies* 63.

²⁸¹ See <<http://worldjusticeproject.org/open-government-index/dimensions>>. accessed 30 January 2017.

²⁸² Worthy B, ‘Freedom of Information and Parliament’ in Horne A and others, *Parliament and the Law* (Hart 2013) 152.

²⁸³ Interviewees G1, C1, C2 and E1.

²⁸⁴ Interviewee G2.

By contrast, in the UK, the belief in bringing about open government has led to the enactment of the Freedom of Information Act 2000 (FOIA),²⁸⁵ which enables individuals to obtain official information, and which ends, ‘the traditional culture of secrecy’, as ex-PM Tony Blair described it.²⁸⁶ Consequently, it has become, ‘an unremovable part of the constitution’.²⁸⁷

Under the FOIA, public authorities must reply clearly to requests for information within 20 days, subject to extension for specific reasons, unless information is refused on statutory grounds. It has been argued that the refusal of a request for information based on public interest, ‘still provides considerable opportunity for ministerial manoeuvring’.²⁸⁸ Under FOIA, public departments have the right to deny requests for information in accordance with a number of exemptions.²⁸⁹ Refusal is then subject to the judgment of the Information Commissioner to evaluate and comment on the reasons behind the decision of the governmental department.²⁹⁰ If he finds that the authority is failing to comply with its duties under the FOIA, he can issue an enforcement notice. An authority which does not comply with these notices may be treated as, ‘if it had committed a contempt of court’.²⁹¹ A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Information Tribunal against the notice.²⁹² Ministers and the Attorney General have, however, the right of veto which overrides the commissioner or the tribunal’s conclusion to allow the disclosure of denied requests of information. Although these vetoes are subject to judicial review, which is, ‘seen as a shift from political forms of accountability to legal forms’.²⁹³ Parliament may also politically bring to account the ministers’ unjustified usage of such rights. Under this Act, even the UK Parliament has become more transparent, and more accountable in the aftermath of the expenses

²⁸⁵ Freedom of Information Act 2000.

²⁸⁶ Cabinet Office, *Your Right to Know, The Government’s Proposals for a Freedom of Information Act* (Cm 3818, 1997) <<https://www.gov.uk/government/publications/your-right-to-know-the-governments-proposals-for-a-freedom-of-information-act>>. accessed 30 January 2017.

²⁸⁷ Birkinshaw P, ‘Regulating Information’ in Jowell J and others, *The Changing Constitution* (8th edn, Oxford University Press 2015) 408.

²⁸⁸ Woodhouse D, ‘Ministerial responsibility: something old, something new’ [1996] Public Law 410–426; *ibid* Birkinshaw 379.

²⁸⁹ Freedom of Information Act 2000, part II.

²⁹⁰ See <<https://ico.org.uk/about-the-ico/what-we-do/>>. accessed 16 October 2016.

²⁹¹ Freedom of Information Act 2000 Article 54 (3).

²⁹² *ibid* Article 57 (2).

²⁹³ Oliver D, *Constitutional Reform in the UK* (Oxford University Press 2003) 167.

scandal of 2009, which was regarded as, ‘the biggest impact of FOI in relation to the UK Parliament’.²⁹⁴

According to Cabinet Office statistics, from 2006 to 2015 there has been a steady increase in requests for official information.²⁹⁵ It also shows that the proportion of requests granted with a full response reflects a downward trend since the end of 2013. Such facts, ‘reflect a changing nature of requests as the monitored bodies have made more routine information available to the public in the form of regular quarterly and annual statistical publications’.²⁹⁶ Although it is claimed that this Act, ‘is not a useful tool to obtain a proper overview of how institutions operate, but it can expose areas of weakness not always noticed by officials or politicians’.²⁹⁷

However, a statement in 2015 by Christopher Grayling, the Minister of Justice, about the people’s abuse of FOI, as a ‘research tool’ to ‘generate stories’ for the media, indicates the government’s irritation with this powerful method.²⁹⁸ In 2005, for instance, the government received several requests for copies of correspondence between the Prince of Wales and government ministers dating back over thirty years. This was known as ‘the Black Spider Memos’.²⁹⁹ The government refused these requests under the FOIA exemption covering communications with the sovereign and the heir to the throne.³⁰⁰ The government maintained that Prince Charles was perfectly entitled to correspond with ministers and that it was proper, even vital, to keep this correspondence confidential. However, after a lengthy legal confrontation, the court proceedings ended on 26 March 2015 with the Supreme Court confirming that the Information Tribunal should order the release of most of the information.³⁰¹ These

²⁹⁴ Hazell R and others, ‘Open House? Freedom of Information and its Impact on the UK Parliament’ (2012) 90 Public Administration 4; op cit Worthy (n 273) 152.

²⁹⁵ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486494/freedom-of-information-statistics-jul-sep-2015.pdf> accessed 16 October 2016.

²⁹⁶ *ibid.*

²⁹⁷ op cit Hazell (n 285).

²⁹⁸ <<http://www.theguardian.com/media/2015/oct/29/freedom-of-information-journalists-chris-grayling-foi>> accessed 16 October 2016.

²⁹⁹ See <https://en.wikipedia.org/wiki/Black_spider_memos> accessed 10 November 2016.

³⁰⁰ See <<https://www.theguardian.com/uk-news/video/2014/nov/21/prince-charles-black-spider-memos-video>> accessed 16 October 2016.

³⁰¹ *R (Evans) & Anr v Attorney General* [2015] UKSC 21; see <<https://www.gov.uk/government/collections/prince-of-wales-correspondence-with-government-departments>> accessed 16 October 2016.

letters are now available online for the public to make a judgement about the role of the Monarch within a democracy.³⁰²

As a result of these perceived difficulties, an independent commission was established on 17 July 2015 to review the Freedom of Information Act 2000.³⁰³ In its report, the Commission concluded that:

The Act is generally working well, and it has been one of a number of measures that have helped to change the culture of the public sector. It has enhanced openness and transparency. The Commission considers that there is no evidence that the Act needs to be radically altered, or that the right of access to information needs to be restricted.³⁰⁴

However, it has been argued that, ‘transparency is much broader than access: it means opening up the process of governance to scrutiny, investigation, monitoring and explanation, and that, where people wish to participate, meaningful opportunities should be provided’.³⁰⁵ As a result of the enactment of The Constitutional Reform and Governance Act 2010, the ideology of freedom of information in the UK not only considers the right of individuals to obtain official information from a particular governmental department according to the FOI Act, but also believes that all public records should be available proactively to the public without the need to demand them through publication schemes. Official information should not be retained forever; it must be revealed in due course. From January 2013 onwards, after 20 years have passed since their creation, all government closed records will be transferred to the National Archives,³⁰⁶ and accordingly released to the public.³⁰⁷ In light of such a policy, officials will have to bear in mind that at a certain time, all of their secret activities will be revealed to the public. This policy will significantly improve transparency in the system of governance and thus control officials’ activities.

³⁰² *ibid.*

³⁰³ See <<https://www.gov.uk/government/organisations/independent-commission-on-freedom-of-information>> accessed 16 October 2016.

³⁰⁴ Independent Commission on Freedom of Information, *Report* March 2016. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf> accessed 16 October 2016.

³⁰⁵ *op cit* Birkinshaw (n 287) 379.

³⁰⁶ The Constitutional Reform and Governance Act 2010 Part 6; <<http://www.nationalarchives.gov.uk/information-management/legislation/public-records-act/public-records-system>> accessed 16 October 2016.

³⁰⁷ See <<https://www.gov.uk/government/publications/twenty-year-rule-on-public-records>> accessed 16 October 2016.

Such policies which concern, ‘widespread democratic involvement in the exercise of power, accountability, explanation, and the sharing of Knowledge’³⁰⁸ are the ideas that should be transferred to Kuwait, in order to strengthen the accountability system of government toward the NA and the public.

6.3.2 Technical Advice

The mechanisms of parliamentary accountability need supporting instruments that are capable of furnishing information regarding official maladministration. As observed:

We don’t have an active body that supports research to enhance our knowledge and improve our controlling function. Nor do we have access to official reports and statistics. On many occasions, I had to search for information myself, moving from governmental department to another which was time and effort consuming. I believe it is intended to make it as hard as possible in order to hinder our controlling responsibilities.³⁰⁹

In addition, due to the political influence of the machinery of the parties in parliament’s decision-making processes, ‘elected representatives are no longer trusted to make all decisions’.³¹⁰ Instead, the need for experts to institute impartial codes of conduct has been sought. Recent developments have revealed a trend towards depoliticising the constitutional watchdogs that control the government’s work, towards, ‘rules-based governance, open to judicial attention’.³¹¹ Therefore:

[A]s parliament’s ability to achieve accountability has been called into question, there has been an increased use of the mechanisms of direct democracy, such as citizens’ juries and focus groups. The expansion in the scope of regulators of privatized utilities, inspectors, commissions, ombudsmen, and even the Citizens’ Charters has changed the public’s understanding of what accountability means.³¹²

³⁰⁸ op cit Birkinshaw (n 287).

³⁰⁹ Interviewees C5.

³¹⁰ Gay O and Winetrobe BK (eds), ‘Parliament’s Watchdogs: At the Crossroads’ (UK Study of Parliament Group, University College London 2008).

³¹¹ Hay and others, ‘Hansard Society’ (2008) cited in ibid Gay and Winetrobe.

³¹² Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable – Report of the Hansard Society Commission on Parliamentary Scrutiny* (Vacher Dod 2001)

<https://assets.contentful.com/u1rlvvbs33ri/29q9xBIXXy2sGsM0eG4OyO/2c51e61ec417140e245c2b6f108e1d38/Publication__The-Challenge-for-Parliament-Making-Government-Accountable-2001.pdf> accessed 30 January 2017.

Accordingly, there have been areas where Parliament has utilised information from external experts to improve its scrutiny of the government's activities and,³¹³ in this sense, 'the Parliamentary Commissioner for Administration (PCA or Parliamentary Ombudsman)³¹⁴ has been successful'.³¹⁵ The key role of an Ombudsman is to alert Parliament to any forms of injustice that have occurred through officials' maladministration.³¹⁶ Maladministration includes, in the words of Cabinet minister, Richard Crossman, when introducing the legislation in 1966, 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on'.³¹⁷

This role creates a threat to the government. 'While ministerial responsibility prevails, ministers will no doubt, from time to time, recoil from the heat of Ombudsman critique' if their departments are found to be breaching the law.³¹⁸ This possibility is what secures the vital role of Ombudsman as an effective check on executive power. Therefore, this study aims to focus on this mechanism in order to explore the potential to apply such a method in Kuwait to improve parliament's accountability of the Executive's functions.

It has been argued that the stated purpose of the enactment of the UK Parliamentary Commissioner Act 1967 was to, 'humanise the bureaucracy'.³¹⁹ However, such an attractive model was not just a mechanism to resolve individual disputes, 'but was for doing so in a manner that reinforces and is complementary to the larger political goals of a modern liberal democracy'.³²⁰ Under this Act, 'the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this act applies'.³²¹ However, any complaint shall be referred to the Commissioner by a member of the House of Commons.³²²

³¹³ For more details see Giddings P, 'The Parliamentary Ombudsman: A Successful Alternative' in Oliver D and Drewry G (eds), *The Law and Parliament* (Butterworths 1998).

³¹⁴ See <<http://www.parliament.uk/site-information/glossary/parliamentary-commissioner-for-administration>>.accessed 30 January 2017.

³¹⁵ op cit Commission on Parliamentary Scrutiny (n 312).

³¹⁶ Gay O, *The Ombudsman – the developing role in the UK* (HC SN04832).

³¹⁷ HC Deb 18 October 1966, vol 734, col 51; *ibid* Gay.

³¹⁸ Abraham A, 'The Ombudsman and the Executive: The Road to Accountability' [2008] Parliamentary Affairs 61, 535–544.

³¹⁹ *ibid*.

³²⁰ *ibid*.

³²¹ Parliamentary Commissioner Act 1967.

³²² Gregory R, 'The Ombudsman, the Citizen and Parliament: A History of the Office of the Parliamentary Commissioner for Administration and Health Service Commissioners (2003) 9 Journal of Legislative Studies 117.

Coupled with the fact that the Ombudsman's reports on such cases are to the relevant Member of Parliament, this is a significant indicator of ownership. It is one of the most important reasons why the Ombudsman is regarded as an Officer of Parliament.³²³

The importance of the Ombudsman's findings and recommendations is that they can escalate, 'from the very particular to the very general, from the individual instance of maladministration to the very edge of policy considerations', which contribute in improving the quality of public services.³²⁴ Ultimately, this contribution in overseeing public administration by such independent professional technicians enhances Parliament's ability to control the government more effectively.

This study is interested in transferring these types of successful policies to Kuwait in order to develop the system of parliamentary accountability of the Executive. The creation of such independent professional controlling bodies should achieve two important advantages. They can generate valuable information about officials' maladministration which will empower the NA's members to better employ their control function over the Executive. Also, they can provide an effective level of support for the NA's members in scrutinising and analysing public complaints about public authorities.

6.3.3 Political Parties

The Constitution of Kuwait is silent regarding the establishment of political parties. However, it confirmed in Article 43 that, 'freedom to form associations and unions on a national basis and by peaceful means shall be guaranteed in accordance with the conditions and manner specified by law'.³²⁵ Notwithstanding, the Explanatory Memorandum of the Constitution in regard to explaining this article stated that it, 'neither permits the establishment of political parties nor prohibits them, rather it delegates the ordinary legislature to do so if desired'.³²⁶ No legislation, however, has been passed to organise the function of political parties.

³²³ op cit Giddings (n 313) 96.

³²⁴ op cit Abraham (n 318).

³²⁵ Al-Remaidhi A and Watt B, 'Electoral Constituencies and Political Parties in Kuwait: An Assessment' (2012) 11(4) Election Law Journal 518–528.

³²⁶ Explanatory Memorandum of the Constitution.

In the absence of organised political parties, the political arena in Kuwait is formed around various association settings.³²⁷ Political grouping in Kuwait is divided into three categories.³²⁸ Firstly, there are political groups based on political aims and programmes, which follow certain ideologies and apply, to some extent, internal regulations to fulfil their goals and political objectives. Among them are *Al Minbar Al Demograti* (The Democratic Platform), *Al Tahaluf Al Watani Al Demograti* (The National Democratic Alliance), and *Harkat Al Amal Al Sha'abi* (Popular Action Movement). Secondly, there are political organisations which are based on Islamic ideologies such as *Al Harakah Al Distoriah Al Islamiyah* (Kuwait Muslim Brotherhood), *Al Harkah Al Salafiah* (The Ancestral Movement), both of which represent *Sunni* Muslims, in addition to *Al Tahaluf Al Islami Al Watani* (The National Islamic Alliance) which represents *Shiat* Muslims.³²⁹ It has been argued that these political groups have had a significant political role in political life and in parliament in particular.³³⁰ All of these originations produced candidates for parliament and, in many cases, their members of parliament formed a unified block in terms of controlling the Executive's powers. Therefore, they were seen as, 'seeds of the future political parties'.³³¹ Finally, tribes in Kuwait also play a significant role in political life.³³² The tribes of *Al Awazem*, *Mutair*, *Ejman*, and *Al Reshaidah* form nearly 30 per cent of the population of Kuwait.³³³ These tribes control the parliamentary seats in their constituencies in most general elections. For example, in the general elections of 2012 the tribes dominated more than 50% of the NA's seats.³³⁴

It has been argued that some political competition and pluralism is allowed in most Arab regimes, including Kuwait, to the extent that it is within the rules of the game,

³²⁷ Al-Mudairis F, *Primary Features of Establishment of Political Organizations in Kuwait 1938-1975* (Dar Al-Quertas 1999).

³²⁸ Al-Gazali S, *The Political Groups in Kuwait in A Century 1910-2007* (Kuwait, no publisher 2007).

³²⁹ Al-Zumai A, 'The Intellectual and Historical Development of the Islamic Movement in Kuwait 1950-1981' (PhD dissertation, University of Exeter 1988).

³³⁰ Ulrichsen K, 'Politics and Opposition in Kuwait: Continuity and Change (2014) 4(2) Journal of Arabian Studies 214-230.

³³¹ op cit Al-Remaidhi (n 158).

³³² Salih KO, 'Kuwait Primary (Tribal) Elections 1975-2008: An Evaluative Study' (2011) 38(2) British Journal of Middle Eastern Studies 141-167.

³³³ Salih KO, 'Kuwait: Political Consequences of Modernization, 1750-1986 (1991) 27(1) British Journal of Middle Eastern Studies 46-66.

³³⁴ see <<http://foreignpolicy.com/2012/02/08/the-identity-politics-of-kuwaits-election>>. accessed 30 January 2017.

which are carefully drawn to guarantee that regime opponents are disempowered.³³⁵ The ruling elite, ‘considers improving the political participation method would result in weakening its powers’.³³⁶ In fact, in such systems, rulers, ‘strive to pit one group against another in ways that maximize the rulers’ room for manoeuvre and restrict the opposition’s capacity to work together’.³³⁷ To achieve this goal, one would understand why electoral and political practices are designed to advantage personal, ethnic and tribal bonds over organised political parties.³³⁸ Political actors, in such an environment that ‘disallows formal political groupings, and where platforms tend to reflect personal and populist, rather than ideological, agendas’,³³⁹ face challenges in building healthy political institutions. Consequently, in such a defragmented political practice, ‘parliaments that result from these limited elections have no real power to legislate or govern as more or less unlimited authority continues to reside with hereditary kings and imperial presidents’.³⁴⁰ In terms of democratisation, it is argued, ‘Kuwait is on the top of the list among its authoritarian neighbouring systems, but also on the top of the political corruption list’.³⁴¹

Popular participation in government is considered to be a crucial attribute of democracy.³⁴² However, as voting is the principal practice for public participation in the decision-making process, political parties have been observed as the ultimate mechanism in which voting can reflect the genuine choice of the people.³⁴³ In other words, the system of voting through political parties offers effective channels in which citizens can express their preferences.³⁴⁴ Therefore, in modern political systems, competition between political parties over power has become the most important feature of democracy. Thus, it is argued that, ‘the condition of the parties is the best

³³⁵ Larry D, ‘Why Are There No Arab Democracies?’ (2010) 21(1) *Journal of Democracy* 93–112.

³³⁶ Interviewee C1.

³³⁷ Brumberg D, ‘The Trap of Liberalized Autocracy’ (2002) 13(4) *Journal of Democracy* 56–68.

³³⁸ As’Ad A, ‘Change and Democratization in the Arab World: The Role of Political Parties’ (1997) 18 *Third World Quarterly* 149.

³³⁹ Ulrichsen K, ‘Pushing the Limits: The Changing Rules of Kuwait’s Politics’ (2016) *World Politics Review* <<http://www.worldpoliticsreview.com/articles/18241/pushing-the-limits-the-changing-rules-of-kuwait-s->> accessed 12 November 2016.

³⁴⁰ op cit Larry (n 335).

³⁴¹ Interviewee G3.

³⁴² Riker WH, *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice* (Waveland Press 1988) 5.

³⁴³ *ibid.*

³⁴⁴ Lawrence E, *In Linking Citizens and Parties: How Electoral Systems Matter for Political Representation* (Oxford University Press 2010).

possible evidence of the nature of any regime'.³⁴⁵ Political parties play a key role in building a strong oppositional front against government tyranny. As a matter of fact, without political parties, it is difficult for disorganised individuals to resist arbitrary rule. Indeed, 'the most important distinction in modern political philosophy, the distinction between democracy and dictatorship, can be made in terms of party politics'.³⁴⁶ They are in short, 'the mainspring of all the processes of democracy',³⁴⁷ and, particularly, in forming and organising the opposition which prevents government tyranny.³⁴⁸

There are varying levels of accountability which can be performed within the inner circle of a party-based government. For example, party accountability has been referred to as, 'the duty of ministers to account to their parliamentary party in order to retain their confidence and support'.³⁴⁹ Matthew Flinders, during his interviews with ministers and PMs, has observed a number of informal meetings and a whole range of powerful forms and important channels of accountability between them.³⁵⁰ In addition, internal party democratisation can play a vital role in advancing democracy in general and, in particular terms, in providing and maintaining qualified decision-making players.³⁵¹ In most democratic systems,³⁵² political parties have become the driving force to form, educate, and present public opinion.³⁵³ On the one hand, they form a critical communication channel between electors to select MPs, and, on the other hand, they create a strong political front that empowers their members to apply ministerial responsibility and to call ministers to account.³⁵⁴ Therefore, the adoption of a non-political party system in Kuwait renders the NA members scattered individuals in which

³⁴⁵ Schattschneider EE and Pearson SA, *Party Government: American Government in Action* (Library of Liberal Thought, Transaction Publishers 2003).

³⁴⁶ op cit Schattschneider (n 345).

³⁴⁷ Blackburn R, *The Electoral System in Britain* (Macmillan Press 1995) 4.

³⁴⁸ Birch A, *The British System of Government* (Weidenfeld and Nicolson 1970) 14.

³⁴⁹ Flinders P, *The Politics of Accountability in the Modern State* (Ashgate 2001) 115.

³⁵⁰ *ibid.*

³⁵¹ Hazan RY and Rahat G, *Democracy within Parties: Candidate Selection Methods and their Political Consequences* (Oxford University Press 2010).

³⁵² Political Parties, Elections and Referendums Act 2000.

³⁵³ Finer S, *The Changing British Party System 1945-1979* (American Enterprise Public Policy Research 1980) 171.

³⁵⁴ *Standards in Public Life* (CM 4057 1998)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336870/5thInquiry_FullReport.pdf> accessed 30 January 2017.

their ability to challenge the Executive's powers is weakened.³⁵⁵

One should wonder whether it is a satisfactory state of affairs in Kuwait to have such a pre-modern aspect of government without political parties, as was the system in Britain until the early part of the eighteenth century. British modernity was associated largely with organisation at all levels; government, political, and ideological organisation and, through time, Britain moved away from the forms of personalised authority to a culture of institutionalised politics and organised political parties.³⁵⁶ Kuwait, in fact, is not a pre-modern society. Politically speaking, Kuwaiti society can overwhelmingly be seen to be the most active forum among other Arabic societies upon issues regarding elected officials, elections and politics.³⁵⁷

The latest events, which were addressed in chapter one, reveal how far this society has become anxious for change and for political reform.³⁵⁸ In fact, according to a survey, Kuwaitis believe that the existence of political parties, which are realised as an important instrument for effective political participation, 'is only a matter of time'.³⁵⁹ All of the interviewees in this research, despite their various backgrounds and professions, agreed that political parties are a crucial element in any democratic system.³⁶⁰ However, in spite of this positive attitude, the people of Kuwait are reluctant to establish political parties. Some argue, 'We are not ready yet to discard our ethnic personal and tribal bonds'.³⁶¹ Voters in any given election cast their votes primarily according to their origins, religion and kinship relationships with candidates.³⁶² As a result, their main concern is fuelled by their negative image of the Arabic application of party politics in regions such as Iraq, Syria and Egypt, which are seen as unattractive models.³⁶³ Many Kuwaitis, 'perceive them as having threatened the political stability and social structure' in the Arab region.³⁶⁴ Their main concern was that such immature

³⁵⁵ op cit Al-Remaidhi (n 158).

³⁵⁶ Maor M, *Political Parties and Party Systems: Comparative Approaches and the British Experience* (Taylor & Francis 2005).

³⁵⁷ Al Nashmi E and others, 'Internet Political Discussions in the Arab world: A Look at Online Forums from Kuwait, Saudi Arabia, Egypt and Jordan' (2010) 72 *International Communication Gazette* 719–738.

³⁵⁸ 'Chronology: Kuwait', (2012) 66(4) *Middle East Journal*; See chapter one.

³⁵⁹ Al-Anzi A and Gharaibeh M, 'Attitudes of Kuwaiti Elite Toward Political Parties: An Analytical Field Study' (2013) vol XXXVII(1) *Journal of South Asian and Middle Eastern Studies* 18–46.

³⁶⁰ 25 Fieldwork interviews.

³⁶¹ Interviewee E2.

³⁶² Interviewee D2.

³⁶³ Interviewee F1.

³⁶⁴ op cit Al-Anzi and Gharaibeh (n 359).

party politics may pave the way for foreign influence in Kuwait particularly through religious and secular parties.³⁶⁵

In addition, the international dimension in this context cannot be ignored. As discussed in chapter two, Britain has played a key role in determining the features of the political system of Kuwait.³⁶⁶ Evidence shows that the British discouraged political parties and preferred divided rule.³⁶⁷ They preferred a direct personal relationship with rulers in the region rather than a strong organised political system. Such a policy allowed the British to continue exerting their influence on decision-makers to protect their imperial interests. This tradition was cemented by the British, and thus the Kuwaitis inherited such a tradition in the governing system of Kuwait, of which the ruling family is still a significant factor, and which, of course, resists change.

6.4 Conclusion

In this chapter, the study has analysed how effective the parliamentary mechanisms in Kuwait have been for controlling the Executive's powers. The study argues that the theoretical framework of parliamentary accountability within the Constitution is capable of providing the NA's members with a great deal of empowerment in this regard. Nonetheless, these mechanisms are unable to function efficiently due to a number of factors.

Among all of the parliamentary control mechanisms, interpellation has been seen as a powerful instrument to control the Executive in Kuwait. This mechanism has been extensively applied by members of the NA to reform and develop the political system of Kuwait. This has generated an effective debate between the legislature and the Executive, and also attracted media attention and public opinion to the public agenda.³⁶⁸ However, the outcomes of this chapter reveal that reforming the parliamentary system of Kuwait is necessary in order to strengthen its capacity to control the Executive's powers. Three main factors have been identified as essential requirements for such reform.

³⁶⁵ *ibid.*

³⁶⁶ See chapter two section 2.2.5.

³⁶⁷ The National Archive Documents, Memorandum by the Secretary of State for Foreign Affairs, Catalogue Reference: CAB/129/87 Image Reference: 0038.

³⁶⁸ *op cit* Salih (n 332, 333).

Firstly, the constitutional shortcomings of the function of parliament, which have been addressed in this chapter, need to be remedied in order to create a stronger controlling framework over the government. According to the Constitution, the nation, not the Amir, is the source of all powers.³⁶⁹ This doctrine needs greater legislative enforcement and elaboration in order to maintain an effective democratic practice. The Amir's practice of the prerogative of dissolution of parliament affects the relationship between parliament and the Executive. In any event, this has enabled the government to overcome the consequences of parliamentary accountability. Also, the formation of the government is an absolute right of the Amir, head of the Executive. Consequently, the membership of ministers in parliament has created a unified governmental block against any attempt at parliamentary control. Ministerial voting, along with supportive MPs, significantly disturbs the function of parliament. The government is playing an influential role in determining parliament's agenda, the nomination of its bodies and watchdogs, and its decision-making process, while in most democracies this is a crucial task of parliament. Reforms in this regard are strongly required.

Secondly, there are procedural shortcomings within the parliamentary control mechanisms. One of the main reasons for this weakness is the absence of political parties, which significantly affects the accountability of ministers and their political responsibility towards the NA.³⁷⁰ Such a fact has led the NA's members and ministers, without a political affiliation agenda, to work mostly according to their own personal agendas and to target marginal issues.³⁷¹ Also, the system of prime ministerial accountability is defective. Due to the absence of a political party structure, reforming such a system, perhaps by limiting the political responsibility to the PM, rather than ministers, is believed to be capable of tackling the problems of personal motivation behind the defective application of the interpellation method. In addition, the parliamentary control mechanisms are not sufficiently transparent and open to the public, in particular, the system of select committees which is regarded as the principal mechanism by which parliament holds the Executive to account.³⁷² Most of these works

³⁶⁹ Article 6 of Constitution.

³⁷⁰ *op cit* Al-Remaidhi (n 158).

³⁷¹ Othman S, 'Parliamentary Control of the Executive: Evaluation of the Interpellation Mechanism, Case Study Kuwait National Assembly, 1992-2004' (2006) 29 *Journal of South Asian and Middle Eastern Studies* 36.

³⁷² Liaison Committee, *Rebuilding the House: Select Committee issues*, (2009-10, HC 272, paras 26-28).

are conducted in a close parliamentary circle. Making parliament more participatory, by empowering the people to democratically participate in the democratic practice, is vital in creating a participative citizenry environment.³⁷³ Therefore, opening channels with a professional audience and affected groups will achieve two important goals. On the one hand, it expands and improves the quality of information available for MPs to control the Executive. On the other hand, it imparts empowerment to individuals, encouraging them to participate and voice their opinions upon issues related to their interests.

Thirdly, there is an absence of peripheral support of parliament. The NA members lack the ability to obtain sufficient information about the Executive's activities, which would enable them to oversee its works. Transparency in the system of government is crucial to oversee its activities. In addition, providing MPs with technical support is believed to increase their capacity to practise control over ministers more efficiently.

The reforms which have been discussed in this chapter were supported by successful policies from the laws and experience of the UK. These policies, which are systematically and culturally adequate to be transferred to Kuwait, are believed to be able to strengthen parliament's system of controlling the Executive. However, parliamentary control mechanisms are under a great deal of influence from the judiciary. In the following chapter, the study assesses the legal mechanisms for controlling the Executive's powers. This examination will address, in particular, the impact of the Constitutional Court's judicial review on the controlling function of parliament.

³⁷³ Interviewee F2.

Chapter Seven

Controlling the Executive Powers by Legal Mechanisms

7.1 Introduction

In a democratic state, it is recognised that ‘the legal process should play a peripheral role in regulating its functioning’.¹ Such a principle still ‘requires that the organs of the state operate through law’.² In fact, the legality of the government’s actions is considered a reflection of its legitimacy.³ It is thus because controlling the Executive’s powers by law has been regarded as a key instrument with which to contribute effectively to securing government accountability and, as a result, good governance.⁴ However, any body of accountability must retain two main characteristics in order to perform its tasks effectively. Firstly, it must be independent from the body which is being held to account, and secondly, it must be empowered to deliver a sufficient level of impact through binding remedies.⁵ These characteristics are found most readily in courts, while in other forms of legal accountability, such as the ombudsman, the tribunal system, and other review bodies, they are less assured. Thus, it has been argued that one of the main aspects of the rule of law is to, ‘express the fundamental principle that government must be conducted according to law and that in disputed cases what the law requires is declared by judicial decision’.⁶ Due to the need to limit the scope of this research, this chapter focuses on judicial accountability as applied by the Kuwait Constitutional Court but not on other broader mechanisms of legal accountability.

Administrative law is particularly important for organising the relationships among the various levels of administration and between the administration and individuals. Therefore, the application of administrative law seems to be inevitable in settling disputes to which the administration is a party. Nevertheless, the judiciary, which concerns itself with administrative law, represents the most important modern judicial institution for protecting legality (rule of law) and constitutionality, establishing the

¹ O’Cinneide C, ‘Legal Accountability and Social Justice’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 389.

² Bradley A and Ewing K, *Constitutional and Administrative Law* (15th edn, Longman 2011) 96.

³ Beetham D, *The Legitimation of Powers* (Macmillan 1991).

⁴ *ibid.*

⁵ Elliott M, ‘Ombudsmen, Tribunals, Inquiries: Re-fashioning Accountability Beyond Courts’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 233.

⁶ *op cit* Bradley and Ewing (n 2) 95.

basis of justice and building the body of law. The constitutional legislator in Kuwait was keen to highlight these goals in Article 166 of the Constitution, which stipulates that, ‘the right to recourse to the courts is guaranteed to all people. Law shall prescribe the procedure and manner necessary for the exercise of this right’.⁷

In this chapter, the study analyses how the judiciary in Kuwait has operated under the Constitution in terms of controlling the Executive’s powers and how far the courts have reflected the desired values of democracy, human rights, the rule of law and the separation of powers. In regard to controlling the Executive’s powers in Kuwait there are two types of judicial review. Firstly, the Constitutional Court judicial review and, secondly, the Administrative Court judicial review.

It is notable that administrative judicial review in the UK is important.⁸ However, in Kuwait it is less important, for the purposes of this study, because Kuwait has a written constitution which provides for the establishment of a Constitutional Court to examine important constitutional disputes. Thus, it is more relevant to focus only on the crucial role of the Constitutional Court in Kuwait, as it is more appropriate and important to the subjects of this study. The emphasis of this study is constitutional review, not judicial review, and considers the constitutional court and not lower courts. Therefore, this study will focus essentially on constitutional cases rather than administrative law cases. In particular, constitutional judgments which affect the system of controlling the Executive’s powers. Consequently, as a result of the non-existence of a similar Constitutional Court in the UK, the method of policy transfer is less applicable in this chapter.

Another form of review in Kuwait is the Criminal Court of Ministers.⁹ The latter is solely responsible for reviewing criminal complaints against ministers regarding actions committed during their term of office.¹⁰ According to Article 132 of the Constitution:

A special law defines the offences which may be committed by Ministers in the performance of their duties, and specifies the

⁷ Article 166 of Constitution.

⁸ Carig P, ‘Accountability and Judicial Review in the UK and EU: Central Precepts’ in Bamforth and Leyland P (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 180.

⁹ Law no 88/1995 Regarding the Criminal Trial of Ministers.

¹⁰ For more details on this subject see Al-Remaidhi A, ‘Individual Ministerial Responsibility in the Constitutional System of Kuwait’ (PhD thesis, University of Essex 2004).

procedure for their indictment and trial, and the competent authority for the said trial, without affecting the application of other laws to their ordinary acts or offences and to the civil liability arising there from.¹¹

There is no doubt that both systems for ministers' political and criminal responsibilities are quite important in sustaining an effective level of accountability. However, the legal system for ministers' criminal responsibility in Kuwait is limited.¹² Since the promulgation of this legislation in 1999,¹³ 19 complaints have been submitted against ministers,¹⁴ yet there has been no single trial conducted. Investigations have always been terminated due to a 'Lack of Seriousness'.¹⁵ Thus, there are insufficient examples for this study to draw on, and furthermore the criminal responsibility of ministers is considered to be outside the remit of this study. The criminal nature of these trials is considered irrelevant to the constitutional nature of this study. Therefore, this chapter will only focus on the relation between constitutional judicial review and the political responsibilities of ministers.

7.2 Review by the Constitutional Court

According to Article 173 of the Kuwaiti Constitution and with reference to the Constitutional Court:

The law specifies the judicial body competent to decide disputes relating to the constitutionality of laws and regulation and determines its jurisdiction and procedure. The law ensures the right of the Government, Parliament and the interested parties to challenge the constitutionality of laws and regulation before the said body. If the said body decides that a law or a regulation is unconstitutional, it is considered null and void.¹⁶

As a result, the Constitutional Court occupies a central role in the constitutional system of Kuwait.¹⁷ According to the constitutional provisions, this Court has the authority to

¹¹ Article 132 of Constitution.

¹² op cit Al-Remaidhi (n 10).

¹³ Decree-law no 35/1990 amended by Law no 88/1995 Regarding the Criminal Trial of Ministers.

¹⁴ See *Al-Jarida Newspaper* (14 August 2011)

<<http://www.aljarida.com/articles/1461972282774433000/>>. accessed 30 January 2017.

¹⁵ According to Article 3 of Law no 88/1995 Regarding the Criminal Trial of Ministers, 'The Interrogation Committee is entitled to dismiss all complaints that are to be considered to lack seriousness'.

¹⁶ Article 173 of Constitution

¹⁷ Al-Mouqatei M, *The Kuwaiti Constitutional System and Political Institution: Theoretical, Historical, and Critical Study, with Material & Cases* (University of Kuwait Press 2014) 467.

review the works of the other two branches of the state: the legislature and the executive. It controls the legislative power by reviewing and determining the constitutionality of its legislation. If it declares any legislation to be unconstitutional, it shall be considered null and void retrospectively from the day such legislation was issued. The same controlling function applies to regulations issued by the Executive. A second key role of the Constitutional Court is to interpret the constitutional provisions. This exclusive function was imposed by Law no 14/1973 for Establishing the Constitutional Court. Finally, the third function of this Court includes reviewing petitions for the validity of membership of parliament.

After examining the formation system of the Constitutional Court in the next section, this study will discuss the Court's three functions under separate headings. The study shall argue that, on various occasions, the Constitutional Court has exercised these functions too often in conflict with democracy and its ethical values. The three functions of this Court have been used in a noticeably regressive path, enhancing the dominance of the Executive's powers. The result of following such a path has affected the parliamentary system of controlling the Executive's powers. The evidence for this proposition will be provided in the coming sections.

7.2.1 The Formation of the Constitutional Court

Under Article 173 of the Constitution, the law specifies 'the judicial body' is competent to decide the constitutionality of laws and regulations. It has been argued that the judicial body referred to in this constitutional article does not necessarily mean a court of law.¹⁸ In fact, the Explanatory Memorandum of the Constitution of Kuwait, regarding Article 173, illustrates the features of this judicial body as, 'a special court, in which the law should consider engaging the National Assembly and the Executive in terms of its membership, in order to be capable of handling its extensive responsibilities'.¹⁹ It is widely accepted among several legal scholars that the Explanatory Memorandum of the Constitution is mandatory.²⁰ In several verdicts, the

¹⁸ *ibid* 473.

¹⁹ Explanatory Memorandum of the Constitution of Kuwait.

²⁰ Al-Saleh A, 'The Legal Nature of the Explanatory Memorandum of the Constitution in Relation to the Formation of the Constitutional Court' (1984) 1(8) Kuwait University Journal of Law 173.

Constitutional Court has referred to the Explanatory Memorandum of the Constitution to justify its ruling in constitutional issues.²¹

However, Article 2 of Law no 14/1973 for Establishing the Constitutional Court did not apply this constitutional guidance. According to this law, the Court's membership comprises five main judges in addition to two reserve members. The required qualifications of those judges are that they are of Kuwaiti nationality with the professional level of a Counsellor.²² Judges must also be elected secretly by the Supreme Judicial Council (SJC). Othman Al-Saleh stresses that this law breached the Constitution by limiting the membership of the Court to judges.²³ He argues that according to the constitutional provisions, this judicial body must include, besides judges, members from other branches of government who are to be chosen by the executive and the legislature.

Thus, in 1983 the National Assembly passed legislation to amend Article 2 of Law no 14/1973 and endorsed the entry of political elements within the Court's membership: two members are to be named by the National Assembly and the Cabinet.²⁴ Albeit such a proposal was perceived, 'as a step towards greater boldness and independence' and a solution to overcome judicial timidity about complex political issues,²⁵ the government rejected this amendment using the right of veto.²⁶ This right enables the Amir to refer legislation back to the NA for reconsideration. However, 'If the NA confirms the bill by a two-thirds majority vote of its members, the Amir sanctions and promulgates the bill within thirty days from its submission to him'.²⁷ Thus, as a majority of its members supported this amendment, the NA started the process to vote on the bill according to Article 66 of the Constitution. The government then referred to the Constitutional Court to interpret Article 173 in order to obtain a binding explanation of the meaning of 'the judicial body'. The NA immediately withdrew its attempt to change the law as doubts

²¹ Constitutional verdicts no 1/1979, 1/1980 and 3/1982.

²² Counsellor is a judge at Appeal or Cassation Court.

²³ op cit Al-Saleh A (n 20) 133; Al-Saleh O, *The Constitutional System and Political Institutions in Kuwait and the Methods of Reforms* (Pt 1, 2nd edn, Dar Al-kotob Press 2003) 682.

²⁴ Fikry F, 'Comments on The National Assembly Amendments of Constitutional Court Law' (1993) 17(1&2) Kuwait University Journal of Law 319–343.

²⁵ Brown N J, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 1997) 173.

²⁶ Article 66 of Constitution.

²⁷ *ibid.*

were so high that the Court would dare to declare its own current formation to be unconstitutional.²⁸

The Court's members do not work on a full time basis, as they are also required to fulfil their wider judicial responsibilities. In other words, members of the Constitutional Court are not dedicated solely to exercising their constitutional functions. Many members of the Court are judges who adjudicate at the criminal, civil, commercial and administrative courts. It has been argued that this awkward status contradicts the constitutional duties required of members in order to fulfil the Court's specialised tasks.²⁹ Others argue that due to the limited quantity of constitutional cases, such an arrangement helps to save expenses and best utilises human resources.³⁰ However, in recent years, the number of constitutional petitions has significantly increased so as to require a full-time court in order to manage such critical tasks.³¹ Recent statistics show that within less than thirty years, the number of these cases has risen from 2 petitions in 1980 up to 64 petitions in 2014.³² The nature of constitutional disputes requires the type of judges who have a deep knowledge and intensive understanding of constitutionalism and its relevant values.³³ Therefore, it was accepted that, 'considerations of professionalism would overcome any other aspects such as seniority'.³⁴ However, all of the Kuwaiti constitutional lawyers interviewed observed that most of the Constitutional Court's members have limited expertise in constitutional matters and, therefore, were lacking the capability to realise the essence of the democratic system to which the constitutional values aspire.³⁵

The method of the appointment system of the Constitutional Court members includes the judiciary and the Executive in its process, while the National Assembly has no role in this process, in contrast to its expected contribution which has been specified in the Explanatory Memorandum of the Constitution.³⁶ The members elected by the SJC must

²⁸ Al-Saleh A, 'Constitutional Review' (unpublished notes for the school of law students 1977) 62–64.

²⁹ op cit Al-Mouqatei (n 17) 472.

³⁰ Al-Tabtabaie A, *The Constitutional Court of Kuwait: Its Formation, Jurisdiction and Procedures - An Analytical Comparative Study* (University of Kuwait Press 2005) 42.

³¹ Interviewee E2.

³² Official Statistics of Ministry of Justice, 'Judicial Yearly Report 2014/2015' (Library of Ministry of Justice).

³³ Barak A, *The Judge in a Democracy* (Princeton University Press 2008) 55.

³⁴ Explanatory Memorandum of Law no 14/1972 of Establishing the Constitutional Court.

³⁵ Interviewees B3, E1 and E2.

³⁶ op cit Al-Mouqatei (n 17) 472.

be nominated by an Amiri decree. This reflects the Executive's domination over the whole process of appointment. Firstly, it enables the Executive to play a key role in determining the nomination of the judges by ministerial appointment.³⁷ The SJC, which elects the Constitutional Court members, is dominated by officials and senior judges who owe their posts to executive appointments.³⁸ According to Law no 23/1990 Relating to the Organisation of the Judiciary, the SJC comprises nine members: the Head of the Cession Court and his deputy, the Head of the Appeal Court and his deputy, the Attorney General, the Head of the First Instance Court, the oldest two counsellors and the deputy to the Minister of Justice.³⁹ Most of these senior officials are selected by the Minister of Justice after consulting, but not with the approval of, the SJC.⁴⁰ In a development in 2016, Yaqoub Al-Sanee, the Minister of Justice, selected the new Head of the Appeal Court, his Deputy and the Head of First Instance Court without waiting for the SJC's response regarding these candidates. This action was criticised in the media,⁴¹ but nevertheless it revealed how the Executive was influencing the system of judicial appointments.

On most occasions, the SJC has chosen candidates from its own members to join the Constitutional Court. It has been claimed that this practice has led to the members of the SJC dominating the membership of the Constitutional Court, in contrast to Article 2 of Law 14/1974, which assumes a process of secret election would be conducted.⁴² By contrast, this practice confirms that 'the SJC's members have been electing their own names secretly as members of the Constitutional Court'.⁴³

Next, the elected judges of the Constitutional Court must be ratified by an Amiri decree.⁴⁴ Such a method empowers the Executive to further control the appointment system for senior judicial positions and also gives the government the ability to reject

³⁷ Al-Jumah K, 'The Principle of Judicial Independence in the Covenant on Civil and Political Rights and Kuwait's Constitution: A Comparative Study' (2008) (32)1 Kuwait University Journal of Law 113–206.

³⁸ *ibid.*

³⁹ Article 16 of Law no 23/1990 of Organising the Judiciary.

⁴⁰ *ibid* Article 20.

⁴¹ *Al-Rai newspaper* <<http://www.alraimedia.com/ar/article/local/2016/09/28/710925/nr/kuwait>>. accessed 6 October 2016.

⁴² Al-Jasim M, *Towards a Radical Reform of the Constitutional Court: A Theoretical and a Practical Study* (Dar Qirtas 2009) 94.

⁴³ Interviewee C5.

⁴⁴ Article 173 of Constitution.

any unwelcome candidates.⁴⁵ A senior judge has confirmed that, ‘the Executive has delayed the ratification of some senior judicial appointments to put pressure on those candidates to provide concessions in return for facilitating their appointments’.⁴⁶ Also, judges with a history of challenging the Executive’s powers have been considered undesirable.⁴⁷ This system of appointment for high profile judicial offices, ‘affects, indirectly, the effectiveness of the constitutional and administrative judicial review’.⁴⁸ Ultimately, ‘The judge must be free from pressure to tailor his or her decisions to make them acceptable to the government of the day.’⁴⁹ Therefore, it has long been argued that, ‘the resulting Constitutional Court has consisted of senior judges with a record of political timidity who turn their back on almost every controversial constitutional argument in the country and have dismissed many challenges on procedural grounds’.⁵⁰ The majority of the ministers, parliamentarians, politicians, and lawyers interviewed,⁵¹ agreed that, ‘Now, the constitutional Judiciary is part of the constitutional and political problem in Kuwait’.⁵² However, some interviewees assured that judges on the bench are sufficiently independent to exercise their duties. No authority can use law to influence their judicial duties.⁵³ In fact, administrative and, to some extent, criminal courts in Kuwait have played a remarkable role in securing the rule of law.⁵⁴ Nevertheless, it has been observed that:

Against the principles which are in place for a robust and independent judiciary, certain members of the Judiciary have failed to maintain such independence, perhaps through bias to a particular political affiliation, external or political pressure, or even perhaps through their desire of furthering their own goals and interests.⁵⁵

In the UK, the process of nominating judges is assigned by statute to an independent agency: the Judicial Appointments Commission (JAC).⁵⁶ The concept of this method is

⁴⁵ Interviewee D1.

⁴⁶ *ibid.*

⁴⁷ Interviewee D2.

⁴⁸ *ibid.*

⁴⁹ Lord Elwyn-Jones ‘Judicial Independence and Human Rights’ in Blackburn R and Taylor J (eds), *Human Rights for the 1990s: Legal, Political and Ethical Issues* (Mansell 1991) 64.

⁵⁰ Brown N, *Constitution in Non-constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (University of New York Press 2002) 154.

⁵¹ 19 out of 25 interviewees.

⁵² Interviewee E3.

⁵³ Interviewees B2, B3, D1.

⁵⁴ Interviewee E3.

⁵⁵ Interviewee C1.

⁵⁶ see <<https://jac.judiciary.gov.uk/>> accessed 17 October 2016.

to encourage independence, equality and diversity in the range of vacancies available for judicial posts.⁵⁷ Candidates are recommended for offices such as the High Court, Upper Tribunals and other current and future judicial offices. The JAC's recommendation is subject to the acceptance of the appropriate authority (the Lord Chancellor, Lord Chief Justice or Senior President of Tribunals), who can accept or reject the recommendation or ask the Commission to reconsider it. However, in the event that this authority rejects a recommendation, it must then justify its decision by giving written reasons to the JAC. What is interesting in this policy for Kuwait is that, besides promoting equality and diversity through such an independent professional body, it enables judges and talented professionals to display their qualifications and interests in certain legal fields. Such a method is believed would promote transparency in the judicial appointment system of Kuwait, and would allow people to debate these important issues instead of dealing with this process as an internal judicial issue shielded by confidentiality. In fact, transparency in the judicial context is a vital feature to promote public trust and confidence in the judiciary.⁵⁸ For this purpose, the profiles of the Supreme Court in the UK (UKSC) are available online for public inspection.⁵⁹ The Constitutional Reform Act 2005, and its amendments, sets out the statutory qualifications required of the candidates for UKSC and their appointment process.⁶⁰ The candidates are chosen by a selection committee comprising of senior judicial members.⁶¹ This commission, after consulting with senior judges and specific officials,⁶² 'must submit a report to the Lord Chancellor which must state: who has been selected; who was consulted; and any other information required by the Lord Chancellor'.⁶³ Therefore, in contrast to the situation in Kuwait, the Lord Chancellor cannot nominate a candidate, however, 'he can invite reconsideration or he can reject a candidate. But if he does either of those he must give reasons'.⁶⁴ This policy, which

⁵⁷ Judicial Appointments Commission, *Diversity Strategy*, see <<https://jac.judiciary.gov.uk/diversity-strategy>> accessed 17 October 2016.

⁵⁸ Grimmelikhuijsen S and Albert K, 'The Effects of Judicial Transparency on Public Trust: Evidence from a Field Experiment' (2015) 93(4) *Public Administration* 995–1011.

⁵⁹ Supreme Court of the United Kingdom, *Biographies of the Justices* <<https://www.supremecourt.uk/about/biographies-of-the-justices.html>> accessed 17 October 2016.

⁶⁰ Constitutional Reform Act 2005, Ss 25-31.

⁶¹ *ibid.*

⁶² For more information about these consultations see, Supreme Court of the United Kingdom *Procedure for Appointing a Justice of The Supreme Court of the United Kingdom* (April 2016) <<https://www.supremecourt.uk/docs/appointments-of-justices.pdf>> accessed 17 October 2016.

⁶³ *ibid.*

⁶⁴ *op cit* (n 63).

provides the judiciary with a great degree of independence in the nomination process of high profile judges, is an example of a process suitable for transfer to Kuwait.

In summary, the Executive in Kuwait plays a dominant role in determining the Constitutional Court's membership system.⁶⁵ The resulting structure of the Constitutional Court consists of senior judges who owe their positions to ministerial nomination and approval. Thus, the Constitutional Court appointment system contradicts the principle of the separation of powers, which is required to maintain an independent judiciary.⁶⁶ Such a fact 'reveals the challenges these judges confront to exercise their expected role in controlling the executive powers'.⁶⁷

7.2.2 The Jurisdiction of the Constitutional Court

In a less detailed clause, Article 173 of the Constitution sets out the construction of a centralised judicial body to review any constitutional disputes.⁶⁸ However, details have been left for normal legislation to manage the framework of this body. It has been argued that, due to its important role in the constitutional system, the arrangement of such a critical mandate would have been better handled by the constitutional document rather than being left for the legislator.⁶⁹ Consequently, Law no 14/1973 has arguably produced less harmony with regard to the Constitution and its Explanatory Memorandum.⁷⁰

In this section, the study will examine the three functions of the Constitutional Court. The main task of the Court is to review and determine the constitutionality of legislation. This judicial mechanism can play a significant role in controlling the Executive's powers. The Court's jurisdiction with regard to reviewing the constitutionality of laws extends not only to legislation promulgated by the NA, but also to regulations issued by the Executive. This mechanism empowers individuals to exert challenges against the constitutionality of the Executive's regulation directly in the Constitutional Court.

⁶⁵ Interviewee C5.

⁶⁶ op cit Al-Jumah (n 37).

⁶⁷ Interviewee D2.

⁶⁸ Article 173 of Constitution.

⁶⁹ Al-Saleh O, 'The Constitutional Arrangement of Judicial Review in Kuwait and its Fulfilment' (1986) 10(2) Kuwait University Journal of Law 31.

⁷⁰ op cit Al-Saleh O (n 23) 682.

This assignment was provided by Article 173 of the Constitution. However, Article 2 of Law 14/1974 provides for two additional tasks: interpreting the constitutional provisions and reviewing petitions for the validity of the parliamentary membership. This study will examine the three main tasks of the Constitutional Court with reference to important decisions made. This examination will focus mainly on the impact of the Court's decisions delivered in relation to the system for controlling executive powers. The objectives of this approach are to explore whether these decisions are compatible with the doctrines of the Constitution, and to discover to what extent these judgments have achieved principled and effective control of executive powers in practice.

7.2.2.1 The Jurisdiction to Determine the Constitutionality of Legislation and Regulation

Until 2014, the government and parliament were the authorities that had the exclusive right to resort directly to the Constitutional Court. Any other constitutional issues were referred to it by lower courts. Individuals were not permitted to resort directly to the Constitutional Court but had to go through a court referral in a related case. If the Court denied the referral, individuals then had to resort to a Committee to Examine Challenges (CEC).⁷¹ This Committee is part of the Constitutional Court. It consists of three of the Court's members: the Chairman, in addition of two of its oldest members. The CEC evaluates courts' decisions for denying referral to the Constitutional Court and decides whether to refer the claims to the Constitutional Court or to confirm the lower courts' denial. The decision of this Committee is final. However, it does not oversee the constitutionality of laws by its review, but only examines the seriousness of these challenges. Although the Constitution grants the Constitutional Court an exclusive role in determining the constitutionality of legislation and regulation, nearly half of the constitutional disputes in the country have been rejected by this Committee. It has been argued that this Committee has been acting as an additional constitutional body aside from the Constitutional Court.⁷²

After the enactment of Law no 109/2014, individuals and legal persons were granted the right to submit their claims directly to the Constitutional Court. Albeit such a

⁷¹ Article 4 of Law no 14/1973 of Establishing the Constitutional Court.

⁷² *op cit* Al-Mouqatei (n 17) 489.

development supported the accessibility of justice to all people, this law provided that on each direct claim there must be a financial guarantee given of five thousand Kuwaiti Dinar.⁷³ This guarantee is subject to confiscation where a case is refused. In practice, such a large sum as a guarantee was sufficient reason for many not to proceed further, thus hindering the ability of individuals to resort directly to the Constitutional Court. A prominent Kuwaiti jurist rightly described this direct claim as ‘the rich man’s option’.⁷⁴

In the UK, there is a similar approach to ‘the rich man’s option’. Mr Justice Darling once said, ‘The law courts of England are open to all men like the doors of the Ritz hotel’.⁷⁵ It has been argued that the expense of the civil courts’ fees in the UK are designed to prevent litigation. For example, five new party members brought a case against Jeremy Corbyn, the Leader of the Labour Party, concerning their right to vote in the leadership election. After losing the case in the Court of Appeal, the claimants were unable to take the case to the Supreme Court due to the costs involved.⁷⁶ However, it could be argued that this case was essentially a dispute in contract law between the claimants and the Labour Party not a constitutional litigation matter.

In Kuwait, the amendment of Law no 109/2014 less controversially required that the claimant should seek a direct benefit from his claim. Otherwise, claims with no direct personal benefits would be rejected.⁷⁷ In general, this undermines the ability to challenge the constitutionality of laws and the regulation of public interests.⁷⁸ One criticism raised is that claims which aim to protect the constitutional provisions would be dismissed on procedural grounds. The constitutionality of legislation cannot be categorised by wholly personal interests. In fact, the legality of the state’s work requires legitimate sources and requires that laws and regulations are compatible with the

⁷³ This equals approximately eleven thousand five hundred sterling pounds.

⁷⁴ Al-Tabtabaie, A, ‘The Kuwaiti Lawyers Association’s seminar upon the amendment of law 14/1973’ *Al-Rai Newspaper* (Kuwait 11 May 2016) <<http://www.alraimedia.com/ar/article/local/2016/05/13/679314/nr/kuwait>>. accessed 30 January 2017.

⁷⁵ cited in Martin J, *The English Legal System* (7th edn, Hodder Education 2013).

⁷⁶ Stewart H and Siddique H, ‘Corbyn Consolidates Grip on Labour with High Court and NEC successes’ *The Guardian* (Manchester 8 August 2016) <<https://www.theguardian.com/politics/2016/aug/08/labour-must-allow-all-members-leadership-vote-court-rules>> accessed 30 October 2017.

⁷⁷ Article 181 of Constitution.

⁷⁸ Feldman D, ‘Public Interest Litigation and Constitutional Theory in Comparative Perspective’ (1992) 55 *Modern Law Review* 44–72.

constitution. This aim should not be linked to individuals' interests but rather to the good of the public.

With regard to standing in the UK, by way of comparison, Section 31(3) of the Senior Courts Act 1981 provides that the Court shall not grant permission for an applicant to seek judicial review unless the applicant has 'sufficient interest' in the matter to which the application relates.⁷⁹ The claimant must also state on his claim form for judicial review, 'The name and address of any person he considers to be an interested party'.⁸⁰ The term 'sufficient interest' (*locus standi*),⁸¹ however, is not defined in the Senior Courts Act 1981, so regard must be paid to case law relating to the type of relief requested.⁸² Courts, in judicial review litigation, have developed a sensible approach to the question of the applicant's sufficient interest.⁸³ Since the decisions reached in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,⁸⁴ and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd*,⁸⁵ the courts have determined flexible views on the condition of sufficient interest, which relaxed the standing requirements. The courts have accepted that well-organised groups which can put forward a substantial case of national concern have sufficient interest⁸⁶ However, difficulties still arise about claimants ('busybodies')⁸⁷ who have no personal interest but are allegedly acting on behalf of the public interest.⁸⁸

This flexibility in defining the sufficient interest required for standing in the UK courts' litigation system provides a valuable lesson for Kuwait. Where there are important disputes, it may turn out to be helpful for Kuwaiti courts to be flexible in defining the

⁷⁹ The Senior Courts Act 1981 s 31(3)

⁸⁰ See Ministry of Justice <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.1A>>. accessed 30 January 2017.

⁸¹ To read more see, Loveland I, *Constitutional Law, Administration Law and Human Rights* (6th edn, Oxford University Press 2012) ch 17.

⁸² According to the Rules of the Supreme Court 2009 SI 1603 rr.10-17, UKSC, Annual Report 2015–2016 (2016-17 HC 32), 84 out of 230 applications were granted.

⁸³ Nason S, 'The Administrative Court, the Upper Tribunal and Permission to Seek Judicial Review' (2012) 21 Nottingham Law Journal 1–25.

⁸⁴ *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617.

⁸⁵ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386.

⁸⁶ Cram IG and Hilson C, 'Judicial Review and Environmental Law - Is there a coherent view of standing' (1996) 16 Legal Studies 1-26.

⁸⁷ *R v Somerset CC, ex p Dixon* [1998] Env LR 111.

⁸⁸ *op cit* Bradley and Ewing (n 2) 714.

conditions of sufficient interest. Courts are urged to solve problems rather than cause them, in particular, in disputes of national concern or related to constitutional matters which concern the entire society.

Although the Kuwaiti Constitution endorsed a specialised judicial body to review the constitutionality of legislation since its promulgation in 1962, the first constitutional dispute to be examined by this body was not until seventeen years later.⁸⁹ As a result, this Court was widely described as lacking political courage.⁹⁰ On many occasions, the Court sidestepped various difficult issues on procedural grounds.⁹¹ This timidity was even more evident when the Court found itself in confrontation with several Amiri decrees which were issued during the suspension of parliament from 1976 until 1981 and from 1986 until 1992.⁹² These two periods were viewed as a state of ‘constitutional coup’.⁹³ The decrees had a major impact on the construction of the constitutional system of the country. In fact, they established an altered constitutional system.⁹⁴ Article 181 of the Constitution states:

No provision of this Constitution may be suspended except when martial law is in force and within the limits specified by the law. Under no circumstances may the meetings of the National Assembly be suspended, nor shall the immunities of its members be interfered with during such a period.⁹⁵

However, even though these decrees brought about the suspension of some constitutional articles, deactivated the functions of the National Assembly and granted the Executive all the powers of the latter, the CEC refused to refer any objections to these decrees to the Constitutional Court, and endorsed the Executive’s argument that ‘a decree-law passed during the suspension of parliament did have validity stemming from its promulgation by the de facto authority in the country’.⁹⁶ It has been rightly perceived that the Constitutional Court, in doing so, was keener to justify an

⁸⁹ Constitutional verdict no 1/1979 on 12 May 1979 published in Kuwait Official Gazette, issue 247 no 25.

⁹⁰ op cit Brown (n 25) 172.

⁹¹ op cit Brown (n 50) 154.

⁹² Parliament was suspended by Amiri decree twice, from 1976 until 1981, and from 1985 until 1992, for more details see chapter three.

⁹³ Al-Tabtabaie A, ‘The Political Control over the Governmental Works during the Dissolution of Parliament’ (1994) 15(2/3/4) Kuwait University Journal of Law 36.

⁹⁴ Al-Homoud I, ‘The Effects Resulting from the Parliament’s Refusal of Law no 35/1990, Issued in the Period of the Suspension of Parliamentary Life’ (1994) 3 Kuwait University Journal of Law 18, 562.

⁹⁵ Article 181 of Constitution.

⁹⁶ op cit Brown (n 25) 170.

unconstitutional governmental exercise instead of fulfilling its responsibility in protecting the Constitution's provisions.⁹⁷ The majority of the judges and constitutional lawyers interviewed asserted that in cases involving sensitive political issues, or which have any sort of influence upon the relation between government and the people, the Constitutional Court was perceived to be conservative towards creating any major impact.⁹⁸ A constitutional lawyer, who challenged the executive in several cases relating to violations against individuals' political rights and their liberties, expressed his view that the Court 'was often more sensitive to the Executive's temper in such issues'.⁹⁹

In recent years, the Court has developed a stronger approach towards its constitutional role.¹⁰⁰ It has been argued that the transformation of the constitutional judiciary has enabled the Court's judges to better sustain justifiability, the rule of law and equality.¹⁰¹ Such a development was a result of several factors involving external political pressure, improvements in the quality of judges and doctrinal change. Firstly, the wide political pressure to which the Court was subjected was due to criticisms about its conservative approach towards crucial political and constitutional matters.¹⁰² Secondly, since 2000,¹⁰³ the profiles of the Court's judges began to improve considerably. A constitutional judge interviewed stated that previously, 'Not all members of the Court were holding law degrees, as they were in fact *Islamic Sharia* jurists'.¹⁰⁴ Such a lack of professional legal knowledge reveals the challenges these judges encountered previously to review thorny constitutional and legal disputes. The final influence was the enactment of Law 37/94 Relating to the Establishment of the Kuwait Institute for Judicial and Legal Studies, which established a professional training agenda for the qualification of junior judges.¹⁰⁵

⁹⁷ op cit Al-Homoud (n 94) 650.

⁹⁸ Interviewees D1, D2, E1, E2, E3.

⁹⁹ Interviewee E2.

¹⁰⁰ Dr Al-Fili Mohammad, *Al-Jarida newspaper*

<<http://www.aljarida.com/articles/1462112771070207800/?previous=2012-07-02>>. accessed 30 January 2017.

¹⁰¹ op cit Al-Tabtabaie (n 93) 36.

¹⁰² Al-Assar Y, 'A Study of the Directions of the Constitutional Court in Kuwait and Egypt with Regards to Judicial Review over the Constitutionality of Laws and Regulation Concerning the Composition of Parliament' (2013) 1(1) Kuwait International Law School Journal 98.

¹⁰³ In this year, new members joined the Constitutional Court among them was Faisal Al-Marshad, a law degree holder.

¹⁰⁴ Interviewee D1.

¹⁰⁵ see <<http://www.kijs.gov.kw/ar/default.aspx>> accessed 16 October 2016.

As a result of this professional progress, within the first years of the Constitutional Court's new era, the Court achieved enormous progress in protecting individuals' political rights. On 1 May 2006, the Court ruled that 15 articles of Law-Decree no 65/1979 Regarding Public Assembly and Meetings were unconstitutional.¹⁰⁶ This case was referred to the Court by the Criminal Court during the trial of an ex-parliament member and a lawyer who had been charged with organising a public assembly without obtaining prior permission from the police.¹⁰⁷ The defendants challenged the constitutionality of the said law. Eventually, the Constitutional Court annulled these articles on the grounds that they had breached Article 41 of the Constitution which provides that, 'Individuals have the right of private assembly, without permission or prior notification, and the police may not attend such private meetings'.¹⁰⁸ Many observers perceived such a verdict as reaffirming the basis of the state of law.¹⁰⁹

In democratic systems, such an effective role is the main desire behind the establishment of constitutional judicial bodies. However, such a transformation is understood only in the sense that it leads to a firmer application of constitutionalism and its related ethical values. Otherwise, there is no means of empowering the courts with critical powers that allow them to question legislation. Perhaps one of the most significant examples of this viewpoint was Constitutional Court verdict no 15/2012,¹¹⁰ which had a substantial impact on the values of democracy and constitutionalism.

In the aftermath of a political crisis between the National Assembly and the Executive, in relation to claims against the Prime Minister, Sheik Nasir Al-Sabah concerning the bribery of members of the 2009 Parliament,¹¹¹ the Amir dissolved the National Assembly and called for new elections. For the first time in parliamentary history, the opposition dominated the resulting parliament. One prominent parliamentarian who joined this parliament described it as 'unprecedented results'.¹¹² However, this parliament lasted for only four months as the Constitutional Court, during a review of

¹⁰⁶ Constitutional Court verdict no 1/2006.

¹⁰⁷ Mubarak Al-Weelan and lawyer Al-Humaidi Al-Subaiee.

¹⁰⁸ Article 41 of Constitution.

¹⁰⁹ Mohammad Al-Moqatie, *Al-Qabas newspaper*

<<http://archive.alqabas.com/Articles.aspx?ArticleID=743596&date=09072016&isauthor=1>>. accessed 30 January 2017.

¹¹⁰ Electoral Petition no 15/2012, by Osama Al-Rashidi in Official Gazette of Kuwait (14 June 2013).

¹¹¹ For more detail see Olimat MS, 'Arab Spring and Women in Kuwait' (2012) 13(5) *Journal of International Women's Studies*; also see background, chapter one.

¹¹² Interviewee C1.

an electoral petition,¹¹³ concluded that the Amir's dissolution of the 2009 Parliament was unconstitutional, and it ruled that all subsequent actions, including the new election of the 2012 Parliament, were void.¹¹⁴

Before calling for a new election, the government requested the Constitutional Court to examine the constitutionality of Law no 42/2006 regarding the Reallocation of Electoral Constituencies. This law amended the previous allocation of the electoral constituencies from 25 to 5 constituencies and changed the voting mechanism from two votes to four votes for each voter. The government claimed that the distribution of votes among these constituencies was imbalanced, as disparity between the electorate numbers varied heavily, although they offered the same number of seats.¹¹⁵ Also, the government claimed that the current voting mechanism under this law had been exercised in a way that generated electoral wrongdoings, which are unusual in Kuwaiti society and reflect an inaccurate representation of voters. Thus, the government argued that this legislation breached articles 7, 8, 29 and 108 of the Constitution.¹¹⁶ Under the constitutional provisions, 'A member of the Assembly represents the whole nation'.¹¹⁷ and 'Justice, Liberty and Equality are the pillars of Society; co-operation and mutual help are the firmest bonds between citizens'.¹¹⁸ Furthermore, it is the state's responsibility to, 'safeguard the pillars of society and ensure security, tranquillity and equal opportunities for citizens'.¹¹⁹ Therefore, the government argued that the principle, 'All people are equal in human dignity, and in public rights and duties before the law, without distinction as to race, origin, language or religion',¹²⁰ should be maintained.¹²¹

Many political groups and parliamentarians opposed the government's petition.¹²² In a letter delivered to the Prime Minister, Sheik Jabir Al-Mubarak Al-Sabah, and to the

¹¹³ Electoral Petition no 6/2012 by Safa Al-Hashim, Official Gazette of Kuwait.

¹¹⁴ This verdict will be examined in the next section.

¹¹⁵ For more details, see Table 5.1 chapter 5.

¹¹⁶ Government's Constitutional Direct Request no 26/2012.

¹¹⁷ Article 108 of Constitution.

¹¹⁸ *ibid* Article 7.

¹¹⁹ *ibid* Article 8.

¹²⁰ *ibid* Article 29.

¹²¹ Government's Constitutional Direct Request no 26/2012.

¹²² 'Chronology: Kuwait' (2013) 67 Middle East Journal 2 <<http://www.questia.com/read/1P3-2980816071>>. accessed 30 January 2017.

Head of Judiciary, Faisal Al-Marshad, opposing the government's petition, a group of political activists argued that:

Despite the Government's faked claims, the key motive behind this attempt was to obtain a constitutional verdict that annuls the existing electoral law. And as a consequence of the dissolution of the NA, the Government was seeking to create a 'legislative vacuum' which enabled it to design solely a new electoral law to control the following general election outcomes.¹²³

Under such political pressure, on 25 September 2012, the Constitutional Court rejected the government's petition, claiming that the variation of votes among the electoral constituencies was an 'unstable element' but which cannot be deemed as a cause for unconstitutionality.¹²⁴ The Court also asserted that the electorate's voting practices and how they cast their votes are matters beyond its competence.¹²⁵ The Court affirmed that such matters are 'legislature business' and should be tackled by 'the appropriate constitutional mechanism'.¹²⁶

Immediately following this verdict and during the dissolution of the NA, the Amir addressed the nation in a televised speech, stating that, 'Now, and after the crucial verdict of the Constitutional Court which allowed the necessary action to amend the electoral law, I have instructed the Government to take urgent measures to amend the electoral laws to protect national security and the nation's unity'. He described the parliament's ex-members' practices as a 'chaotic sedition that could jeopardise our country [and] undermine our national unity'.¹²⁷ The Amir argued that the previous mechanism for voting had been used inappropriately, affecting the practice of democracy, dragging the country into severe danger and threatening its national unity, a situation which required him to act immediately, 'using the available constitutional powers' to amend the mechanism of voting and the related electoral laws by law-decrees under Article 71 of the Constitution.¹²⁸

¹²³ *Alanba newspaper* (18 September 2012) <<http://www.alanba.com.kw/ar/kuwait-news/parliament/325373/18-09-2012>>. accessed 30 January 2017.

¹²⁴ Constitutional Court verdict no 26/2012 on 25 September 2012.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ Ulrichsen K, 'Politics and Opposition in Kuwait: Continuity and Change' (2014) 4(2) *Journal of Arabian Studies* 214–230.

¹²⁸ See the Amir's televised speech to the nation 19 October 2012 (in Arabic) <<https://www.youtube.com/watch?v=XOSi487tSWY>>. accessed 30 January 2017.

Under this amendment, voters were permitted to vote for only one candidate out of ten to be elected in each constituency.¹²⁹ In addition, the Amir also issued a decree-law to amend various electoral procedures and to establish a new Electoral High Commission to oversee the implementation of the new election procedures which this decree proposed.¹³⁰ According to Article 71 of the Constitution:

Should the necessity arise for urgent measures to be taken while the National Assembly is not in session or is dissolved, the Amir may issue decrees in respect thereof which have the force of law, provided that they are not contrary to the Constitution or to the appropriations included in the budget law.¹³¹

After the following general election under the amended electoral laws, these decrees were challenged by a losing candidate who submitted an electoral petition to the Constitutional Court.¹³² The applicant argued that the Amir's decrees lacked the condition of 'necessity' which allowed the Amir to use Article 71 for urgent measures, and thus should be regarded as unconstitutional actions. He claimed that the NA, which primarily has the legislative power, is the constitutional authority that has the right to amend legislation and, in particular, electoral laws. However, the Constitutional Court adopted a contradictory position towards these critical challenges. The Court rejected the claim of the unconstitutionality of Decree-Law no 20/2012 which amended the voting mechanism and accepted the government's privilege, under 'necessity', to reformat electoral laws and, consequently, the capability to affect parliamentary elections and the democratic process. However, it accepted the claimant's argument that Decree-Law no 21/2012, regarding the establishment of an Electoral High Commission, was unconstitutional as it was lacking the required condition of 'necessity'.

Chapter three concluded that any type of democratic approach should aim to achieve two important objectives: avoiding tyranny as a negative practice of power, through effective accountability; and, as a positive purpose, promoting popular participation. The Court's endorsement of the Law-Decree, which amended the voting mechanism, made these objectives unachievable. On the one hand, it allowed the Executive the

¹²⁹ Amiri Decree no 20/2012 to Amend the Electoral Law no 35/1963 (Official Gazette of Kuwait 21 October 2012).

¹³⁰ *ibid.*

¹³¹ Article 71 of Constitution.

¹³² Electoral Petition no 15/2012 by Osama Al-Rashidi (Official Gazette of Kuwait 14 June 2013).

opportunity to shape the features of the electoral system according to its sole judgment of necessity. Since the Executive was entirely free to decide the design of the voting system for the NA's elections, parliamentary accountability over it could not be performed effectively. Indeed, an unelected executive will not exercise such tyrannical power to support the creation of a powerful independent body whereby its members are qualified to call it into account. Rightly, 'the use or exploitation of extraordinary authorities can contribute to the destruction of the very political system they are intended to protect.'¹³³

In addition, many argue that this decree breached the Constitution, as Amiri decrees under Article 71 should not be used to change electoral laws.¹³⁴ According to the Explanatory Memorandum of the Constitution,¹³⁵ which most academics, as discussed earlier, consider to be obligatory constitutional texts,¹³⁶ 'the assignment of legislation to the executive touches the essence of populism in its most particular features, which is the core of sovereignty'.¹³⁷ Therefore, the Constitution, in no more obvious language, has affirmed that, 'No law may be promulgated unless it has been passed by the NA and sanctioned by the Amir'.¹³⁸ Indeed, 'Legislative supremacy involves not only the right to change the law but also that no one else should have that right'.¹³⁹ According to the opinion of the Venice Commission of the Council of Europe, such authorisation given to the Executive, with no clear and well defined framework, 'is not acceptable in a democratic constitutional state',¹⁴⁰ particularly in regard to legislation that forms and constructs parliament's representation mechanisms.¹⁴¹ These types of legislation, after

¹³³ Blick A, 'Emergency powers and the withering of the Royal Prerogative' (2014) 18(2) *The International Journal of Human Rights* 195–210.

¹³⁴ *op cit* Al-Assar (n 102) 105.

¹³⁵ The Memorandum was drafted by the framers of the Constitution and was attached to the constitutional codes and sanctioned by the Amir Act. Also, the members of the Constituent Assembly who consisted of 20 elected representatives and 14 appointed ministers voted on the Memorandum in a dedicated session during the voting on the Constitution.

¹³⁶ Al-Tabtabaie A, 'The Legal Nature of the Explanatory Memorandum of the Constitution' (1984) 8(1) *Kuwait University Journal of Law* 121–173; Al-Baz A, 'The Kuwaiti Constitution and its Explanatory Memorandum: its Legal Classification and Obligatory Nature' (1985) 10(3) *Kuwait University Journal of Law* 11–77.

¹³⁷ *ibid* Al-Tabtabaie.

¹³⁸ Article 79 of Constitution.

¹³⁹ *op cit* (n 2) Bradley and Ewing.

¹⁴⁰ CDL-AD (2002) 033 eOpinion on the Draft Amendments to the Constitution of Kyrgyzstan, adopted by the Venice Commission at its 53rd Plenary Session (Venice, 13-14 December 2002), <[http://www.venice.coe.int/webforms/documents/CDL-AD%20\(2002\)%20033-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD%20(2002)%20033-e.aspx)> accessed 25 October 2016.

¹⁴¹ *op cit* Al-Tabtabaie (n 136).

all, organise the representative system in democracies. Such fundamental laws require proper deliberation,¹⁴² and a greater level of political consensus among the political elite.¹⁴³

At the same time, the Court contributed to undermining popular participation by accepting the Law-Decree's amendments which affected the quality of representation. The Court justified its endorsement of the Amir's decree by claiming that:

It is unacceptable that the executive has no right, during the dissolution of parliament, to take any urgent measures should necessity arise. According to the Explanatory Memorandum of the Amiri decree, the application of the former voting system revealed the defective practices of voting among the electorates. These negative practices threatened the state's national security and the nation's unity. Therefore, the law-decree sought to tackle all the negative practices of sectarianism and tribalism amongst voters which disrupt the accurate parliamentary representation of the nation. The executive is allowed, according to its own judgment, to act immediately during the absence of the original legislature, using its exceptional legislative powers according to article 71 of the Constitution, to protect the state's supreme interests from these major risks. Eventually, the Government is obliged under section 2 of Article 71, to refer such a decree to the next Assembly at its first sitting. Unless the Assembly confirms the decree, it retrospectively ceases to have the force of law.¹⁴⁴

It is quite difficult to support the Court's endorsement of this decree in this regard. Evidently, according to the Court's justification, the prime aim of the Law-Decree was to tackle the choices of the electorates which were deemed, as stated in the Explanatory Memorandum of the Law-Decree, as negative practices. There was no obvious 'necessity' that justified the Executive's application of Article 71(1) which granted the Executive the prerogative to issue 'emergency' decree-laws, even though under Article 71(2) these Decrees are subject to the approval of the NA.

Such decrees are referred to the National Assembly within the fifteen days following their issue if the Assembly is in session. If it is dissolved or its legislative term has expired, such decrees are referred to the next Assembly at its first sitting. If they are not thus referred, they retrospectively cease to have the force of law, without the necessity of any decision to that effect. If they are referred and the

¹⁴² Morris C, *Parliamentary Elections, Representation and the Law* (Hart Publishing 2012) 152.

¹⁴³ Zineddine M, 'Dialectic of Democracy and Elections: A Constitutional Political Reading in the Electoral System' (2009) 33(2) *Kuwait University Journal of Law* 360.

¹⁴⁴ *ibid*; Constitutional Court verdict no 15/2012.

Assembly does not confirm them, they retrospectively cease to have the force of law, unless the Assembly approves their validity for the preceding period or settles in some other way the effects arising therefrom.¹⁴⁵

However, in the previous example, it is quite difficult to assume that the members of the NA, who won the elections under the new amended electoral law, would raise any doubts about the validity of their membership, or dispute the law by which they won their seats, as to do so would consequently nullify their membership.

Ironically, such claimed urgent measures were directed to confront the danger of the individuals' electoral choices. Notwithstanding, the amended voting mechanism was introduced by a governmental initiative in 2006.¹⁴⁶ Indeed, voting behaviour remains the rational judgement of voters on how they are governed and by whom,¹⁴⁷ a mechanism which measures the nation's will rather than undermines national unity. Besides, the results of the latest general election of February 2012, which was held under the former voting system, produced an anti-government parliament, which was the main motive behind the enactment of the Decree-law amendments. This was observed by the majority of the interviewees to be a reflection of the voters' anger towards the corruption of the government in its relationship with the previous parliament's members of 2009.¹⁴⁸ A key anti-government parliamentarian deemed this amendment as aiming directly at preventing them from acquiring the same majority they had held under the previous voting system.¹⁴⁹ This uncovers the political considerations behind the government's arguments about its electoral amendments.

In a further display of irony, the Court went on to justify the Amiri Decree's amendment by claiming that it was, 'A common application of the international standard of "one man, one vote"'.¹⁵⁰ In fact, the quality of representation is one of the most important indices by which democracy can be measured.¹⁵¹ Obviously, this voting mechanism does not really follow the 'one man, one vote' rule, as the Court sought to justify. The new law-decree has reduced the electorate's right to choose the representatives of their

¹⁴⁵ Article 71 (2) of Constitution

¹⁴⁶ Minutes of the NA meeting of 17 July 2006, Eleventh Legislative Term, Library of the National Assembly.

¹⁴⁷ Blackburn R, *The Electoral System in Britain* (Macmillan Press 1995) 95.

¹⁴⁸ 22 Interviewees out of 25.

¹⁴⁹ Interviewee C2.

¹⁵⁰ *ibid*; Constitutional Court verdicts no 15/2012.

¹⁵¹ *op cit* Beetham (n 3) 36.

constituencies, so each voter can cast only one vote over ten seats in each electoral constituency.¹⁵² This means that the other nine seats are outside the voters' ability to influence. Thus, the value of the choice of each voter will not exceed ten per cent of the general outcome of the election in the constituency. Under this electoral design, the electors are no longer able to select, or to influence the selection of the other nine members as representatives of their democratic preferences. Therefore, such a mechanism cannot empower public participation in exercising an effective role in determining majority choices. Even though, 'A healthy parliamentary democracy must aspire in its elections not only to 'one person, one vote', but also to the representative principle of one vote, one value'.¹⁵³

In contrast, under Law no 42/2006 Regarding Reallocation of Electoral Constituencies, voting has also been comparatively reduced in value rather than absolutely. The weight of an elector's vote in the second electoral constituency has three times more value compared with a similar voter in the fourth or fifth constituencies.¹⁵⁴ Such an imbalanced allocation of votes affects the composition of the NA membership system, particularly from the viewpoint that electoral laws in Kuwait are designed intentionally to control and undermine the democratic experience.¹⁵⁵ In any conception of democracy, there is a strong connection between the representativeness of the system and democratic accountability.¹⁵⁶ In order to affect the general character of the NA and to influence its effectiveness,¹⁵⁷ it has been argued that electoral laws in Kuwait, and the representative system of the NA, 'have been fractured along traditional lines of affiliations increasing the relevance of family, tribe and sect interests at the expense of creating a common attachment to the state'.¹⁵⁸ These arrangements, which are not dependent on any reasonable criterion,¹⁵⁹ were to create an elite element within the NA

¹⁵² For more details, see the study's previous discussions upon the electoral system in Kuwait in chapter five section 5.2.1.

¹⁵³ op cit Blackburn (n 147) 18; Al-Desaiem N, 'The Right of Dissolution in the Parliamentary System' (PhD thesis, University of Cairo 2012) 113.

¹⁵⁴ See Table 5.2 chapter five.

¹⁵⁵ Alhajeri A, 'Citizenship and Political Participation in the State of Kuwait, The case of the National Assembly' (PhD thesis, University of Durham 2004).

¹⁵⁶ Vermeule A, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press 2007).

¹⁵⁷ Al-Mouqatei M, 'A Study of the Kuwaiti Constitutional Experience' (PhD thesis, University of Warwick 1987).

¹⁵⁸ op cit Alhajeri (n 155).

¹⁵⁹ op cit Al-Mouqatei (n 157).

that is incapable of reflecting the wider will of the nation.¹⁶⁰ In this way, ‘the adjustment of the constituencies in Kuwait were of a gerrymandering nature to serve the election of certain groups or candidates at the expense of others’,¹⁶¹ in order to produce weak assemblies that are incompetent in exercising effective control over the Executive’s powers. Although such a law reflects serious challenges to democracy and its related ethical values, the Constitutional Court, on procedural grounds, sidestepped from taking responsibility to protect the constitutional values that prevent such inequality and unjust electoral laws.

In summary, the Amiri Decree violated the constitutional principle of the separation of powers by allowing the Executive to exercise the role of the NA. This power helped the government to amend electoral laws whenever it felt ‘necessary’ to counter an active anti-government majority in parliament. The doctrine of ‘necessity’ is a very dangerous term within a democracy,¹⁶² particularly in a world that teems with security challenges and terrorism threats.¹⁶³ However, the Kuwaiti government’s invocation of this term over the performance of an elected assembly cannot be accepted as reflecting a real national security risk. From the standpoint that the political struggle for rule is a normal democratic end,¹⁶⁴ it is now more dangerous that the Kuwaiti judiciary has established a different meaning for this term.

Eventually, there will be no means of exercising parliamentary accountability over government if the latter is able to issue the electoral laws. It is thus, since government’s dominance in formatting the electoral laws grants it the opportunity to affect the parliamentary elections and the democratic process by directing the general election’s outcome. Such arguments reveal how extensively the Court has justified its judgments on political considerations and has become involved in the political relationship between the two branches of the government. It is equally unacceptable that the judiciary should be involved in directing any political guidance to other powers in the state, or in playing a dominant role to determine thorny political issues, as such a

¹⁶⁰ op cit Alhajeri (n 155).

¹⁶¹ op cit Al-Mouqatei (n 157).

¹⁶² Dimitrijevic N, ‘Constitutional Theory in Times of Crisis: Power, Law and Morality’ (2016) 42(3) *Philosophy and Social Criticism* 227–245.

¹⁶³ Jackson R, ‘Security, Democracy, and the Rhetoric of Counter-Terrorism’ (2005) 1(2) *Democracy and Security* 147.

¹⁶⁴ Schmitter PC and Terry LK, ‘What Democracy is... and is not’ (1991) 2(3) *Journal of Democracy* 75–88.

situation produces a Government of Judges.¹⁶⁵ This reveals how far the Constitutional Court's judicial review in this regard has been exercised to the detriment of democracy and its related ethical values.

In modern democracies, it is no longer appropriate to enable government 'to exercise authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted'.¹⁶⁶ Therefore, the ability to exercise such powers in the UK, 'both domestically and externally, was an important point of contention,' in order to enhance Parliament's control over the powers of the Royal Prerogative, even with regard to war-making.¹⁶⁷ The debates about limiting the Royal Prerogative have developed over a long period of time in the UK, but have eventually been effectively achieved. Among the key limitations which are imposed by legal restrictions are the Fixed Term Parliaments Act 2011, and the Civil Contingencies Act 2004.

An example of how to confine executive law-making in an emergency in the UK, was the enactment of the latter Act. This fully detailed legislation provides an integral legal framework to ensure emergency powers are executed within limits. The Act starts by providing a clear and explicit definition of the meaning of emergency. Section 1 defines an emergency as, 'an event or situation which threatens serious damage to human welfare or to the environment, or war or terrorism which threatens serious damage to the security of the United Kingdom'.¹⁶⁸ However, in a democracy, there are constitutional principles that govern emergency legislation. Among them, 'The need to ensure that legislation is a proportionate, justified and appropriate response to the matter in hand and that fundamental constitutional rights and principles are not jeopardized', and most importantly, 'to ensure that effective parliamentary scrutiny is maintained in all situations'.¹⁶⁹

The notion of the 'Triple Lock' under the Civil Contingencies Act 2004 may provide

¹⁶⁵ Emam S, *The Constitutional Court and The Dilemma of the Accommodation between Sovereignty of the Constitution and Sovereignty of People* (Nass Press 1997) 134.

¹⁶⁶ Department of Justice and The Lord Chancellor, *The Governance of Britain* (White paper, Cm 7170, 2007) para 14.

¹⁶⁷ *op cit* Blick (n 133) 195–210.

¹⁶⁸ See Civil Contingencies Act 2004 s1 (a) (b) and (c).

¹⁶⁹ House of Lords Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008–09 116) 8.

valuable lessons on how to limit the scope of emergency regulations.¹⁷⁰ One of the most important limitations in this regard is on changing parliament's procedures,¹⁷¹ or amending the Human Rights Act 1998.¹⁷² The Act also 'provides that the maker of the emergency regulations must have regard to the importance of ensuring that Parliament, the High Court and the Court of Session are able to conduct proceedings in connection with the regulations or action taken under the regulations.'¹⁷³ The conditions for making emergency regulations,¹⁷⁴ their scope and purposes,¹⁷⁵ and duration,¹⁷⁶ are well defined in clear terms. Therefore, the differences between Kuwait and the UK are in terms of the details and mechanisms to enforce the values of constitutionalism. Obviously, as a matter of policy transfer, the measures applied in the UK to enforce and protect these values are more embedded in the legal system throughout a specific, explicit and practical legal framework. Kuwait is urged to adopt a similar legal framework in order to overcome the status of ambiguity that leads the Executive to dominate through its uncontrolled authoritarian powers, and to confine 'the evils of emergency legislation.'¹⁷⁷ Due the difficulties imposed by the rigid nature of the Kuwaiti Constitution, these challenges, including the paradox of Amiri Decrees, can only be implemented by constitutional amendments which requires the approval of the Amir. Therefore, for the sake of harmony and democratic process, the reform steps should be confined to a gradual and consensual transformation agenda. This can be achieved through degrees of change. It could be initiated by a conventional restraint arrangement covering limitation of the Amir's emergency powers, a supplementary legal instrument such as the Civil Contingencies Act, until the desire end of passing a constitutional amendment is achieved in due course.

¹⁷⁰ For full commentary on all parts of the Act, see Walker C and Broderick J, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press 2006).

¹⁷¹ Civil Contingencies Act 2004, s22(5)(a); s(28) ss(1), (2), (3), and (4).

¹⁷² *ibid* s 23(5)(b).

¹⁷³ Explanatory notes of Civil Contingencies Act 2004, Scope of emergency regulations, s22(50).

¹⁷⁴ *ibid* s(21).

¹⁷⁵ *ibid* s(22).

¹⁷⁶ *ibid* s(26).

¹⁷⁷ Walker C, 'The Governance of Emergency Arrangements' (2014) 18(2) *The International Journal of Human Rights* 211–227.

7.2.2.2 The Jurisdiction of Interpreting the Constitution

Law no 14/1973 assigned the task of interpreting constitutional provisions to the Constitutional Court.¹⁷⁸ Many legal scholars agree that, when exercising the function of determining the constitutionality of legislation and regulation, this constitutional role is a natural practice of the Court, which does not need further confirmation.¹⁷⁹ However, Article 173 of the Constitution did not sanction the Court, independently and without a constitutional dispute, to accept requests to interpret the Constitution's provisions. Nevertheless, the Constitutional Court affirmed, in many of its explanatory decisions, that it was granted this task through its capacity as the exclusive body able to decide the constitutionality of laws and regulation.¹⁸⁰ As a result, this task cannot be excluded from the Court unless through a constitutional amendment to Article 173, the Court argues.¹⁸¹ The Court has assigned this task to itself without any constitutional reference.¹⁸² There is no indication as how to uphold this claim within the wording of Article 173, nor within the Explanatory Memorandum of the Constitution.¹⁸³ The only express sanction of this task to the Court was through the establishment of Law no 14/1973.¹⁸⁴ Therefore, on the basis that the Court triggered this task by misinterpreting the constitutional provisions,¹⁸⁵ it has been claimed that the Court's action was more in relation to legislating a new constitutional provision rather than explaining an existing one.¹⁸⁶

Under Article 2,¹⁸⁷ the NA and the Executive were granted the right to resort to the Constitutional Court to seek its interpretation of constitutional disputes between themselves. Since its establishment under Law no 14/1973, the Court has received 14 interpretation requests. Among these, the NA submitted a single request whilst the

¹⁷⁸ Article 1 of Law no 14/ 1973 of Establishing the Constitutional Court.

¹⁷⁹ op cit Al-Saleh (n 23) 668.

¹⁸⁰ Explanatory Constitutional Decision no 3/1996.

¹⁸¹ *ibid.*

¹⁸² Al-Tabtabaie A, *The Constitutional Limits Between the Legislature and the Judiciary: A Comparative Study* (University of Kuwait Press 2000) 344.

¹⁸³ Al-Faili M, 'Explanatory Jurisdiction of the Constitutional Court in Kuwait: An Appraisal' (1999) 23(3) Kuwait University Journal of Law 41.

¹⁸⁴ op cit Al-Tabtabaie (n 30) 104.

¹⁸⁵ Al-Mutairi Turki, 'The Interpreting Jurisdiction of the Constitutional Court of Kuwait and the Rules of Interpretation' (2012) 36(4) Kuwait University Journal of Law 173.

¹⁸⁶ op cit Al-Tabtabaie (n 30).

¹⁸⁷ Law no 14/1973 of Establishing the Constitutional Court.

Executive submitted the remainder.¹⁸⁸ Within this jurisdiction, the Court has issued 11 explanatory decisions. Six of these were as a result of the Executive's request to interpret constitutional provisions regarding disputes about the application of the parliamentary control mechanisms. The majority of the parliamentarians interviewed considered that, in most cases, the Executive's requests for interpretation sought the Court's support to limit the parliamentary control mechanisms.¹⁸⁹

Based on the principle of the separation of powers, many argue that parliamentary matters should fall beyond the courts' jurisdiction.¹⁹⁰ In fact, the Constitutional Court also confirmed that none of the parliamentary works which arise from the NA's law-making function can be subject to the Court's review.¹⁹¹ However, in most of these explanatory decisions, the Court examined parliamentary works and commented on the practices of the NA's members. Some of these decisions were in favour of enhancing the NA's capacity to control the Executive's powers but others were not. It is notable, in this regard, that this study does not aim to analyse these decisions from a legal perspective. The study is, however, interested in shedding light on the fact that they have enabled the judiciary to review and control parliamentary functions, which has then affected the constitutional principle of the separation of powers between the NA and the Executive.

An example is Explanatory Decision no 3/1982. The Court received a government request to interpret Article 99 of the Constitution regarding the limits of parliamentary questions concerning an individual's privacy. The constitutional disputes were related to a PQ which had been submitted to the Minister of Public Health to disclose the names and numbers of patients who had been sent abroad for medical treatment. The Constitutional Court asserted that PQs should not seek government information which violates Article 30 of the Constitution. Under this article, personal liberty is guaranteed.¹⁹² The Court considered that such information was private, and disclosing this would be contrary to an individual's right of privacy, notwithstanding, the member who raised the question was seeking to scrutinise the ministry's policies for using public funds to send patients outside the country for medical treatment. The Court's

¹⁸⁸ *op cit* Al-Mutairi (n 185) 114.

¹⁸⁹ 4 Interviewees out of 5.

¹⁹⁰ *op cit* Al-Tabtabaie (n 30) 344.

¹⁹¹ Constitutional Court verdicts nos 1/1994 and 3/1994.

¹⁹² Article 30 of Constitution.

interpretation of Article 30 was highly criticised.¹⁹³ It has been argued that an individual's right of privacy remains a relative right towards the common good. Therefore, parliament's right to control public expenditure requires that members are capable of controlling and reviewing official information in order to exercise their duties.¹⁹⁴ Consequently, the Executive employed the Court's decision to withhold such information.

Next, based on another governmental request, in Decision no 3/2004 the Court deemed any PQ seeking information related to the government's foreign policy to be unconstitutional.¹⁹⁵ The Court considered that such issues contradict the public nature of parliamentary discussions and deemed them 'an exclusive right of the Amir'.¹⁹⁶ The Court considered its judgment as a firm application of the principle of the separation of powers. This judgment was widely criticised as it created new limits on the PQ device, which lack any constitutional basis.¹⁹⁷ In fact, the wording of Article 99 of the Constitution, which organises the PQs, did not enforce any limitations on the NA members' applications in such regard. Moreover, under the Constitution provisions it is an absolute right of the NA to oversee these issues. Under Article 70 of the Constitution:

(1) The Amir concludes treaties by decree and transmits them immediately to the National Assembly with the appropriate statement. A treaty has the force of law after it is signed, ratified, and published in the Official Gazette. (2) However, treaties of peace and alliance; treaties concerning the territory of the state, its natural resources or sovereign rights, or the public or private rights of citizens; treaties of commerce, navigation, and residence; and treaties entailing additional expenditure not provided for in the budget, or involving amendment of the laws of Kuwait; shall come into force only when made by a law. (3) In no case may treaties include secret provisions contradicting those declared.¹⁹⁸

¹⁹³ op cit Al-Mutairi (n 185) 120.

¹⁹⁴ op cit Al-Tabtabaie (n 30) 137.

¹⁹⁵ Al-Tabtabaie A, *Parliamentary Questions* (University of Kuwait Press 2006).

¹⁹⁶ Explanatory Decision no 3/2004.

¹⁹⁷ op cit Al-Mutairi (n 185) 126.

¹⁹⁸ Article 70 of Constitution.

Therefore, it has been argued that the Court in this explanatory decision violated the principle of the separation of powers by giving itself the right to insert a constitutional amendment by creating new limits on the practices of PQs.¹⁹⁹

The activities of the parliamentary committees of inquiry are also subject to the Court's review. Under Article 114 of the Constitution, 'the National Assembly at all times has the right to set up committees of inquiry or to delegate one or more of its members to investigate any matter within its competence'.²⁰⁰ In two governmental requests to interpret this article, the Court outlined the subjects these committees are entitled to investigate. In its Explanatory Decision no 1/1986, the Court responded to the Executive's question regarding the limits of the scope of work of the parliamentary committees of inquiry. The Court confirmed that the NA's right to form committees of inquiry to investigate the Executive's activities is extended to include examining the works of current and previous executives. Also, it ensured that the NA's members were permitted to examine general issues within the Executive's competence and not necessarily a particular subject, as the Executive claimed in its explanatory request.²⁰¹ Also, in Decision no 2/1986, the Court affirmed that the NA's committees of inquiry were entitled to examine individuals' secret financial information in the Central Bank of Kuwait regarding beneficiaries of a public fund loan.²⁰²

The Court next used this function to interpret Article 100 of the Constitution, which deals with how the NA's members interpellate ministers. Under this article, 'every member of the National Assembly may address the Prime Minister and ministers' interpellations with regard to matters falling within their competence'.²⁰³ According to a governmental request to interpret this article, in order to state whether subjects of interpellation are bound by any constitutional constraints, the Court asserted that interpellation matters addressed to the Prime Minister and ministers must be in relation to specific, detailed actions, therefore broad topics were not allowed. In addition, the Court confirmed that ministers are not responsible for ex-ministers' faults unless the wrong-doings were continued by the subsequent minister.²⁰⁴ Furthermore, based on a

¹⁹⁹ op cit Al-Mutairi (n 185) 126.

²⁰⁰ Article 114 of Constitution.

²⁰¹ Constitutional Court Explanatory Decision no 1/1986.

²⁰² *ibid* Decision no 2/1986.

²⁰³ Article 100 of Constitution.

²⁰⁴ Constitutional Court Explanatory Decision no 8/2004.

governmental request to interpret Articles 100, 123 and 127, which organise interpellations addressed to the Prime Minister, the Court introduced a new limitation on these.²⁰⁵ Under Article 123 of the Constitution, ‘the Council of Ministers has control over the departments of the State. It formulates the general policy of the Government, pursues its execution, and supervises the conduct of work in government departments’.²⁰⁶ Article 127 states that, ‘the Prime Minister presides over the meetings of the Council of Ministers and supervises the co-ordination of work among the various ministries’.²⁰⁷ The Court asserted that these articles outline the competence of the PM’s works, which are subject to parliamentary control.²⁰⁸ It concluded from the wordings of these articles, and the wording of Article 58, that the, ‘Prime Minister and the ministers are collectively responsible to the Amir for the general policy of the State’,²⁰⁹ and that the PM is only responsible to the NA for the general policies of government, while the general policy of the state is beyond any type of parliamentary control and subject only to the Amir’s review. It has been argued that such an odd classification of the PM’s responsibilities has no constitutional basis and can thus lead to a type of uncontrolled governmental activity which parliament is unable to oversee.²¹⁰

Notwithstanding these pronouncements, the Court’s explanatory decisions are not constitutional verdicts. They lack the equivalent legal efficacy of the Constitutional Court’s verdicts, which are issued according to its jurisdiction in determining the constitutionality of laws and regulation. As previously discussed, under Article 173 of the Constitution, if the Court decides that a law or a regulation is unconstitutional, it is considered null and void.²¹¹ However, this doctrine does not apply to the Court’s explanatory decisions. Some even argue that they are technically not judicial verdicts. They are akin to a political arbitration, or a dialogue, between the NA and the Executive upon disputes regarding their understanding of the constitutional provisions and, therefore, the acknowledgment of the parties to the decisions stems only from their respect for its role.²¹² In fact, the Court’s decisions in this regard cannot be enforced on

²⁰⁵ Constitutional Court Explanatory Decision no 10/2011.

²⁰⁶ Article 123 of Constitution.

²⁰⁷ *ibid* Article 127.

²⁰⁸ Constitutional Court Explanatory Decision no 10/2011.

²⁰⁹ Article 58 of Constitution.

²¹⁰ *op cit* Al-Mutairi Turki (n 185) 149.

²¹¹ Article 173 of Constitution.

²¹² *op cit* Al-Faili (n 183) 53.

the NA and the Executive. The nature of the parliamentary function is considered out of the scope of the judiciary's scrutiny, based on the constitutional principle of the separation of powers.²¹³ It is thus because the nature of the parliamentary control function requires acquaintance with political considerations which are out of the Court's capacity.²¹⁴ In contrast, it has been argued that, according to the principle of the rule of law, all powers of the state must perform their tasks according to the law.²¹⁵ Under its interpretative jurisdiction, the Constitutional Court should practise a wider role in providing the accurate meanings of the constitutional doctrines.²¹⁶ Thus, the Court's attitude in seizing this jurisdiction has been viewed as a safety valve where any misunderstanding of a constitutional provision might initiate a political crisis between the NA and the Executive.²¹⁷ In such cases, the Court can play a critical role in determining the precise meaning and accurate application of constitutional texts,²¹⁸ a role which safeguards the principle of the separation of powers between the two branches of the state.²¹⁹

In the UK, there is no constitutional body similar to the Constitutional Court of Kuwait. At the top of the judicial system, there is the UKSC. It does not have specific constitutional powers but hears cases of the greatest public or constitutional importance. However, in a democratic state, the need for a central authority is required, so that citizens are aware of the ultimate authority which overrides the other powers where there is a clash.²²⁰ This authority in the Constitution of the UK is arguably Parliament not the courts. Dicey defined the legislative supremacy of Parliament as, 'the right to make or unmake any law whatever; and that ... no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament'.²²¹ Parliamentary sovereignty means that courts must give effect to any Act of Parliament, unless it is incompatible with European Union law or the Human Rights Act (HRA)

²¹³ Article 50 of Constitution.

²¹⁴ *op cit* Al-Tabtabaie (n 195) 272.

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ *op cit* Al-Tabtabaie (n 30) 109.

²¹⁸ *op cit* Shafiq (n 165) 82.

²¹⁹ *op cit* Al-Assar (n 102) 99.

²²⁰ Oliver D, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003) 30.

²²¹ Dicey AV, *The Law of the Constitution* (Wade ECS ed, 10th edn, Oxford University Press 1959) 39–40, cited by Bradley and Ewing, *Constitutional & Administrative Law* (n 2) 53.

1998.²²² This doctrine also imposes a duty on courts not to hold an Act of Parliament to be invalid or unconstitutional.²²³ A justification for this doctrine is that it, ‘preserves comity between the legislature and the courts, and thus it promotes trust between those in power and, in turn, it promotes good governance’.²²⁴ However, questions have been raised by the courts in relation to the common law constitutionalism doctrine against parliamentary sovereignty.²²⁵ Recent judicial proceedings have held the view that,²²⁶ if an act of parliament contravened a fundamental principle of the Constitution, the courts may refuse to recognise such an act. The difficulty of such a paradoxical argument is that it has never been done. However, Lord Woolf once suggested, ‘If parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent’.²²⁷

The concept of the Constitutional Dialogue,²²⁸ (Declaration of Incompatibility),²²⁹ delivers an interesting example in terms of the role of the Constitutional Court in a given democracy. In the UK, as a legal system that stands on a common law legal order, such a dialogue has been perceived as, ‘a necessary device to square common law doctrines with unqualified legislative supremacy’,²³⁰ and more specifically, ‘in the context of applying international human rights norms’.²³¹ The protection of fundamental human rights has changed dramatically over the last few decades. Once it had become a party to the European Union (EU) and the European Court of Human Rights (UCHR), the UK’s national laws, including Acts of Parliament, became subject to the assessment of an international tribunal.²³² Also, according to the doctrine of its supremacy, EU laws override any incompatible provisions of national law.²³³ Under the

²²² Human Rights Act 1998 s (4) 2.

²²³ op cit Bradley and Ewing (n 2) 53.

²²⁴ op cit Oliver (n 220) 33.

²²⁵ op cit Bradley and Ewing (n 2) 59.

²²⁶ *Jackson v AG* (2005) UKSC 56; *Oppenheimer v Cattermole* (1976) 1 AC 249.

²²⁷ Lord Woolf, ‘Droit Public – English Style’ [1995] Public Law 1, 57–71.

²²⁸ Meuwese A and Snel M, ‘Constitutional Dialogue: An Overview’ (2013) 9(2) Utrecht Law Review 123–140.

²²⁹ See chapter 5.

²³⁰ Allan TRS, ‘Constitutional Dialogue and the Justification of Judicial Review’ (2003) 23 Oxford Journal of Legal Studies 563.

²³¹ Barak-Erez D, ‘The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue’ (2004) 2 International Journal of Constitutional Law 611.

²³² Elliott M, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective’ in Jowell J, Oliver D and O’Cinneide C (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015) 39–103.

²³³ Case 26/62, *Van Gen den Loos* (1963) ECR 1, 12, cited in Oliver (n 220).

Human Rights Act 1998, courts are entitled to declare any legislation or policy that breaches the provisions of the European Convention on Human Rights (ECHR)²³⁴ to be incompatible with the Convention.²³⁵ However, ‘declarations of incompatibility’ do not affect the validity of the law concerned.²³⁶ Rather, it simply represents a strong normative statement by the judiciary, which invites response. In other words, such a declaration initiates a sort of dialogue between the judiciary and parliament to consider amending the said law in order to be compatible with the provisions of the ECHR.²³⁷ In an application of the method of policy transfer, such a judicial approach seems an attractive mechanism for progressing constitutional matters. It allows the state an opportunity to reconsider defective legislation without it being annulled through a judicial decision and thus eliminating the likelihood of creating a legal vacuum and/or a political crisis.

It can be concluded that the main jurisdiction of the Kuwaiti Constitutional Court lies in interpreting the constitutional texts during its exclusive task of determining the constitutionality of laws and regulation. However, this jurisdiction has been used outside of its original scope. In particular, it was employed by the Executive to challenge the constitutionality of the practices of the NA’s members to call it to account. Thus, the majority of the interpretation requests which have been submitted by the Executive have aimed to oppose the controlling function of the NA. Consequently, the decisions have also been used by the Executive as a measuring tool to argue about the constitutionality of parliament’s controlling practices.²³⁸ This has had the unfortunate effect of dragging the Court into the political arena from which justice should be kept distant.²³⁹

7.2.2.3 The Jurisdiction of Reviewing Electoral Petitions

The third jurisdiction of the Constitutional Court is reviewing electoral petitions regarding the validity of the membership of the NA. The Court was conferred with this

²³⁴ <<http://www.echr.coe.int/pages/home.aspx?p=basictexts>> accessed 25 October 2016.

²³⁵ Human Rights Act 1998, section 4 <<http://www.legislation.gov.uk/ukpga/1998/42/section/4>> accessed 25 October 2016.

²³⁶ *Miranda v Secretary of State for the Home Department* [2014] EWHC 255.

²³⁷ See <<https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/constitutional-reform/>> accessed 25 October 2016.

²³⁸ For more details, see Parliamentary Questions, chapter six, section 6.2.1.2.

²³⁹ Interviewee D2.

task through its Establishment Law no 14/1973.²⁴⁰ Originally, this task was assigned to the NA by Article 95 of the Constitution. Under this article:

The National Assembly decides upon the validity of the election of its members. No election may be declared invalid except by a majority vote of the members constituting the assembly. This jurisdiction may, by law, be entrusted to a judicial body.²⁴¹

The Standing Orders Act no 12/1963 of the NA details the procedures of this task in Articles 4 to 11. Since its establishment in 1963, the NA exercised this task five times prior to the enactment of Law no 14/1974, which empowered the Constitutional Court.²⁴² The Explanatory Memorandum of this law rightly states that, ‘in order to avoid political considerations, which usually accompany parliamentary decisions, it has been agreed to assign this task to the Constitutional Court to sustain a technical legal assessment over such types of disputes’.²⁴³

Historically, in most modern parliaments the validity of the elected members of parliament was a genuine task of the elected assemblies,²⁴⁴ in order to secure a state of independence for parliament from other branches of government. Nevertheless, the judiciary is more qualified to review the legal aspects of these types of disputes and to deliver impartial conclusions. However, judges must fulfil this crucial responsibility with adherence to their judicial function and with respect to the principle of the separation of powers.²⁴⁵ Therefore, this exceptional mandate should always be carried out with the minimum of application, otherwise any judicial expansion of such jurisdiction might violate the principle of the separation of powers.²⁴⁶

The Court’s jurisdiction in reviewing electoral petitions comprehensively extends to examine all the electoral stages. During this task, it oversees the preceding phases of the election, the polling and the announcement of the results.²⁴⁷ Thus, the Court examines the electoral register process, polling administration and the casting of votes

²⁴⁰ Article 1 of Law no 14/ 1973 of Establishing the Constitutional Court.

²⁴¹ Article 95 of Constitution.

²⁴² See the Minutes of NA meetings: 12/3/1963, 9/4/1963, 28/3/1967, 13/3/1971, and 16/3/1971, Library of National Assembly.

²⁴³ The Explanatory Memorandum of Law no 14/1972 of Establishing the Constitutional Court; Al-Mouqatei (n 17) 56.

²⁴⁴ Grist R, ‘Challenging Elections in the Courts’ [2015] Public Law Jul 375–385.

²⁴⁵ Interviewee E3.

²⁴⁶ op cit Al-Mouqatei (n 17) 80.

²⁴⁷ op cit Al-Tabtabaie (n 30) 150.

and, finally, the declaration of the election results. Since its establishment in 1973 until 2006, the Court has reviewed 50 electoral petitions.²⁴⁸ According to numerous decisions, the Court affirmed that the prime aim of this comprehensive supervision mandate is to ensure that the results reflect the accurate will of the electorate.²⁴⁹ Therefore, the Court asserts that any misconduct in the electoral procedures, which does not extend to affecting the accurate will of the electorate, shall not nullify the election.²⁵⁰ However, the Court abandoned this doctrine in its recent judgment. Based on an electoral petition submitted by a losing candidate who challenged the legality of the previous government's procedures to dissolve the 2012 NA,²⁵¹ the Constitutional Court accepted his claim and ruled that all the following procedures of this unconstitutional dissolution, including the Amiri decree calling for the general election and consequently the polling itself, were null.²⁵² However, such alleged illegal procedures of the dissolution of parliament should not and cannot affect the accurate will of the electorate.²⁵³

Such an unprecedented ruling provoked a wide debate among constitutional scholars,²⁵⁴ particularly as the Constitutional Court in the following year,²⁵⁵ based on this precedent ruling, dissolved parliament for the same reasons relating to shortcomings within the procedures of the general election that had been held on 1 December 2012. The Court concluded that this whole election again was void on the basis that it was conducted according to an unconstitutional amended electoral law, which was reformed by an emergency Amiri Decree-Law²⁵⁶ during the dissolution of the NA.²⁵⁷ Some commentators considered these verdicts to be significant developments towards effective judicial review, whilst others viewed them as a cause for major constitutional

²⁴⁸ Constitutional Judgments, vols 1 to 5, Publications of Ministry of Justice.

²⁴⁹ Constitutional Court Verdicts nos 5/2003, 6/2003, 9/2003, 10/2003, 11/2003, 12/2003, and 14/2003, Constitutional Judgments, vol 1, May 2003, Publications of Ministry of Justice.

²⁵⁰ Constitutional Court Verdict no 12/2003 on 6 December 2003, Constitutional Judgments, vol 1, May 2003, Publications of Ministry of Justice.

²⁵¹ Electoral Petition no 6/2012 by Safa Al-Hashim (Official Gazette of Kuwait 20 June 2012).

²⁵² For more information, see chapter 1 section 1.4.

²⁵³ Interviewees C1, C2, and C5.

²⁵⁴ *op cit* Al-Assar (n 102) 118.

²⁵⁵ Electoral Petition no 15/ 2012 by Osama Al-Rahidi (Official Gazette of Kuwait 16 June 2013).

²⁵⁶ Amiri Decree no 21/2012 Regarding Amending the Electoral Law no 35/1963 (Official Gazette of Kuwait 21 October 2012).

²⁵⁷ The law-decree tackled some articles which were regarded as non-urgent action by the Court to be handled by a Decree under article 71 of Constitution.

turmoil.²⁵⁸ In the next paragraph, the study offers a critical overview of the Constitutional Court verdict no 16/2012, which resulted in the dissolution of parliament, in order to examine the extent to which this judgment has affected the practice of democracy and, in particular, constitutionalism.

The most controversial topic in this regard was the Constitutional Court jurisdiction in examining the Amir's decree, which dissolved the 2012 Parliament.²⁵⁹ It has been widely agreed among constitutional jurists that the jurisdiction of the Constitutional Court in reviewing electoral petitions should be viewed as limited. The scope of this jurisdiction is focused on examining the election process to confirm that the result represents the accurate will of the electorate.²⁶⁰ In order to carry out such an examination without restriction, some believe that this jurisdiction extends to reviewing all the previous stages of the election including the act dissolving the NA, which initiates the whole process. Supporters of this argument hold the view that everything that is based on a void action is considered the same.²⁶¹ In other words, if there is a constitutional shortcoming based on the preceding procedures, then the entire general election should also be considered valueless. In fact, this conclusion was the prime argument of the Court in its verdict under examination. However, there is consensus that the Court is not permitted to review acts of dissolution further than their procedural aspects.²⁶²

Others, however, assert that the decree of dissolution is not a preceding procedure of a general election. It is, in fact, a separate supreme act, which is not attached directly to the electoral process, even though the election is one of its effects.²⁶³ In addition, this decree has no direct effect upon the voters and their voting practices during the electoral process. The electoral process starts, in technical terms, with the Amir's Decree to call the electorate to an election, and only by this decree does the process of the general election begin and later become subject to the Court's review.²⁶⁴ The Court should not

²⁵⁸ Interviewee E3.

²⁵⁹ Amiri decree no 443/2011 (Official Gazette of Kuwait 6 December 2011).

²⁶⁰ Al-Remaidhi A, 'Comments on Two judgments of Constitutional Court for Challenges nos 6, 22, 30/2012 concerning Parliament's Dissolution' (2012) 36(4) Kuwait University Journal of Law.

²⁶¹ Al-Mouqatei M, *Al-Rai Newspaper* (Kuwait 12 May 2012, issue 12003); op cit Al-Assar (n 102); Sandid BA, 'Nullity of National Assembly Dissolution Decree in Light of the Principle of Lawfulness and Pertinent Court Ruling' (2015) 39(1) Kuwait University Journal of Law 446.

²⁶² op cit Al-Tabtabaie (n 30).

²⁶³ op cit Al-Remaidhi (n 260) 28.

²⁶⁴ *ibid.*

extend its consideration prior to this stage otherwise the practice will lead to the judiciary being granted the right to review other aspects of the dissolution acts.

It has been argued that governmental actions, in regard to the relationship between the legislative and executive powers, including Amiri Decrees to dissolve the NA and to call for the general election, should be considered ‘acts of sovereignty’ which fall outside of the judicial jurisdiction.²⁶⁵ Under Article 2 of Law no 23/1990 on Organising the Judiciary, the legislature confirmed that, ‘Courts are not permitted to examine acts of sovereignty’. The concept of political acts or acts of sovereignty means that certain actions are not subject to judicial control.²⁶⁶ The theory behind this doctrine is that the judiciary is incompetent to deal with such acts due to their sensitive political considerations and, therefore, the Executive power should be allowed to exercise a wider discretionary authority apart from any kind of judicial review.²⁶⁷ However, Law no 23/1990 did not specify distinctly the doctrine of acts of sovereignty. Rather, it recognised that the courts shall provide the meaning of this term through their judgments.²⁶⁸ In numerous rulings, the Constitutional Court has refined the application of this doctrine by acknowledging its incompetence to examine any type of these acts.²⁶⁹ As such, actions:

[I]ssued by the government as a sovereign power but not as an administrative power, which are exercised to organise its relationship with other branches of government, are excluded from judicial review due to the nature of these works that need considerations, information and measures related to the supreme interests of the State, which are incompatible to be subjected to judicial review.²⁷⁰

Moreover, the Constitutional Court reaffirmed its acknowledgment of this doctrine in its verdict under examination. In reply to the Executive’s defence regarding its incompetence,²⁷¹ the Court conceded that:

Even though it is recognized by this Court that acts of sovereignty are not subject to its control, however, under its obligation to protect the

²⁶⁵ op cit Al-Tabtabaie (n 30) 192.

²⁶⁶ op cit Shafiq (n 165) 81.

²⁶⁷ Abouelenen MM, ‘Judges and Acts of Sovereignty’ in Nathalie Bernard-Maugiron (eds), *Judges and Political Reform in Egypt* (American University in Cairo Press 2009; Cairo Scholarship Online 2012).

²⁶⁸ *ibid.*

²⁶⁹ Constitutional Court verdicts nos 2/1982, 2/1999, *Constitutional Judgments*, vol 2, June 2003, Publications of Ministry of Justice.

²⁷⁰ Constitutional Court verdict no 2/1999.

²⁷¹ Notes of the Defence of the Government stated in verdict no 2/1999.

accurate applications of the constitutional doctrines, there shall be no omissions in the constitution which prevent the Court from extending its exclusive task of constitutional review. The Court asserts its examination over the previous procedures of the general election of the NA, which extends to scrutinising the constitutionality of the executive's procedures to dissolve the NA itself. As such, examination is only directed to control the procedural restrictions on the Amir's decree to dissolve the NA but not over the subjective aspects of such a decree, which fall outside of its control.²⁷²

Nevertheless, the Court's conclusion about its competence to examine the procedural restrictions of an act of sovereignty have also been criticised. It has been agreed that those who have no jurisdiction to review the substance of a sovereign act cannot claim the same jurisdiction to review its promulgation of procedural aspects. Otherwise, such unacceptable differentiation shall disrupt not only the jurisdiction of the Constitutional Court but also the entire jurisdiction of all courts.²⁷³

Rightly, it has been argued that the Court's jurisdiction in reviewing electoral petitions should be a limited task. Originally, this task was a parliamentary function assigned to the NA under Article 59. Under this article, the NA exercised this function five times according to the governing articles of electoral petitioning indicated in Election Law no 35/1963. Article 41 of this law outlined that, 'each voter shall have the right to request invalidation of the polling held in his electoral constituency, and each candidate shall request the same in the constituency in which he was a candidate'. In addition, Article 11 of the Standing Orders of the NA states that, 'If the NA annulled the nomination of a member or more, it has the right to declare the accurate candidate'.²⁷⁴

The Constitution allowed the NA to assign, by law, this task to a judicial body. Nevertheless, the constitutional authorisation indicated in Article 95 does not suggest any alteration to the parliamentary nature of this exercise. In fact, the NA at any time has the power to repossess this task by amending Law no 14/1973. Therefore, it has been suggested that the exercise of this parliamentary work by the Constitutional Court should be carried out according to the limits indicated in the electoral law. By examining the wording of Articles 41 and 42 of the electoral law, one can distinctly perceive that electoral petitioning is formulated for each individual to challenge the

²⁷² *ibid.*

²⁷³ *op cit* Al-Remaidhi (n 260) 33.

²⁷⁴ Article 11 of the Standing Orders Act no 12/1963 of National Assembly.

electoral results in his own constituency but not other constituencies.²⁷⁵ The system of electoral petitioning does not assume that a single petition would result in challenging the entire composition of the NA. It is thus because the NA, which originally exercised this task, is not established to deal with a petition that challenges its entire validity. In such a scenario, it is not conceivable for it to declare its invalidity as a body for any reason. It is permissible to decide the validity of one or more of its members, but not the entire assembly. As a result, the Constitutional Court cannot play a role which the NA itself is not permitted to exercise. According to Article 50 of the Constitution:

[T]he system of government is based on the principle of the separation of powers functioning in co-operation with each other in accordance with the provisions of the Constitution. None of these powers may relinquish all or part of its competence specified in this Constitution.²⁷⁶

Many argue that this argument prevents the judiciary from playing any role in determining the composition and functioning of the NA,²⁷⁷ or at least the role of determining the validity of the NA as a whole.

In the UK, before the enactment of the Parliamentary Elections Act 1868, determining the validity of election results was a competence of select committees in the House of Commons.²⁷⁸ Subsequently, electoral challenges have been decided by the courts.²⁷⁹ Now, the law in force which controls election petitions is the Representation of the People Act 1983 (RPA).²⁸⁰ Under this law, various types of elections can be challenged, including parliamentary elections, local elections, and European Parliament elections.

According to Part 3 of the RPA 1983 and the relevant judicial proceedings, challenging an election is permitted if:

An error was made by an electoral official that affected the result or at least meant that ‘the election was not conducted so as to be substantially in accordance’ with the rules (under these grounds, the

²⁷⁵ The Constitutional Court supports this argument, see Electoral Petition no 40/2008 by Abdullah Al-Gannam, Constitutional Judgments vol 5 part 2 August 2005 to December 2008, Publications of Ministry of Justice.

²⁷⁶ Article 50 of Constitution.

²⁷⁷ Watt B, *UK Election Law, a Critical Examination* (Glass House Press 2006).

²⁷⁸ Grist R, ‘Challenging Elections in the Courts’ [2015] Public Law Jul 375–385.

²⁷⁹ Electoral Commission, *Challenging Elections in the UK* (2012)

<http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf> accessed 25 October 2016.

²⁸⁰ Representation of the People Act 1983.

election court is able to conduct a scrutiny of ballot papers to ascertain which candidate has the majority of lawful votes);

Corrupt or illegal practices were committed by a candidate or his or her agent or 'such practices so extensively prevailed in an election that they may reasonably be supposed to have affected the result';

The successful candidate was disqualified.²⁸¹

Among the significant features of this legislation is that it imposed strict procedural requirements and required substantial financial security on electoral challenges.²⁸² It also required that petitions must be decided by special election courts, with limited chances of appeal.²⁸³ Such an approach, as argued, has minimised and discouraged both legitimate and unfounded challenges.²⁸⁴ However, despite the fact that the aim of such restraint was suggested in order to reduce the numbers of vexatious or ill-founded petitions, such a 'financial deterrent acts chiefly as a barrier to those without significant financial resources, regardless of the strength of their arguments.'²⁸⁵

Ultimately, but most importantly, two key factors can be learned from the UK experience in this regard. There are both well-established institutional and power allocation features that need to be considered. Firstly, electoral courts are competent only to review petitions regarding an election in a particular constituency.²⁸⁶ Secondly, the powers of these courts are limited to electoral disputes. Therefore, in terms of dissolving parliament, as in the case of Kuwait, this is not a judicial business to decide.²⁸⁷ In fact, 'the power to dissolve parliament and proclaim an election has always been thought to be fundamentally and exclusively a political decision. As such it is not 'justiciable' but is within the exclusive discretion of the Executive'.²⁸⁸ Thus, only the

²⁸¹ op cit Electoral Commission (n 279) 8.

²⁸² The initial cost of bringing a UK parliamentary election petition is over £5,500, see *ibid* 28.

²⁸³ op cit Grist (n 278) 375–385.

²⁸⁴ op cit Electoral Commission (n 279) 31.

²⁸⁵ *ibid*, 32.

²⁸⁶ White I, *Parliamentary election petitions* (Commons research briefing HC 05751, 2015)

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05751>> accessed 19 October 2016.

²⁸⁷ Horne A and Kelly R, 'Prerogative Powers and the Fixed-term Parliaments Act' UK Const L Blog (19 November 2014) <<https://ukconstitutionallaw.org/2014/11/19/alexander-horne-and-richard-kelly-prerogative-powers-and-the-fixed-term-parliaments-act/>> accessed 19 October 2016.

²⁸⁸ See Blackburn R, *The Meeting of Parliament: A Study of the Law and Practice Relating to the Duration of the United Kingdom Parliament*, (Dartmouth 1990) 76; Stoltz D, 'Fixed Date Elections, Parliamentary Dissolutions and the Court' (2010) 33(1) *Canadian Parliamentary Review* <<http://www.revparl.ca/english/issue.asp?param=197&art=1365>> accessed 18 October 2016.

PM has the right to request the dissolution of parliament.²⁸⁹ Rightly, ‘such a determination is essentially political, and ultimately the electorate rather than the court is the proper forum to pass judgment on it’.²⁹⁰ Thus, these powers in the UK do not overlap between the government’s branches. Rather, they are kept well apart. Indeed:

[I]t is fundamental to the workings of government as a whole that all these parts play their proper role. It is equally fundamental that not one of them oversteps its bounds, and that each shows proper deference for the legitimate sphere of activity of the other.²⁹¹

Therefore, there is no doubt or ambiguity about who exercises which power and by which circumstance. Such clarity upon the exercise of these critical powers should be adopted by Kuwait through a similar detailed legislation that institutionalises the system of electoral disputes in greater detail, in order to protect and maintain a better application of the principle of separation of powers.

7.3 Conclusion

The essence of democracy is reflected in the set of values which it can produce and protect. Among these values are the rule of law, human rights and the separation of powers. Judicial review over executive powers, ‘is an essential process in a constitutional democracy founded upon the rule of law’.²⁹² However, the political environment in Kuwait has not been seen to allow the Constitutional Court to fulfil its anticipated role of protecting the values of constitutionalism.

The Court’s appointment system and the technical qualification of judges reveal the difficulties this body encounters in performing its responsibilities effectively. Judges in Kuwait:

[R]espect the rule of law but mostly in relation to cases involving the personal affairs of individuals. In crucial political events that included confrontation with the Government, they were vague and with no clear vision. They seemed sensitive to the temper of the Government and their boldness was often absent.²⁹³

²⁸⁹ Subject to the provisions of the Fixed-term Parliaments Act 2011; Kelly R, *Dissolution of Parliament*, (Commons Research Briefing HC SN/PC/05085 January 2015).

²⁹⁰ Supreme Court of Canada’s decision in *New Brunswick Broadcasting Co v Nova Scotia* (Speaker of the House of Assembly) [1993] 1 SCR 319, 100 DLR. (4th) 212 (McLachlan J).

²⁹¹ *ibid.*

²⁹² *op cit* Bradley and Ewing (n 2) 669.

²⁹³ Interviewee E3.

By examining the three tasks of the Constitutional Court's functional system, it can be concluded that the system of controlling the Executive's powers by the judiciary is insufficient. The Court, on various occasions, has been unable to effectively control the tyrannical powers of the Executive by legal means. Also, the Court was incapable of adjusting the embedded principles of constitutionalism in the constitution. In particular, in its approaches to critical disputes related to the NA's constitutional role, 'the Court was incapable of fulfilling a neutral role'.²⁹⁴

According to the Constitution's provisions, 'The system of government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers'.²⁹⁵ The NA's genuine authority is therefore derived directly from the Constitution, but not from any other branches of government. A sovereignty which stems from the will of the people should be reflected by their choices in the general election, rather than in courts judgments.²⁹⁶

The consequence of the Constitutional Court's approach to disputes related to the NA's function and its inconsistent judgments have had negative impacts on the latter's ability to control the Executive's powers. Rather, on many occasions, it empowered the Executive to affect the function and the composition of the NA. This study suggests that in an environment which suffers weakness in human political rights, the absence of an active NGO, and free speech,²⁹⁷ the judiciary should hold greater responsibilities in securing the rule of law against the powers of the Executive. However, 'it is unclear if the Kuwaiti judiciary is likely to emerge soon as a force holding the Executive accountable to clear legal and constitutional standards'.²⁹⁸ The Court, 'has been faced with some of the most vexatious constitutional disputes over issues including press freedom, women's suffrage, and emergency rule, but avoided ruling on them, often through a legal technicality'.²⁹⁹ Also, recently, the 'Judiciary has been dragged perforce

²⁹⁴ Interviewee E2.

²⁹⁵ Article 6 of Constitution.

²⁹⁶ Al-Jasim M, *The Spirit of the Constitution: The Theory of Balance, Introduction to the Idea of the State and the Law* (Dar Qerttas Press 2007) 361.

²⁹⁷ See <<http://ccprcentre.org/ccprpages/kuwait-absence-of-ngos-at-review-of-kuwait-highlights-precarious-human-rights-situation>> accessed 25 October 2016.

²⁹⁸ Brown N, 'Mechanisms of Accountability in Arab Governance: The Present and Future of Judiciaries and Parliaments in the Arab World' [2003] United Nations Development Program <<ftp://pogar.org/LocalUser/pogarp/governance/nbrown/mechanisms.pdf>> accessed 25 October 2016.

²⁹⁹ *ibid.*

to the world of politics'.³⁰⁰ Therefore, the effectiveness of the role of the judiciary in Kuwait, it is argued, is, 'under a status of ebb and flow, in accordance with the political environment in the state'.³⁰¹ Furthermore, the danger is that the depth of the term emergency is expanding. In various scenarios, the Executive misused the application of this alleged circumstance to confront the escalation of the NA's ability to hold it to account. However, the recognition of this expansion by the Constitutional Court is even more dangerous.

This study concludes that major reforms are needed to secure an independent constitutional judiciary capable of holding the Executive to account. A clear and specific boundary between the role of the Court and the role of the NA is needed in order to maintain the principle of the separation of powers. Such arrangements are required to sustain a firmer application of constitutionalism and its related ethical values. In the following chapter the study reaches its conclusions.

³⁰⁰ Interviewee D2.

³⁰¹ Interviewee D2.

Chapter Eight

Conclusion

8.1 The Answers

This research focused on the problems behind the domination of the Executive's powers in Kuwait. The main objective of this study was to reveal the inner workings of this phenomenon, and to discover how to control these powers by effective democratic mechanisms that respect the principle of constitutionalism and its related global values of the rule of law, human rights, and the separation of powers. Therefore, the essential aim of this research was constitutionalising the system for controlling the Executive's powers.

8.1.1 Thesis Answer

The research thesis argues that, currently, the design of Kuwait's Constitution, and the de facto government system, lack the necessary features to control the Executive's powers according to democracy and the desired ethical values of the rule of law, human rights, and the separation of powers. Thus, the thesis proposition was that the constitutional structure of the democratic system of Kuwait provides the Executive and the Amir with powers that undermine the values of constitutionalism, and so a revision of the Constitutional framework needs to be considered.

Parliament and the judiciary were identified as the most effective mechanisms that are qualified to employ an effective level of control over executive powers. However, the study has concluded that Kuwait's constitutional design lacks the necessary requirements to empower parliament and the judiciary to exercise effective control over the powers of the Amir and the Executive.

The research hypothesis was tested by three different methodologies. Firstly, by a doctrinal analysis approach. This largely documentary approach was measured against specific criteria: constitutionalism and its related ethical values of democracy, human rights, the rule of law and the separation of powers. Secondly, the study was not limited to the examination of texts and legal doctrines, but the theoretical approach was also supported by fieldwork interviews. Thirdly, the study drew on the UK's law and experience, in a policy transfer approach, to distil those lessons and policies that are presumed to be successful in controlling executive powers.

8.1.2 Objective One Answer

This research set out the constitutional history of Kuwait in order to demonstrate the culture that has influenced and shaped the constitutional and political practices. The research demonstrated in chapter two the impacts of these influences on the constitutional structure and on the version of democracy applied. The objective of this approach was to consider whether the Constitution received popular acclaim and whether it functions now as a democratic ruling system.

This research, therefore, began its investigation by providing a brief background exposition of the historical developments of the political system of Kuwait. The aim of this approach was to answer the following research question: has the Constitution of Kuwait been designed as a conservative or authoritarian structure that is contrary to democracy and the related desirable ethical values?

Among its important findings in this regard was that Kuwait emerged as an Emirate founded on popular consensus.¹ Popular participation in the governing system is a key feature in Kuwait's political character, a feature which justifies its attachment to follow a relatively democratic path despite the neighbouring authoritarian region. Indeed, this fact reveals that this Emirate can, and must, uphold such a practice in order to avoid a similar dramatic path as the chaos of the Arab Spring. This applies, particularly, in reaction to the continuing and escalating popular demand for political reform in Kuwait.

Kuwait's international relationships have influenced its political system. Britain, the colonial power, provided a great degree of political and financial support to the rulers of Kuwait. Such sensitivity towards international influence has persisted and affected its political system. Also, huge oil revenues empowered the Kuwaiti government to employ this financial strength toward its political domination in Kuwaiti society.² The government deployed its escalating financial resources to formulate a rentier economy that has hindered democracy and its means of accountability.³ Yet, evidence offered in this research indicates that the ruling family have been keen to support the home front

¹ Al-Ibrahim HA, *A Political Study* (University of Kuwait Press 1975).

² Gause FG III, 'The Persistence of Monarchy in the Arabian Peninsula: A Comparative Analysis' in Joseph Kostiner (ed), *Middle East Monarchies: The Challenge of Modernity* (Lynne Rienner Publishers 2000) 182.

³ Gause FG III, *Oil Monarchies: Domestic and Security Challenges in Arab Gulf States* (The Council on Foreign Relations Ins 1994) 43.

in times of foreign threats, and vice versa. Supporting democratic governance was one of their tactics in this regard.

The historical facts reveal that, since the reign of Sheik Mubarak and afterwards, a dramatic change in Al-Sabah's method of rule was noticeable. Most of the rulers, except for Sheik Abdulla Al-Salim, recurrently tended to revert to autocratic forms of government. History has also revealed that the Kuwaiti people were determined to play their role in the way they were governed. Since 1928, several attempts have been made to form a democratic channel in order to control government activities. Consequently, in 1963, after the state's independence, the new Constitution of Kuwait affirmed that, 'The system of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers'.⁴ Most of the constitutional doctrines in regard to democracy and its ethical values were, in fact, similar to some extent to the global values of constitutionalism. However, 'a constitution is much more than a document that spells out a set of laws and lays out the design of government'.⁵ Rather, authoritarianism, 'is the result of a set of often internal and occasionally external forces that make the establishment of a constitutional regime virtually impossible'.⁶ Evidently, the Amir and the Executive have maintained a set of dominant powers within the Constitution that have influenced the development of the democratic practice in Kuwait and have weakened, as a result, the system of accountability of the Executive.

8.1.3 Objective Two Answer

The study intended to identify and explore the desired constitutional values of Kuwait. Democracy, the rule of law, human rights and the separation of power principles were the ideological tools of measurement on which this study was based, to guide the researcher's examinations and his proposed solutions. In order to examine the constitutional structure of the democratic system, in chapter three this study drew on these universal ethical values and thereby evaluated the democratic system applied in the context of Kuwait.

⁴ Article 6 of Constitution.

⁵ Franklin D and Baun M (eds), *Political Culture and Constitutionalism: A Comparative Approach* (ME Sharpe 1995) 2.

⁶ *ibid.*

The study has shown that the western notion of constitutionalism does not contradict, in general, the Islamic and Arabic culture in Kuwait. The broad ambit of views in this spectrum proves that there is more than one specific answer for the arguments upon the Islamic and Arabic perspective of constitutionalism. However, apart from the divergence of conditions within the Islamic and Arabic countries, Kuwait in particular does not lack the platform to adopt the global ideas of constitutionalism. In fact, the study conclusion was that Kuwait's historical constitutional characters, who have been examined in chapter two, positioned it to accommodate a reasonable level of adherence to these universal values of constitutionalism.

8.1.4 Objective Three Answer

In chapter five, the research examined the predominant powers of the Executive, and determined whether they can be controlled, and by whom. Among the objectives of this study was to explore the control of the Executive's powers by efficient mechanisms. Thus, the research examined the role of the Amir and the Executive's powers in the parliamentary system, in order to define the problems and limitations to applying the values of constitutionalism. The study attempted, by this approach, to assess whether such powers are in contrast with democracy and the desired values. The study focused, in chapters six and seven, upon the constitutional powers of the Amir and the Executive in relation to parliament and the judiciary, which affect the practice of democracy. Also, the scope of this study focused on the relation between the judiciary and the Executive and how the interaction of such a relationship affected the application of the parliamentary and judicial control mechanisms.

At the outset of the research conclusions, it must be stressed that most of the findings from the fieldwork confirmed that parliamentary and judicial mechanisms to control the Executive powers were, in theory, generally capable of delivering an acceptable degree of accountability. This finding was contrary to the thesis' early predictions. The theoretical framework of parliamentary accountability within the Constitution is believed to be capable of providing the NA's members with a great deal of empowerment in this regard. Nonetheless, these mechanisms are unable to function efficiently due to a number of factors. Also, in theory, judges administering justice, 'are not subject to any authority. No interference whatsoever is allowed with the conduct of justice [and] Law guarantees the independence of the Judiciary and states the

guarantees and provisions relating to judges and the conditions of their irremovability'.⁷ Nevertheless, the judiciary was unable, in reality, on various occasions, to protect the values of the rule of law in particular and constitutionalism in general.

With regard to the parliamentary mechanisms, the study has revealed in chapter six that the constitutional shortcomings of the function of parliament compromised the system of controlling the Executive's powers. One of the main reasons for this weakness was the absence of a political party system. In light of this fact, the NA consists of scattered members without a political affiliation. On many occasions, the application of the parliamentary control mechanisms was compromised by the personal agenda of MPs and, thus, often targeted marginal issues,⁸ while the government was consolidated toward confronting these accountability approaches as an informal unified political party.⁹

The dominant powers of the Amir and the Executive affected the controlling function of the NA. The appointment of the government is an absolute right of the Amir.¹⁰ Although the Amir is immune from any type of accountability,¹¹ he nevertheless governs through his ministers.¹² Consequently, most of the government policies were, in fact, his personal instructions. Thus, given that the Amir is immune from any type of legal or political accountability, the NA's attempts to challenge and scrutinise these policies have not always been an easy task. This revealed the paradox of the dissolution of parliament practices in Kuwait. It is the sole discretion of the appointed government to request the dissolution of parliament. On various occasions, this mechanism has been used as a result of the NA's attempts to call the government to account. The Executive's membership in parliament has also affected the latter's decision-making process, disturbed its function, and played an influential role in determining its agenda. Such a

⁷ Article 163 of Constitution.

⁸ Salih KO, 'Parliamentary Control of the Executive: Evaluation of the Interpellation Mechanism, Case Study Kuwait National Assembly, 1992-2004' (2006) 29 *Journal of South Asian and Middle Eastern Studies* 36.

⁹ Interviewee C2.

¹⁰ Article 56 of Constitution.

¹¹ *ibid* Article 54.

¹² *ibid* Article 55.

fact significantly affected the application of the accountability of ministers and their political responsibility towards the National Assembly.¹³

In addition, there are procedural defects within the parliamentary control mechanisms. They are not sufficiently open for public participation.¹⁴ Most of the workings are conducted in close parliamentarian circles that are unable to create a participative citizenry vehicle, in which people are empowered to democratically participate in public affairs in parliament. This is particularly relevant, bearing in mind that other forms of popular participation in politics are extremely restricted in Kuwait. Also, the system of prime ministerial accountability is defective. Reforming such a system by limiting the political responsibility to the PM, rather than ministers, is believed to tackle the problems of the personal motivations behind the poor applications of the method of interpellation. Moreover, there is an absence of peripheral technical support for parliament.

As for the judicial control mechanisms, the study revealed that again, the dominant powers of the Executive and its control of the appointment system to judicial posts affect the effectiveness of these mechanisms. The independence of the judiciary should be ‘a central component of any democracy and is crucial to the separation of powers, the rule of law, and human rights’.¹⁵ However, the utilisation of judicial review by the Constitutional Court is still only an aspiration. The political environment in Kuwait is not set up to allow this court to fulfil its anticipated role in protecting the values of constitutionalism. There has been little effort invested in creating a generation of judges who are allowed to adjust the accurate meanings of constitutionalism. The imposition of political and constitutional responsibilities on the judiciary in order for it to play an effective role in controlling the Executive’s tyranny before being subjected to institutional reform, in terms of its independence and the qualification of its members, makes such a duty challenging. Thus, the judiciary is at present insufficiently competent, yet is rising as a driving force to promote constitutionalism and the progress of democracy.

¹³ Al-Remaidhi A, ‘Comments on Two Judgments of Constitutional Court for Challenges nos 6, 22, 30/2012 concerning Parliament’s Dissolution’ (2012) 36(4) Kuwait University Journal of Law 33.

¹⁴ Liaison Committee, *Rebuilding the House: Select Committee Issues* (2009–10, HC 272-I paras 26–28).

¹⁵ Aharon B, *The Judge in a Democracy* (Princeton University Press 2008) 76.

8.1.5 Objective Four Answer

The study also sought to establish means to improve the parliamentary and judicial mechanisms to control the Executive's powers. This objective was achieved by applying the study's doctrinal, qualitative and policy transfer research methods. Thus, in each relevant discussion in chapters five, six and seven, the study offered lessons and reform ideas which were viewed as successful policies obtained from the UK's law and experience. These policies were suggested as a reform agenda to be implemented in Kuwait.

8.1.6 Objective Five Answer

The final research objective was to explore whether Kuwait's political and constitutional reform agenda could be completed peacefully and avoiding a path of violence. Ultimately, the dramatic events that followed the Arab Spring in this region were fuelled by the tyrannical and uncontrolled powers of their governments. That is what history tells us. Readiness for such potential confrontation in the future is what wisdom compels. The ability of self-transformation to adopt, peacefully, the values of constitutionalism in Kuwait is possible. However, the rigid nature of the Constitution of Kuwait imposes true challenges on how to achieve such transformation. Nevertheless, the study has shown how to achieve its objective in promoting a soft transformation agenda. Some examples and solutions have been offered to overcome these challenges. For instance, in chapter five and six, the study has suggested ideas on how to confront the predominant powers of the Amir and the Executive in relation to the composition, function and the dissolution of the NA. The study has shown that such problematical application of power can be solved through affordable political and legal rational measures. Also, in order to reform the application of Amiri Decrees, a number of possibilities were demonstrated in chapter seven for transformation in a way which could be a consensual rather than a hard transformation. The same soft transformation measures were offered in chapters five and seven to reform the judiciary's status of independence. All of these suggestions supports the key aim of constitutionalising the Executive's powers through a stable, gradual, effective and soft transformation agenda.

8.1.7 Overall Perceptions

Since the promulgation of the Constitution in 1962, Kuwait is no longer an absolute autocratic state. In contrast to the neighbouring region, its arguably democratic practice distinguishes the Emirate as a semi-constitutional democracy. The Constitution initiated the processes to embrace the ethical values of constitutionalism. The system of government was described as democratic and the nation was addressed as the source of all powers.¹⁶ However, the practice has revealed some deficiencies. As Bagehot stated, ‘Hobbes told us long ago, and everybody now understands, that there must be a supreme authority, a conclusive power, in every State on every point somewhere’.¹⁷ In a democracy, such authority is accountable.

Article 6 of the Constitution which provides that, ‘The system of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers’, must be reflected explicitly in the system of government. This doctrine entails that the nation, represented in its elected National Assembly, is the ultimate authority in the state. Thus, there shall be no superior authority that undermines parliament and prevents it from exercising the control of the Executive’s powers. The principle of separation of powers should be applied firmly in relation to the parliament’s composition, function and dissolution. Also, the judiciary should enjoy a greater level of independence to enable it to maintain the rule of law. Such independence does not only mean that courts are protected from any type of influence, but also that judges embrace the role of courts in a democracy, which entails resisting governments’ appetite for tyranny.

Two important facts have recurrently emerged from the historical political practice of Kuwait. First, the Amir and his Executive have been determined to uphold prominent powers that undermine the practice of democracy. Second, the people also continue to confirm their right to participate in limiting the government’s powers. At the same time, the Amir was unarguably a unifying factor in the political history of Kuwait. ‘Kuwaitis have generally been well-disposed toward their rulers’.¹⁸ Apparently, the Kuwaiti people are not willing to accept a similar path to the Arab Spring events. It is no

¹⁶ Article 6 of Constitution.

¹⁷ Bagehot W, *The English Constitution* (1867) (e-book version)
<<http://www.gutenberg.org/ebooks/4351>> accessed 28 November 2016.

¹⁸ Ghitis F, ‘The Kuwait Model for Arab Kingdoms’ (World Politics Review 2012).

contradiction to adopt these two ideas at the same time. However, the question arises: where is history leading?

In the UK, the monarch was once as powerful as the Amir in Kuwait. In the nineteenth century, Bagehot's work *The English Constitution*,¹⁹ examined a structure, which although not identical to the situation in Kuwait, had a remarkable similarity, as the monarch had claims and pretensions to power. In his writings, Bagehot discussed how the King had become constrained by the developments in parliamentary power and more generally in political power. The English Constitution, he claimed, 'is framed on the principle of choosing a single sovereign authority, and making it good'. This ultimate authority is the elected House of Commons. Bagehot then argued that, to understand the English Constitution, one must divide it into two parts. First, 'the part that excites and preserves the reverence of the population – the DIGNIFIED parts, ... and next, the EFFICIENT parts – those by which it, in fact, works and rules'. He continued, 'The dignified parts are very complicated and somewhat imposing, very old and rather venerable; while its efficient part, at least when in great and critical action, is decidedly simple and rather modern'.²⁰ Under this interesting theory, 'The Queen is only at the head of the dignified part of the Constitution. The Prime Minister is at the head of the efficient part'.²¹

Primarily, it should be admitted that the constitutional and political system of Kuwait is different from the UK. However, the idea of reserving the ultimate authority to the people, to some extent, is mutual in both systems. Under Article 6 of the Kuwaiti Constitution, 'sovereignty resides in the people, the source of all powers'. Despite all the critical powers of the Amir, he must exercise them through his ministers who then bear the political responsibility for their actions toward the NA. Arguably, it could be perceived that this practice represents a similar, though premature, practice of Bagehot's theory. In order to improve the quality of the system of controlling the Executive's powers, the research has tried to establish a similar application of this theory of the division of powers.

¹⁹ op cit Ghitis (n 18).

²⁰ *ibid.*

²¹ *ibid.*

The features of this division are urgent in three dimensions. Firstly, in the formation of the government, the NA should participate in the process and thus reflect its confidence in the new cabinet. Secondly, the formation, function and dissolution of the NA must be institutionalised, so as to reflect more democratic ends. An independent body is needed to regulate and supervise the general election and the electoral laws. The government should not vote on the selection of the NA committee memberships, nor should it control the function of the other parliamentary control mechanisms. Furthermore, the practices of the previous dissolution of the NA should be scrutinised by every new elected assembly. This practice may, in time, help to establish a firmer exercise of this right, particularly if the government were to be held responsible for the previous unconstitutional request for dissolution. Thirdly, the appointment system for judicial posts should be protected against any forms of governmental influences. The next section explores the prospects of the research's reform agenda.

8.2 The Prospects

In this section, the study discusses, in the form of an overview of all the research findings, how likely it is that the research reform agenda would be implemented in the spirit of soft-transformation.

At the time of writing, Kuwait's most recent general election was 27 November 2016. The popular participation in this election scored a remarkably high percentage of voters.²² Although this election was conducted under the current controversial voting system, which has witnessed a wide boycott by many political groups since 2012, a large number of opposition MPs were elected. This development indicates the fact that the people of Kuwait are determined to maintain their right to a say in the way they are governed, even though they had experienced recurrent governmental attempts to limit this right. Also, it affirmed the people's determination to achieve such a right through peaceful and non-violent methods.

Ultimately, it is vividly apparent that a constitutional reform in Kuwait is required to improve the quality of the system of controlling the Executive's powers. Nevertheless, the rigid nature of the Constitution of Kuwait imposes true challenges to achieving this

²² See <<http://www.reuters.com/article/us-kuwait-election-idUSKBN13M0D4>> accessed 10 December 2016.

goal. According to Constitution,²³ any constitutional amendment requires a mutual agreement between the NA and the Amir. The NA, therefore, is unable to achieve such a reform without the approval of the Amir. The Amir is unlikely to cede his dominant powers easily and be subjected to the control of the NA. The prospects of reaching such an understanding about an acceptable constitutional reform seems paradoxical. In light of the consequences of the Arab Spring events, such potential conflict is also hazardous. The need for a gradual soft transformation, therefore, should be considered as the only available rational choice. Thus, the study offers its soft transformation agenda as an alternative, potential and peaceful transformative solution. This agenda is driven by three schemes.

Firstly, the utilisation of the current constitutional system. Due to the limitation on changing the constitutional provisions, the study urges academics and professional experts to explore improvement of the application of the Constitution's current doctrines through the academic research field.

Secondly, the study also urges the NA to establish a permanent political and constitutional reform committee to create a constant discussion forum that is able to generate and deliberate constitutional reform ideas with the government.

Thirdly, and most importantly, the researcher offers the findings of this study and its constitutional reform recommendations to the related public bodies and NGOs. The aim of this approach is to engage with interested groups in order to promote its soft transformation agenda.

8.3 Future Studies

This section addresses the research limitations and suggests future research in terms of constitutionalising the Executive's powers.

Due to the limitations of time and space on this study, a number of important issues, which are relevant to the research problems, have been indicated without deeper discussion. Most importantly, the political party system is an important feature missing from the political system of Kuwait. The importance of the party machine in a democracy is unarguable. Thus, the issues of how such a mechanism can be

²³ Article 174 of Constitution.

implemented and to what extent it can reform the system of controlling the Executive in Kuwait are left for future research.

Next, this research has highlighted the importance of reforming the electoral system of Kuwait. Democracy has a wider meaning than merely voting. Thus, a deeper analysis is required to explore why and how this system can affect the practice of democracy and, consequently, improve the control of the Executive's powers. In this respect, it is also crucial to promote greater citizen empowerment to participate in controlling executive powers. Widening the participation of individuals in overseeing the government's works is necessary. The interaction of people with the parliamentary, judicial and political control mechanisms is essential to sustain an efficient accountability system in respect of those who are in government. This can be achieved by exploring new channels to establish how individuals can exercise a wider role in this regard. This objective can be explored by various mechanisms.

Improving the protection of political rights and public liberties in Kuwait is a vital issue in terms of promoting constitutionalism. Thus, a deeper analysis of the system of political and civil rights in Kuwait and its limitations is needed. The criminal judiciary in Kuwait has played an influential role in this regard. A number of criminal cases have revealed that the Criminal Court has provided restricted meanings to the practice of political and civil rights. This policy has resulted in restricting the political participation of the people. Thus, an exploration of the impact of the Kuwaiti criminal judiciary on democracy is also needed.

In addition, for the same reason, the study lacked the opportunity to discuss the role of the Administrative Court's judicial review over the Executive's powers. This type of judicial control can contribute to empowering citizens to exercise an effective control over the Executive's powers. In Kuwait, a number of limitations and restrictions prevent people from challenging specific issues in courts. Therefore, this crucial issue requires further examination in order to improve the application of rule of law.

In terms of the potential of the research methods, future studies may expand and utilise the application of these methods to explore further areas of research. In its qualitative research study, this study utilised an interview method to obtain data that revealed the views and expertise of the participants upon the research questions, but not, for example, on how the entire parliament as a body operates. The most important data for

this study was not what politicians have to say in the assembly, but what they had to say when they are not in public. Thus, the aim of the interview method was to search for the output rather than process. Alternatively, a method of observation could be undertaken by a socio-logical study to analyse the personal dynamics of the selected people. Without the dynamics of party discipline, it would be interesting to know how debates and the decision-making process are structured in the Kuwaiti NA, and to compare that important data with countries such as the UK where there is party discipline. Do these powerful people in the NA decide according to socio-economic class or seniority or other forms of status? What would be the impact of such data on understanding the effectiveness of the accountability system of the executive powers in Kuwait? These interesting questions have been raised by this research for future studies.

The policy transfer method could also be derived from the structure in place in other jurisdictions. Therefore, other studies could, for example, examine France, the United States, or Germany as positive models of how these countries are able to control executive powers by efficient mechanisms. Alternatively, as negative examples, policy transfer could be considered in relation to Egypt, Libya, Syria and Bahrain to learn from their mistakes in following a hard transformation path to reform. Arguably, these negative examples may also offer lessons to be considered in terms of their failure to observe constitutionalism and its related ethical values.

The study, therefore, urges future studies to tackle these problems and investigate the entire governing system in order to improve the quality of Kuwait's democratic practice in general and, in particular, the accountability system of government.

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Appendices

Appendix 1: Interviews Schedules

A. Interviews with Ruling Family Members

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

A.1 What is your current job title?

A.2 How long have you been in your current position?

A.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

A.4 What do these values mean to you?

A.5 How do you consider these values relate to each other?

A.6 How do you prioritise these values compared to each other?

A.7 Do you think it is more important to be effective as a government or is it more important to be democratic as a government? How far should democracy be allowed to get in the way of the effective working of the Executive?

A.8 What sort of democracy do you think Kuwait aspires to be? Do you think it is enough that we have fair elections which ensure that we have representative members in the Assembly? Or do you think democracy should require further channels for participation by citizens?

A.9 In your view, who represents the ultimate authority of the nation? Is it the people, the Assembly, or the Amir?

Section Three: The powers of the Amir and the Executive

In this section you will be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive. Please keep in mind Article 27 of the Kuwaiti Criminal Code which forbids criticising the person of the Amir in public.

A.10 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values?

A.11 How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government? Is the Head of State using his given constitutional powers appropriately in regard to the relation between the National Assembly and the government?

A.12 Is the government's practice of the dissolution of the National Assembly appropriate? In what ways?

A.13 Is the National Assembly's opposition to the government's policies conducted appropriately?

A.14 On what basis should the cabinet be selected? Are there any specific ministerial posts which should be exclusive for Ruling Family members? If yes, why?

A.15 To what extent are the powers of the State separated in practice? Do you think these powers have been equally accountable?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

A.16 Do you think parliament effectively controls the Executive? If so, in what ways?

A.17 Are the parliamentary mechanisms to control the Executive's powers appropriate?

A.18 Do you think Assembly members have enough information from the government to control the Executive?

A.19 Do you think parliament would work better if it were allowed to organise through political parties?

A.20 What do you think is the impact of the absence of political parties on democracy in Kuwait?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

A.21 What is your assessment of the effectiveness of judicial review in controlling the Executive's powers?

A.22 To what extent do you think justice is accessible for individuals to challenge the government's decisions in practice?

A.23 To what extent do the judiciary support democracy and its ethical values?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

A.24 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

A.25 Would you like to add any comments?

Many thanks for your participation.

B. Interviews with Ministers

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

B.1 What is your current job title?

B.2 How long have you been in your current position?

B.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

B.4 What do these values mean to you?

B.5 How do these values relate to each other?

B.6 How do you prioritise these values compared to each other?

B.7 Do you think it is more important to be effective as a government or is it more important to be democratic as a government? How far should democracy be allowed to get in the way of what is viewed as the effective working of the Executive?

B.8 What sort of democracy do you think Kuwait aspires to be? Do you think it is enough that we have fair elections which ensure that we have representative members of the Assembly? Or do you think democracy should require further channels for participation by citizens?

B.9 In your view, who represents the ultimate authority of the nation? Is it the people, the Assembly, or the Amir?

Section Three: The powers of the Amir and the Executive

In this section you will be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive.

B.10 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values? How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government?

B.11 Is the government's practice of the dissolution of the National Assembly appropriate? In what ways?

B.12 To what extent are the powers of the State separated in practice? Do you think these powers have all been accountable?

B.13 How far do Ministers act independently in their decisions? To what extent do you think Ministers practice their ministerial responsibilities based on their personal judgement?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

B.14 Do you think parliament effectively controls the Executive? If so, in what ways?

B.15 In what ways, if any, have parliamentary control mechanisms affected you? How do you assess this experience?

B.16 To what extent have your ministerial decisions been influenced by parliamentary control mechanisms?

B.17 What do you think about parliamentary debates?

B.18 What do you think about parliamentary questions?

B.19 What do you think about interpellation?

B.20 What is your evaluation of the effectiveness of the scrutiny by Committees of Inquiries over the Executive's activities?

B.21 Do you think parliament would work better if it were allowed to organise through political parties?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

B.22 What is your assessment of the effectiveness of judicial review in controlling the Executive's powers?

B.23 To what extent do you think justice is accessible for individuals to exert their role in challenging the government's decisions in practice?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

B.24 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

B.25 Would you like to add any comments?

Many thanks for your participation.

C. Interviews with National Assembly Members

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

C.1 What is your current job title?

C.2 How long have you been in your current position?

C.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

C.4 What do these values mean to you?

C.5 How do these values relate to each other? How do you prioritise these values compared to each other?

C.6 Do you think it is more important to be effective as a government or is it more important to be democratic as a government? How far should democracy be allowed to get in the way of what is viewed as the effective working of the Executive?

C.7 What sort of democracy do you think Kuwait aspires to be? Do you think it is enough that we have fair elections which ensure that we have representative members of the Assembly? Or do you think democracy should require further channels for participation by citizens?

C.8 In your view, who represents the ultimate authority of the nation? Is it the people, the Assembly, or the Amir?

Section Three: The powers of the Amir and the Executive

In this section you be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive.

C.9 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values? How does the Amir view the National Assembly's opposition to the government's policies?

C.10 How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government?

C.11 Is the government practice of the dissolution of the National Assembly appropriate? In what ways?

C.12 To what extent are the powers of the State separated in practice? Do you think these powers have been equally accountable?

C.13 How do you assess the role of ministers' membership in parliament?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

C.14 Do you think parliament effectively controls the Executive? In what ways?

C.15 How have you exercised parliamentary control mechanisms? How do you assess this experience? What is the method most frequently used by you? What works best?

C.16 How do you assess the method of parliamentary questions?

C.17 What do you think about interpellation? And how do you assess the impacts of interpellation on the political responsibility of ministers in practice?

C.18 What is your evaluation of the effectiveness of scrutiny of Committees of Inquiries over the Executive's activities? To what extent do you think these committees make ministers accountable?

C.19 How do you assess the National Assembly's ability to access official information?

C.20 How do you evaluate the technical support provided for parliament to fulfil its role in controlling the Executive?

C.21 Do you think parliament would work better if members were allowed to organise political parties?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

C.22 To what extent do you think justice is accessible for individuals to exert their role in challenging the government's decisions in practice? What is your assessment of the effectiveness of judicial review in this regard?

C.23 To what extent do you assess the role of the judiciary in supporting democracy and its ethical values? What is your assessment of the role of the judiciary in interpreting and applying the constitutional and legal texts which organise the political rights and civil liberties of citizens?

C.24 To what extent do you think the Constitutional Court has played a fair and effective role in the disputes between the Executive and National Assembly?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

C.25 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

C.26 Would you like to add any comments?

Many thanks for your participation.

D. Interviews with Judges

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

D.1 What is your current job title?

D.2 How long have you been in your current position?

D.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

D.4 What do these values mean to you?

D.5 How do these values relate to each other?

D.6 How do you prioritise these values compared to each other?

D.7 Do you think it is more important to be effective as a government or is it more important to be democratic as a government? How far should democracy be allowed to get in the way of what is viewed as the effective working of the Executive?

D.8 What sort of democracy do you think Kuwait aspires to be? Do you think it is enough that we have fair elections which ensure that we have representative members of the Assembly? Or do you think democracy should require further channels for participation by citizens?

D.9 In your view, who represents the ultimate authority of the nation? Is it the people, the Assembly, or the Amir?

Section Three: The powers of the Amir and the Executive

In this section you will be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive.

D.10 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values?

D.11 How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government?

D.12 To what extent are the powers of the State separated in practice? Do you think these powers have been equally accountable?

D.13 What is your evaluation of the extent of the independence of the judiciary in Kuwait?

D.14 To what extent does the system of judicial appointments affect its role in controlling the Executive?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

D.15 Do you think parliament effectively controls the Executive? In what ways?

D.16 Do you think parliament would work better if it were allowed to organise through political parties?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

D.17 What is your assessment of the effectiveness of judicial review in controlling the Executive's powers?

D.18 To what extent do you think justice is fairly accessible for individuals to exert their role in challenging the government's decisions in practice?

D.19 To what extent do you assess the role of the judiciary in supporting democracy and its ethical values?

D. 20 What is your assessment of the role of the judiciary in the fulfilment of the rule of law?

D.21 To what extent do you think the Constitutional Court has played a fair and effective role in the disputes between the Executive and the National Assembly?

D.22 To what extent do you think judges are qualified to exercise legal accountability over the Executive's actions?

D.23 What is your assessment of the role of the judiciary in interpreting and applying the constitutional and legal texts which organise the political rights and civil liberties of citizens?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

D.24 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

D.25 Would you like to add any comments?

Many thanks for your participation.

E. Interviews with Constitutional Lawyers

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

E.1 What is your current job title?

E.2 How long have you been in your current position?

E.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

E.4 What do these values mean to you?

E.5 How do these values relate to each other?

E.6 How do you prioritise these values compared to each other?

E.7 Do you think it is more important to be effective as a government or is it more important to be democratic as a government? How far should democracy be allowed to get in the way of what is viewed as the effective working of the Executive?

E.8 What sort of democracy do you think Kuwait aspires to be? Do you think it is enough that we have fair elections which ensure that we have representative members of the Assembly? Or do you think democracy should require further channels for participation by citizens?

E.9 In your view, who represents the ultimate authority of the nation? Is it the people, the Assembly, or the Amir?

Section Three: The powers of the Amir and the Executive

In this section you will be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive.

E.10 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values?

E.11 How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government?

E.12 To what extent are the powers of the State separated in practice? Do you think these powers have been equally accountable?

E.13 What is your evaluation of the independence of the judiciary in Kuwait?

E.14 To what extent does the system of judicial appointments affect its role in controlling the Executive?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

E.15 Do you think parliament effectively controls the Executive? In what ways?

E.16 Do you think parliament would work better if it were allowed to organise through political parties?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

E.17 What is your assessment of the effectiveness of judicial review in controlling the Executive's powers?

E.18 To what extent do you think justice is accessible for individuals to exert their role in challenging the government's decisions in practice?

E.19 To what extent do you assess the role of the judiciary in supporting democracy and its ethical values?

E.20 What is your assessment of the role of the judiciary in the fulfilment of the rule of law? Are they fair and effective?

E.21 To what extent do you think the Constitutional Court has played a neutral role in the disputes between the Executive and the National Assembly?

E.22 To what extent do you think judges are qualified to exercise legal accountability over the Executive's works?

E.23 What is your assessment of the role of the judiciary in interpreting and applying the constitutional and legal texts which organise the political rights and civil liberties of citizens? Are they fair and effective?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

E.24 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

E.25 Would you like to add any comments?

Many thanks for your participation.

F. Interviews with Political Group Leaders

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

F.1 What is your current job title?

F.2 How long have you been in your current position?

F.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

F.4 What do these values mean to you?

F.5 How do these values relate to each other?

F.6 How do you prioritise these values compared to each other?

F.7 Do you think it is more important to be effective as a government or is it more important to be democratic as a government? How far should democracy be allowed to get in the way of what is viewed as the effective working of the Executive?

F.8 What sort of democracy do you think Kuwait aspires to be? Do you think it is enough that we have fair elections which ensure that we have representative members of the Assembly? Or do you think democracy should require further channels for participation by citizens?

F.9 In your view, who represents the ultimate authority of the nation? Is it the people, is it the Assembly, or is it the Amir?

F.10 What opportunities do you think exist for ordinary citizens to participate in politics? How far do you think they do participate? Has it changed? And why?

F.11 To what extent do you think political rights and civil liberties enable individuals to bring influence to bear upon government?

F.12 What is your evaluation of the absence of political parties on democracy in Kuwait?

F.13 To what extent do you think transparency is applied in the government's works?

F.14 To what extent does the current electoral system reflect the people's will? How do you assess the fairness of the allocation of seats in the electoral constituencies?

Section Three: The powers of the Amir and the Executive

In this section you will be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive.

F.15 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values and the government's policies?

F.16 How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government?

F.17 Is the government's practice of the dissolution of the National Assembly appropriate? In what ways?

F.18 To what extent are the powers of the State separated in practice? Do you think these powers have been equally accountable?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

F.19 Do you think parliament effectively controls the Executive? In what ways?

F.20 How do you assess the parliamentary mechanisms of controlling the Executive's powers?

F.21 Do you think parliament would work better if it were allowed to organise through political parties?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

F.22 To what extent do you think justice is accessible for individuals to exert their role in challenging the government's decisions in practice?

F.23 To what extent do you assess the role of the judiciary in supporting democracy and its ethical values?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

F.24 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

F.25 Would you like to add any comments?

Many thanks for your participation.

G. Interviews with Civil Society Institutions (CSI)

Section One: Biography

In this section you will be asked to provide answers that establish who you are, your office's duties and your experience.

G.1 What is your current job title?

G.2 How long have you been in your current position?

G.3 Could you please tell me about your previous professional experience?

Section Two: Ethical values

Now, let us think about the values which we are trying to promote in Kuwait. In this section you will be asked questions related to the ethical values of democracy, human rights, the rule of law and the separation of powers and the relationships between these values in regard to the effectiveness of government.

G.4 What do these values mean to you?

G.5 How do these values relate to each other?

G.6 How do you prioritise these values compared to each other?

G.7 What is the role of CSI in Kuwait in furthering democracy?

G.8 What opportunities do you think exist for ordinary citizens to participate in politics? How far do you think they do participate? Has it changed? And why?

G.9 To what extent do you think political rights and civil liberties enable individuals to bring influence to bear upon government?

G.10 What is your evaluation of the absence of political parties on democracy in Kuwait?

G.11 To what extent do you think transparency is applied in the government's works?

G.12 To what extent does the current electoral system reflect the people's will?

G.13 To what extent do citizens exert control over the decision-makers in practice?

G.14 Are there any cooperation channels for CSI to engage with the political and legal mechanisms of accountability?

G.15 To what extent can CSI express their political views? Are there any restrictions enforced by official authorities? If yes, please explain?

G.16 Can you describe the relationship between the CSI and the government?

Section Three: The powers of the Amir and the Executive

In this section you will be asked questions about the constitutional powers of the government and its effect on the system of controlling the Executive.

G.17 To what extent do you think the constitutional powers of the Amir and the Executive affect the practice of democracy and its relevant values? How does the Amir view the National Assembly's opposition to the government's policies?

G.18 How far do these powers affect the mechanisms of political and judicial accountability which are required to control the government?

G.19 To what extent are the powers of the State separated in practice? Do you think these powers have been equally accountable?

Section Four: Controlling the Executive's powers by parliamentary mechanisms

Now, I will ask you about controlling the Executive's powers by parliamentary mechanisms which include expressing wishes, submitting questions, requesting general debates, setting up inquiry committees and submitting interpellation to ministers and the Prime Minister.

G.20 Do you think parliament effectively controls the Executive? In what ways?

G.21 How do you assess the parliamentary mechanisms of controlling the Executive's powers?

Section Five: Controlling the Executive's powers by legal mechanisms

Now, I will ask you about controlling the Executive's powers by legal mechanisms.

G.22 To what extent do you think justice is accessible for individuals to exert their role in challenging the government's decisions in practice?

G.23 How do you assess the role of the judiciary in supporting democracy and its ethical values?

Section Six: Conclusion questions

Finally, before thanking you for your valuable help and support of this research, I would like to ask you if you have any further suggestions or comments.

G.24 What kind of constitutional reforms in Kuwait do you suggest to achieve the status which I set out in the beginning?

G.25 Would you like to add any comments?

Many thanks for your participation.



Appendix 2: Information Sheet

**Constitutionalising the Executive's Powers in Kuwait with Reference to the UK's
Law and Experience.
PhD Research by Mohammad M Almutairi**

Ref: Invitation for an interview as expert for a PhD research project

Dear NAME,

You are invited to take part in a research project.

Before you decide it is important for you to understand why the research is being carried out and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Please ask if there is anything that is not clear or if you would like more information.

What is the purpose of this research?

This is a PhD research project, which is supported by the University of Leeds and recognized by the Kuwaiti Cultural Office at the Embassy of Kuwait in London.

The research thesis argues that the current constitutional design lacks the necessary features to control Executive powers according to the ethical values of democracy, the rule of law, separation of powers, and human rights and therefore, requires both fundamental and detailed reforms in order to achieve these objectives. By evaluating

the current constitutional structure to produce an acceptable level of democracy, this study aims to discuss the applicable democratic system, and, if it is able to reflect such ethical values, to identify the reasons behind any discrepancies, and to suggest solutions in a comprehensive review, particularly, of the role of the Executive in the democratic function, and how to control it by effective legal and parliamentary mechanisms.

This research is expected to be completed by October 2016, although initial research findings will be available before this. Primary fieldwork data will be collected in Kuwait from January to April 2016.

Why is this research needed?

The study aims to analyse how the Legislature and the Judiciary have been operating under the Constitution in terms of controlling the Executive's powers and how far they have been able to deliver on these ethical values. The significance of this research is that it aims to understand and discover not only the written Constitution and the applied laws and rules, but also actual constitutional practices. Therefore, the study seeks to examine the reality in practice through fieldwork to generate deeper information on the relevant topics of the study by interviewing the key players in these areas. The aim is to enrich the study with the practical evaluations of the related practitioners upon the research problems in order to deliver a comprehensive analysis that covers the theoretical and practical aspects of the research thesis.

Whilst there are no immediate benefits for people participating in this project, it is hoped that this work will improve public policies which reflects the importance of your contribution for the public good.

How will the research be carried out?

You are requested to take part in an interview at a secure and safe location at your convenience. It is up to you to decide whether or not to take part. If you do decide to take part, you will be given this information sheet to keep and you will be contacted after seven working days to establish whether you have consented to participate or not. In the event of acceptance, you will be asked to sign a consent form. However, you may withdraw your consent within one month after conducting the interview. In case you choose to withdraw your approval, you can email me or call me directly on my contact

number provided above. In the event of withdrawal, your data will be destroyed immediately.

As a participant in this study, you will be asked, on a voluntary basis, to answer several questions and you may decline answering any of them, if you so choose. The questions will be designed in a clear and short form that will not exceed 25 substantive questions to be discussed within 60 – 90 Minutes. If you agree, the interview will be recorded by a voice recording device otherwise, the investigator will use, instead, written note-taking. All information which you will provide will be held in confidence and will not be identified in any way in the final report. However, the researcher will use the data for academic purposes in his research but will maintain anonymity in which data will not be used in any way that identifies any individual. The researcher will not use directly the interview notes. They will be used to produce relatively generalised statements. However, the researcher will use direct quotations from the interview data in his thesis but only in a limited way which is sensitive to the anonymity of the interviewee who gave the quotation. The researcher will be careful about how much of a quotation will be extracted, and also will consider carefully the content and context of the quotation that might identify persons. The researcher will always select quotations in a way which would not reveal any potential identification of persons. This means that the researcher will exclude any data which might signal a particular person. Publications arising from this research will be of an academic nature. Any referencing to the participants' data will not identify them by adopting the same restrictions as above.

The interview is meant to elicit your views about general practices and policies which operate in the Kuwait Constitution. I am not seeking evidence about individuals, and you should not reveal any personal cases of malpractice which may be considered as criminal actions. You must also bear in mind the legal limitations regarding slandering the Amir in person. You are requested therefore, to comply with Article 27 of the Kuwaiti Criminal Code which forbids criticising the person of the Amir in public. The researcher may be required to reveal information about serious wrongdoing involving harm to others to legal authorities.

If you have any concerns or comments resulting from my involvement in this research, you may contact me (as above) or the researcher's main supervisor Prof. Clive Walker at: C.P.Walker@leeds.ac.uk.

Mohammad M. Al Mutairi

School of Law

University of Leeds

Email: lwmmal@leeds.ac.uk

Tel: +965 555 555 01

Appendix 3: Consent Letter



UNIVERSITY OF LEEDS

<p><u>Consent to take part in a project on Constitutionalising the Executive Powers in Kuwait with Reference to the UK's Law and Experience</u></p>	<p>Add your initials next to the statement if you agree</p>
<p>I confirm that I have read and understand the information sheet/ letter dated [] explaining the above research project and I have had the opportunity to ask questions about the project. I understand that I can be critical of general practices under the Kuwaiti constitution but subject to respecting Article 27 of the Kuwaiti Criminal Code which forbids criticising the person of the Amir in public.</p>	
<p>I understand that my participation is voluntary and that I am free to withdraw at any time up to one month after conducting the interview without giving any reason and without there being any negative consequences. In addition, should I not wish to answer any particular question or questions, I am free to decline.</p> <p>Contact numbers: Researcher. Mohammad M. Al Mutairi lwmmal@leed.ac.uk Tel:+96555555501 Main supervisor: Dr. Clive Walker C.P.Walker@leeds.ac.uk.</p> <p>I understand that in case I choose to withdraw from the study according to the conditions outlined above, all data already provided by me will be destroyed following withdrawal.</p>	
<p>I give permission for members of the research team to have access to my anonymised responses. I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in the report or reports that result from the research. I understand that my responses will be kept strictly confidential.</p>	
<p>I agree for the data collected from me to be stored and used in relevant future research in an anonymised form.</p>	
<p>I understand that other genuine researchers will have access to this data only if they agree to preserve the confidentiality of the information as requested in this form.</p>	
<p>I understand that other genuine researchers may use my words in publications, reports, web pages, and other research outputs, only if they agree to preserve the confidentiality of the information as requested in this form.</p>	

I understand that relevant sections of the data collected during the study, may be looked at by individuals from the University of Leeds or from regulatory authorities where it is relevant to my taking part in this research. I give permission for these individuals to have access to my records.	
I agree to take part in the above research project and will inform the lead researcher should my contact details change.	

Name of participant	
Participant's signature	
Date	
Name of lead researcher [or person taking consent]	Mohammad M. Al Mutairi
Signature	
Date*	

*To be signed and dated in the presence of the participant.

Once this has been signed by all parties the participant should receive a copy of the signed and dated participant consent form, the letter/ pre-written script/ information sheet and any other written information provided to the participants. A copy of the signed and dated consent form should be kept with the project's main documents which must be kept in a secure location.

Appendix 4: Ethics Committee Approval

Performance, Governance and Operations
Research & Innovation Service
Charles Thackrah Building
101 Clarendon Road
Leeds LS2 9LJ Tel: 0113 343 4873
Email: ResearchEthics@leeds.ac.uk



UNIVERSITY OF LEEDS

Mohammad Menwer Almutairi
School of Law
University of Leeds
Leeds, LS2 9JT

ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee University of Leeds

Dear Mohammad

Title of study: Constitutionalising the Executive's Powers in Kuwait with Reference to the UK's Law and Experiences
Ethics reference: AREA 15-044

I am pleased to inform you that the above research application has been reviewed by the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and following receipt of your response to the Committee's initial comments, I can confirm a favourable ethical opinion as of the date of this letter. The following documentation was considered:

Document	Version	Date
AREA 15-044 committee respons.docx	1	04/01/16
AREA 15-044 Annex 1 Ethics Form.docx	1	04/01/16
AREA 15-044 UNIVERSITY OF LEEDS RESEARCH ETHICS COMMITTEE APPLICATION FORM (2).pdf	1	17/11/15
AREA 15-044 Annex 2 Information sheet.docx	2	04/01/16
AREA 15-044 Annex 1 Consent Form.docx	2	04/01/16
AREA 15-044 Risk Assessment Form.doc	1	17/11/15

Please notify the committee if you intend to make any amendments to the original research as submitted at date of this approval, including changes to recruitment methodology. All changes must receive ethical approval prior to implementation. The amendment form is available at <http://ris.leeds.ac.uk/EthicsAmendment>.

Please note: You are expected to keep a record of all your approved documentation, as well as documents such as sample consent forms, and other documents relating to the study. This should be kept in your study file, which should be readily available for audit purposes. You will be given a two week notice period if your project is to be

audited. There is a checklist listing examples of documents to be kept which is available at <http://ris.leeds.ac.uk/EthicsAudits>.

We welcome feedback on your experience of the ethical review process and suggestions for improvement. Please email any comments to ResearchEthics@leeds.ac.uk.

Yours sincerely

Jennifer Blaikie

Senior Research Ethics Administrator, Research & Innovation Service

On behalf of Dr Andrew Evans, Chair, [AREA Faculty Research Ethics Committee](#)

CC: Student's supervisor(s)

Appendix 5: Support Letter



From the School of Law
Professor Clive Walker

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UK

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27 January 2016

To whom it may concern

**RESEARCH DATA COLLECTION FOR POSTGRADUATE DEGREE:
Constitutionalising the Executive's Powers in Kuwait with Reference to the
UK's Law and Experiences**

This is to confirm that MOHAMMAD MENWER ALMUTAIRI, a postgraduate student under my supervision, is seeking in the coming months to undertake the data collection phase of his PhD research at the University of Leeds. The title of the research topic is as stated above.

The fieldwork data collection involves interviews with experts who can contribute practical knowledge and insights to the inquiry being pursued. Specifically, his data collection will involve an interview session that will take approximately an hour. Those interviewed can be assured of the highest ethical standards, including confidentiality of the data and anonymity.

I now request that my student is given full opportunity to collect data from you.

Your cooperation on this matter would be greatly appreciated and would be most helpful in facilitating this important project. Please do not hesitate to contact me if you have any enquiries about this research.

Yours sincerely,

Clive Walker

Professor Emeritus Clive Walker

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