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**The Constitutional and Conceptual Underpinnings of  
Kuwait's System of Government**

**Tahani Nouri AlTerkait**

**A thesis submitted to the University of Durham for the degree of Doctor of Philosophy in  
the School of Government and International Affairs**

**2017**

*It is our way of using the words 'democracy' and 'democratic government' that brings about the greatest confusion. Unless these words are clearly defined and their definition agreed upon, people will live in an inextricable confusion of ideas much to the advantage of demagogues and despots.*

*Tocqueville*

## **Abstract**

This study investigates the constitutional and conceptual underpinnings of Kuwait's system of government. The Constitution of Kuwait, which was ratified in 1962, promulgated democracy as its government system; yet curiously, the Constitution lacked any actual explanation of the concept of democracy. Instead, it merely identified the system of government as 'democratic', with 'the people of Kuwait' as the source of all powers.

To explain what Kuwaiti democracy and its government system truly involve, the study has traced its roots and origins: first, by shedding light on the ruling traditions since Kuwait emerged and flourished as a small city state in the seventeenth century. Second, by demonstrating how the Constitution and its Explanatory Memorandum explain Kuwait's system of government. Third, by narrating the tale of the Constitution and its ratification in 1962 by the elected members of the Constituent Council.

The study also focuses on the controversial history of the Islamic Sharia clause in the Arab world, reflected in the Minutes of Proceedings of both the Constituent Council and Constitution Committee. In addition, it highlights the evolution of representative councils, encompassing the 1921 Shura Council, the 1938 Legislative Council, and the 1961 Constituent Council; and applies David Held's classical models of democracy to the theoretical model adopted by scholars of Kuwait constitutional law.

Historical, constitutional and conceptual narratives on democracy lead the research to conclude that Kuwait's political experience is rich and unique. In the early 1960s, Kuwait successfully withstood all regional challenges to become the first independent, democratic state in a region known for its autocratic regimes. Yet for over half a century since, it has never tackled the constitutional and conceptual shortcomings inherent in its adoption of a hybrid system.

Accordingly, the study finds that the system of government in Kuwait is mixed; with its political system infused with rudimentary features of hereditary, representative, parliamentary and presidential systems, and profoundly influenced by its Arab-Islamic roots.

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## **Declaration**

I, Tahani Nouri AlTerkait, hereby confirm that the composition of this PhD thesis is entirely my own work.

Tahani N. AlTerkait

## **Statement of Copyright**

The copyright of this thesis rests with the author. No quotation from it should be published without her prior written consent and information derived from it should be acknowledged.

Tahani N. AlTerkait

## **Dedication**

*Ameena Ibrahim Khorsheed & Nouri Yousef Al-Terkait*

*My phenomenal parents*

\*\*\*

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Special thanks and appreciation go to Ms. Sarah Deyyain, Director of the Office of H.E. and Minister of Information at the Kuwait Ministry of Information. Ms. Deyyain went out of her way to deal with all sorts of bureaucracy necessitated by my period academic leave. Her strenuous efforts and professionalism have been exceptional; I cannot thank her enough for her leadership and friendship.

We grow up learning that 'Family is not an important thing; it is everything'; a statement many of us take for granted. Yet we do not know how important family truly is until we find ourselves in need. During the PhD journey, family and friends are needed more than at almost any other time. The emotional support of family, reminding us that 'you can do it!' when writer's block

threatens to take hold, is invaluable. I am truly fortunate to be blessed by a phenomenal family, whose love and support at all levels has been endless.

Mum and Dad: I am indebted to everything you have done for me, and words are not enough to thank you.

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I also want to express my sincere appreciation to my loyal friends who have become part of my family: your love, dedication and patience while I have been away since 2001 is my trophy of true friendship.

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Last, but not least, thank you to the wonderful people who worked behind the scenes, and I call my ‘autonomous soldiers’: Shaun Lawson, my editor; and Ms. Amani Bawazeer, for your generous assistance with the transliteration. We were a team and I am so grateful for your help in making my dream come true.

Thank you all so very much.

## System of Transliteration

Number	Name	Transliteration	Detached	Final	Medial	Initial
1	Alif	' / ā	ا	ا	ا	ا
2	Bā'	b	ب	ب	ب	ب
3	Tā'	t	ت	ت	ت	ت
4	Thā'	th	ث	ث	ث	ث
5	Jīm	j	ج	ج	ج	ج
6	Ḥā'	ḥ	ح	ح	ح	ح
7	Khā'	kh	خ	خ	خ	خ
8	Dāl	d	د	د	د	د
9	Dhāl	dh	ذ	ذ	ذ	ذ
10	Rā'	r	ر	ر	ر	ر
11	Zāy	z	ز	ز	ز	ز
12	Sīn	s	س	س	س	س
13	Shīn	sh	ش	ش	ش	ش
14	Ṣād	ṣ	ص	ص	ص	ص
15	Ḍād	ḍ	ض	ض	ض	ض
16	Ṭā'	ṭ	ط	ط	ط	ط
17	Zā'	ẓ	ظ	ظ	ظ	ظ
18	'Ayn	'	ع	ع	ع	ع
19	Ghayn	gh	غ	غ	غ	غ
20	Fā'	f	ف	ف	ف	ف
21	Qāf	q	ق	ق	ق	ق
22	Kāf	k	ك	ك	ك	ك
23	Lām	l	ل	ل	ل	ل
24	Mīm	m	م	م	م	م
25	Nūn	n	ن	ن	ن	ن
26	Hā'	h	ه	ه	ه	ه
27	Wāw	w/ū	و	و	و	و
28	Yā'	y/ī	ي	ي	ي	ي

Notes:

1. In this study, the word 'Emir', which means 'Head of State' and from which, the word 'emirate' is derived, is written 'Amir', following the spelling used in the Constitution of Kuwait and official statements by the government of the State of Kuwait.
2. The names of authors were written as spelt in English, based on their publications or business cards.
3. The word 'Shura' (the Islamic tradition of consultations) is not transliterated in this study given its popularity in English dictionaries.



# Chapter 1: Introduction

## 1.1 Rationale behind the Study

Several incentives led me to conduct research on Kuwaiti democracy. Some of them stemmed from professional motives; others, for academic reasons. From a professional point of view, working with academics and researchers for more than two decades led me to want to become one myself. I am not an academic by profession, but prior to enrolling on my PhD programme, was a Press Attaché at the Information Office (KIO) of the Embassy in Kuwait in Washington DC (2001-2007). During my seven-year tenure, my mission was to build diplomatic, academic and cultural bridges with American and international organizations represented in universities, think tanks, non-governmental organizations and broader diplomatic circles.

There is always an invisible link between the past and the future: as has very much been in evidence during my career. As an employee in Kuwait's public sector, I could not have imagined going on to pursue higher education at a later stage of life (after, indeed, fully 12 years of public service). However, small incidents and promising signals often presage subsequent career change. In my case, one such occasion happened in Washington; another in Kuwait.

In 2003, while working in Washington, I promised one of my contacts some books on the politics and democracy of Kuwait. I headed directly to KIO library to compile a suitable package. Surprisingly, in contrast to its many Arabic publications, the library had barely any books in English, except for one memoir: *The Siege: Crisis Leadership and The Survival of US Embassy Kuwait*, co-authored by Nathaniel Howell, former US Ambassador to Kuwait.<sup>1</sup>

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<sup>1</sup> Ambassador Nathaniel Howell was US Ambassador to Kuwait from 1987 to 1991. He co-wrote *The Siege* with Roberta Culbertson, an anthropologist at the Virginia Foundation for Humanities. The book was published in 2001,

Thus, one of the most active, influential Arab information offices in the American capital had proven woefully lacking in books in English authored by Kuwaitis. Yet English is the main language of Kuwait's audience in the US. Observing the empty shelves left me feeling a steely determination to do something to remedy this. Six years later, I began my Master's in International Studies and Diplomacy at the School of Oriental and African Studies (SOAS), University of London; followed by my PhD in Politics at the University of Durham. My aspiration is, one day, for my own publications to have pride of place on the KIO library shelves.

The second example took place while I was applying for doctoral programmes at different universities around the UK. It became apparent that the number of British academic centres focusing on Gulf studies was unexpectedly limited. This, of course, made it quite the task to find the right institution and supervisor to work with on Kuwaiti democracy; but also provided further inspiration. My work can provide a major contribution to the much-neglected study of the Gulf region in general; and the politics of Kuwait, in particular. The aim is to continue fostering academic ties and invest in future initiatives to promote Kuwait's democratic experience at all levels.

We can quickly identify that most academic research conducted on democracy in the Arab world usually focuses on two dimensions: (1) Religion, and whether Islam is compatible with Western ideals of democracy; and (2) electoral participation, which is often treated as the main tool of measuring and evaluating democracy in the region. I am not seeking to downplay the value of the most popular studies of Arab democracy in any way; but areas such as those examined in this study (conceptual and constitutional) have been sorely neglected. The profound lack of political research on constitutional and conceptual perspectives in the Arab world has left a yawning gap

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providing a memoir of American diplomats and citizens living in Kuwait during the seven month-long Iraqi occupation of 1990/1.

in the literature, resulting in lower levels of interest from other researchers; and naturally created its own obstacles for the collection of data and resources over the course of this study.

While examining the literature, the main objective was to identify the conceptual roots and origins of democracy in Kuwait, which proved an extremely challenging task. This was remedied when I looked at the Constitution and other references in Kuwaiti constitutional law. At the Archives of Kuwait National Assembly, I could access 55 Minutes of Proceedings (MOPs) related to the debates on drafting the Constitution of Kuwait (see Chapter 5). My experience of these archives confirmed the scarcity of political research on myriad important constitutional and conceptual aspects. Thus, the rationale behind this study is to make a significant, substantial contribution to knowledge, enriching the literature in so doing: especially because of a major focus on data derived from primary sources.

Investigating the Constitution of Kuwait and its Explanatory Memorandum was an eye-opening experience. The Kuwaiti Constitution reflects political dynamics and aspirational governing principles which have enriched not only Kuwaiti democracy, but the hybridity of Kuwait's government system. The ratification of the Kuwaiti Constitution and adoption of a democratic system were not a coincidence but owed to various political traditions and dynamics. These dynamics remain hugely influential today, and are enshrined in Kuwaiti identity and culture, as follows:

1. From the very beginning, the interdependence between the ruler and ruled in Kuwait followed the Islamic tradition of Shura, based on consultations, negotiations, consent and consensus. Sabah I (1752-1762), indeed, was appointed by the notables of Kuwait. In

other words, the first ruler of Kuwait did not come to power by force or sword. Rather, his position was more of a political assignment: The Sheikh governs, while the notables are consulted on key issues. This kind of ‘joint governing’ created bridges of communication and transparency, and established a political legacy, whereby people consult and share their concerns with their ruler. Even now, this partnership between al-Sabah and the notables is referred to during political crises (see Sections 2.3.2 and 2.3.3).

2. The Constitution of Kuwait, ratified on 11 November 1962, would not have seen the light of day had it not been for the strenuous efforts of both the Amir and elected representatives of the Constituent Council. The vision and wisdom of Abdullah al-Salim al-Sabah, the Amir of Kuwait (1950-1965), expedited and facilitated all procedures towards drafting and ratifying the Constitution on time.

Two weeks after Kuwait’s independence, the Amir issued Decree 12/1961, calling for elections of the Constituent Council. The Decree was explicit about the nature of the Kuwaiti Constitution: first, it would be based on the spirit of the Kuwaiti people, and hence customized according to the circumstances of Kuwait. Second, it would enact laws based on democratic foundations.<sup>2</sup> There is a clear implication here that Kuwait would have a mixed constitution: it would adopt democracy as a modern government system, but also extract laws from other sources predominant in its Arabic identity and Islamic

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<sup>2</sup> Decree 12/1961 was published in Kuwait Official Gazette no: 241 on 28/07/1961. The decree states: ‘We Abdullah al-Salim al-Sabah, Amir of the State of Kuwait, desiring to establish a government system based on definite foundations, and in preparation to issue the constitution of the State of Kuwait which derives its laws from the circumstances of Kuwait and based on democratic principles, aiming the prosperity and welfare of the people’ (Dashti and Marafi, 2013, p. 8-9).

Sharia. Ratification of the Constitution was a huge milestone in the emergence of modern Kuwait (see Chapter 5).

3. The study sheds light on the history of representative councils, with the aim of highlighting the role of reformists, whether in individual or group form, who fought against all forms of absolute rule until the citizens' voices were heard and their rights to rule jointly were protected. Tensions escalated when the tradition of 'joint governing' was violated during the reign of Mubarak (1896-1915) and Salim (1917-1921). Thus, the study provides examples from councils held in 1921, 1938 and 1961: indicating how the concept of representation evolved in Kuwait from consultative to legislative; and finally, to a parliamentary form of representation.

The idea of institutionalizing the tradition of 'joint governing' stemmed from the reformists' belief that people are the source of all powers. Thus the 1921 Shura Council was an initiative by the notables, prompted by the succession crisis within the ruling family, and objections to the policies of Ahmad al-Jaber al-Sabah's predecessors (see Section 2.4.1).

In 1938, the Legislative Council was a response to several international and local crises, which had terminated the alliance between ruler and ruled. The reformists petitioned the Amir with a list of political reforms and called for the election of a representative council to assist the Amir in running the town's affairs (see Section 2.4.2).

In 1962, the Constituent Council was convened because of threats from Abdulkarim Qasim, President of Iraq (1958-1963), who rejected Kuwaiti independence and proclaimed Iraqi sovereignty over its territories. There had also been local calls for a representative council and political reforms since the suspension of the Legislative Council in 1938. The 1962 Council made the sovereignty of Kuwait and its national interest its ultimate priority. Disagreements between the Amir, elected members of the Council and the Kuwaiti government were cast aside for the greater good; the outcome of which was the assertion of Kuwait's independence, with a new Constitution scheduled to be ratified one year later (see Section 2.4.3).

This study, then, evaluates the success of the Constitution in reflecting the true reality of Kuwaiti society, with its many dynamics and challenges. The Kuwaiti Constitution was an ambitious attempt to lay down a framework for the kind of society Kuwait was and could be – but did it succeed?

## **1.2 Research Problem**

This is a study about the conceptual and constitutional underpinnings of Kuwait's government system. The aim is to examine the roots and origins of democracy, as defined and explained in the Constitution of Kuwait – yet it only mentions the word 'democracy' twice: during the Preamble, when the Amir of Kuwait proclaims, 'we Abdullah al-Salim al-Sabah, Amir of the State of Kuwait being desirous of consummating the means of democratic rule for our dear country...'<sup>3</sup>; then in Article 6, which identifies the government system as follows: 'The system

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<sup>3</sup> 'In the name of Allah, the Beneficent, the Merciful, we, Abdullah al-Salim al-Sabah, Amir of the State of Kuwait being desirous of consummating the means of democratic rule for our dear Country; and, having faith in the role of this country in furthering Arab nationalism and the promotion of world peace and human civilization; and, striving towards a better future in which the country enjoys greater prosperity and higher international standing, and in which also the citizens are provided with more political freedom, equality, and social justice; a future which upholds

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’.

That there is no real explanation in the Constitution of what Kuwaiti ‘democracy’ entails is rather perplexing, to put it mildly. Yet Article 6 has generated a popular belief among Kuwaiti nationals, including politicians, intellectuals and government officials, that Kuwait is a democracy with special characteristics (see Chapter 3 for more on the views of Kuwaiti politicians and intellectuals on democracy).

The main research question is, therefore: ‘Is Kuwait a democracy?’ The following questions will also be examined:

1. What historical factors have led Kuwait to adopt a democratic system since 1961? What political, regional and social variants paved the way for Kuwait to adopt the first democratic constitution in the Gulf region? What lay behind the transition from tribal, traditional society under Islamic Sharia and *Shura* to a modern, democratic state? Was this a legacy of the British, and the Anglo-Kuwait Treaty of 1899? Or did it owe more to the power of Arab nationalism during the 1960s?
2. How did the Constitution of Kuwait define democracy? Did Kuwait adopt a particular definition? What do debates on democracy in Kuwait involve in comparison with Western debates? Article 6 not only specifies that democracy is the government system, but also refers to people as the source of all powers. This is a true reflection of the literal

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the traditions inherent in the Arab nature by enhancing the dignity of the individual, safeguarding public interest, and applying consultative rule yet maintaining the unity and stability of the country; and, having considered Law Number I of 1962 concerning the system of government during the period of transition; and, upon the resolution of the Constituent Assembly; Do hereby approve this Constitution and promulgate it’ (see Appendix).

meaning of democracy: 'Rule by people'. Where do the democratic ideals in the Kuwaiti Constitution stand on questions of culture and religion? (see Chapter 3 for more on this)

3. What is the best theoretical approach through which to understand Kuwaiti democracy? Is Kuwait replicating or adopting any model in the Western world - for example, British constitutional monarchy? (see Chapter 4)
4. What are the constitutional underpinnings of the Kuwaiti government system? To what extent is the Kuwaiti Constitution liberal and democratic? Has Islamic Sharia, specified in Article 2 as 'a main source of legislation', proven a barrier to democracy? Who were the drafters of the Constitution, and what were their backgrounds and political affiliations? What do they think of democracy in comparison to Islamic Sharia? How responsive were they to the idea of democracy in a society commonly regarded as 'conservative'? What conclusions and main highlights can be identified in the debates on democracy? (see Chapter 5)
5. What are the conceptual underpinnings of the Kuwaiti government system? What form of democracy has Kuwait adopted - presidential or parliamentary? What are the characteristics and shortcomings of the Kuwaiti model of democracy? Was the Kuwaiti Constitution a replication of any particular model in the region, or merely an adaptation between Western democratic ideals and the realities of Kuwait?

To answer these questions, accessing the archives and library of the Kuwait National Assembly was essential; because as we have noted, the Constitution is very limited in its definition and explanations around democracy. Article 6 merely tells us that the form of government will be 'democratic' - but nothing else.



The only legal text which defines the form of democracy adopted in Kuwait is The Explanatory Memorandum of The Constitution of Kuwait (EM): which in legal terms, has the same supreme power as the Constitution. The EM, which bears responsibility for explaining the provisions of the Constitution, defines Kuwaiti democracy as follows:

For ensuring the unity and stability of the government, the Constitution adopted a democratic system as a middle path between the two systems; the parliamentary and presidential system, with more leaning towards the first, because the presidential system exists only in the republics, and the main principal of the presidential system is the head of state who is elected by the people for a few years, and he is responsible before his people and his representatives [Ministers] in particular. Additionally, it was wanted, by this leaning that the governance would not lose its popular character in the parliamentary oversight or defy the traditional heritage of the Shura as well as in the rapid reaction on the style of governance and the actions of the rulers. It is not a secret that if opinions remitted and the advice delayed, they would mostly lose their impact, and miss out on its role in guiding the governance and management alike. It should be noted that these parliamentary virtues did not make the Constitution forget the defects of the parliamentary system, which were revealed by the constitutional experiments, and it did not obscure the view of the stability feature which is treasured by the presidential system. Perhaps for the parliamentary system, the devil lies in the solidarity of ministerial responsibility to parliament; it is worrying that this responsibility will make the government a target of a relentless battle between the parties, and even makes this goal a major cause of being a member of this or that party. It is the most dangerous for the safety of democratic governance to make this deviation a base for building political parties in the state instead of programs and principles. In addition, making the government a desire not just a mean to achieve a safest rule and a better life, and if democratic governance ends up like this, the rights and freedoms will be forfeited in the name of protecting them. As well as political action will be astray to become a trade in the name of patriotism, and then the ministerial solidarity will fall apart on the rock of hidden personal interests. Moreover, the public bloc inside and outside the parliament will be cracked, which loses the parliament its strength and the people their unity. For all of that it was a necessity to learn from the experiences of other countries in this respect and get out as much as necessary from the logic of a pure parliamentary system, even though the system of the emirate is hereditary<sup>4</sup> (Explanatory Memorandum, 1962).

However, despite the EM stating that the government system is neither parliamentary nor presidential, but a combination of both, this study argues that it palpably fails to explain and demonstrate the features of Kuwait's customized model.

During the process of my preliminary research, I became increasingly aware that most, if not all, studies published in Arabic on Kuwaiti democracy lack any sort of conceptual background.

These works are almost entirely descriptive and conducted on an empirical basis. Moreover, the

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<sup>4</sup> Section 3 of The Explanatory Memorandum of the Constitution of Kuwait, translated by the researcher. Further analysis can be found in Section 6.3.

classification of anything conceptual and/or constitutional is made under the umbrella of law studies: particularly the section on Kuwaiti constitutional law.

It is important to highlight that this study's exposure to multi-disciplinary subjects does not undermine its political orientation. To be more specific, this thesis is an example of political research; its focus on Islamic Sharia is merely a reflection of the contemporary conflict between democracy and Islam in the Arab world, with the Kuwaiti Constitution a reflective example of this (see chapters 3, 5 and 6). Its focus on the philosophical or conceptual foundations of the government system, and deviation at certain points towards legal and constitutional areas, is simply to meet the research requirements and answer the research questions.

Given the above context, the core arguments can be summarized as follows:

1. Democracy in Kuwait is neither defined nor explained by the Constitution of Kuwait.
2. The conceptual foundations of the Kuwaiti government system are liberal and democratic; but within a non-democratic context.
3. There are clear parallels between Kuwaiti and classical models of democracy.
4. Kuwaiti democracy has adopted ideas from different systems and cultures; but has never replicated a model in and of itself. Kuwait is unique for having created its own form of government, inspired and influenced by Western and Islamic values. It has tailored a political system which suits the nature and aspirations of the State and people of Kuwait – but neither replicated nor imitated any other democracy in so doing.

5. The system of government in Kuwait is not so much democratic as hybrid: a mixture of democratic, hereditary, representative, parliamentary, influenced to a great extent by the country's Islamic roots and Arabic heritage.

This study is limited in scope to the events around the drafting and ratification of the Constitution of Kuwait, which took place between Kuwaiti independence being attained in 1961, and the Constitution being issued the following year. The main objective of the research is to highlight the key debates in the Constituent Council over democracy as a governing system; and Islamic Sharia, which was and continues to be controversial, and is in constant competition with the democratic system, both in theory and in practice.

The main examples utilized are not collected from interviews or secondary sources, but directly from 56 MOPs, accessed at the Archives of the Kuwait National Assembly in 2013. The MOPs are the historical written records of all discussions and meetings convened by the Kuwait Constituent Council to draft, discuss and approve by consensus the 183 Articles of the Kuwaiti Constitution. To narrow the scope of the study, the examples do not refer to all records covering these 183 articles; but focus instead on discussions regarding Article 6 (the democracy clause) and Article 2 (the Sharia clause), thereby highlighting the chief problems under discussion<sup>5</sup>.

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<sup>5</sup> **Article 2:** 'The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation'.

**Article 6:** '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' (See Appendix).

Given that the data available in the MOPs and constitutional law literature on the conceptual foundations of the Kuwaiti system of government are in Arabic, this provided great motivation to be original and unconventional in conducting this study. The use of the MOPs as supporting examples represents the first such attempt in both Arabic and English. Most academic research in politics applies liberal democracy as a theoretical framework - but this study chooses the classical models of democracy developed by David Held (2006), which are elaborated upon below in Section 1.4.

### **1.3 Value and Significance of the Study**

The evidence suggests that there is no published research in the political realm devoted to the study of the conceptual and constitutional foundations of Kuwaiti democracy. This therefore represents the first attempt to investigate a democratic model in the Arab world as identified by its constitution, drafters and members of its Constituent Council, and experts in constitutional law. The accounts of political scientists, sociologists and scholars of Islamic Sharia on the question of democracy are of great significance. This study is expected to encourage a multi-disciplinary form of research, which brings together more than one field to discuss each issue from a particular perspective.

During the period of the data collection in Kuwait, I made a variety of important observations, which are worth reflecting on. For one thing, the literature on democratic theory adopted by the Kuwait government system is not classified under the field of political science. Rather, the theoretical aspects of Kuwaiti democracy fall within the realm of Kuwait constitutional law: for example, the Faculty of Law at Kuwait University. This explains the issue mentioned above – namely, that most, if not all, research on Kuwaiti democracy published in Arabic lacks any sort of conceptual framework. This eye-opening revelation left the researcher with two choices:

1. To follow the vast majority of scholars and students of Kuwaiti politics by ignoring the constitutional law-based literature on Kuwaiti democratic theory, claim that this in fact belongs to a different discipline with its own mechanisms and methodology, and merely apply one of the forms of modern democracy instead. Accessing the literature on Kuwaiti constitutional law proved that theoretical frameworks for Kuwait's system of government do exist - but were classified within constitutional law and published in Arabic only. In scholarly terms, the language barrier and accessibility of data could obstruct the research process.
2. To utilise and properly evaluate the literature on Kuwaiti constitutional law for the purposes of this study's political orientation. The study does, it should be acknowledged, tackle many different areas based on multi-disciplinary approaches; but all of these are directed within a political context.

The researcher selected the second option: seeking to enrich the literature on Kuwaiti politics and democracy and encourage more conceptual studies based on the Explanatory Memorandum of the Constitution of Kuwait. Above all, this research hopes to revive and regenerate interest in studying and developing the conceptual aspects of Kuwait's governing system – which to this point, has been remarkably neglected by academic scholarship.

On an empirical level, this is also the first attempt to assess and examine the concept of democracy, as debated and discussed by the members of the Constituent Council. This was the first elected Council in the history of independent Kuwait, and its mission was to draft and ratify the state's first constitution within a specified one-year time frame. Chapter 5, which focuses solely on those MOPs covering the Council's debates on democracy as the government system of

Kuwait (Article 6), and Sharia as either ‘a’ or ‘the’ main source of legislation (Article 2) will, it is hoped, contribute significantly to academic understanding of Kuwaiti democracy as a case study situated in the Arab world; a highly unusual one, given the many contradictions between the principles of Sharia and democracy. Contradictions which, as the chapter sets out, caused great difficulty to those charged with drafting the Constitution.

On a conceptual level, the study presupposes that the horizons of democracy in the Arab world are limited; and that the reasons behind this lie in highly superficial understandings of democracy itself. Accordingly, the conceptual framework demonstrates the concepts and definitions of democracy between the West - where it first emerged in ancient Greece - and the East, where several post-colonial Arab states adopted democracy in their constitutions and claimed democratic practices in their systems without any clear commitment to core democratic ideals. This inevitably resulted in democratic systems on paper (constitutions), but authoritarian regimes in reality (see Chapter 2).

The task of Chapter 3: *Concepts and Definitions of Democracy* involved developing a conceptual framework to identify, define and highlight the main terms and norms of this research. Chapter 3 not only introduces us to definitions of democracy from Western and Islamic perspectives; but also to other concepts such as the Shura, which Islamic Sharia scholars argue is the Arabic or Islamic version of Western democracy.

It was notable how reliant scholars of Kuwait constitutional law had been on the foundations of classical theories of Western democracy. Yet the significance of Held’s approach lies not merely in his models of democracy, but its indication that democratic frameworks have almost always

been hybrid arrangements; with Kuwait constituting a particular form of hybridity. Moreover, whereas most studies on Kuwaiti democracy adopt modern democratic theories of democracy as their conceptual framework, this study does not. Its adoption instead of classical theories forms an attempt to revive the study of classical political theory, in the conviction that students of history, political theory and politics will all find it of future benefit.

Our multi-disciplinary approach represents a contribution to the political, conceptual, constitutional and historical study of Kuwaiti society. The search for new research strategies, methods and approaches can always add value. In this sense, accessing the MOPs at the Kuwait National Assembly Archives and applying Held's classical models of democracy by way of understanding and developing the concept of democracy in both Kuwait and the Arab world were, from the author's point of view, akin to unearthing hidden treasures.

#### **1.4 Methodological Approach**

The study examines the concept of democracy from its origins: finding that the Constitution singularly fails to provide either an exact, straightforward definition of democracy, or explanation of the government system. This has led the researcher to examine four aspects, which effectively shaped the development of Kuwait's government system from its origins onward.

The study assigns five chapters (in addition to the Introduction and Conclusion) to discuss the historical, theoretical, constitutional and conceptual elements necessary to answer the research questions (see Section 1.2).

This research takes a political orientation. The multidisciplinary approaches it adopts is merely done to answer the research questions. For example, our focus on Islamic Sharia debates does

not make this a study on Islamic jurisprudence. If any researcher discusses democracy in the Arab-Muslim world without raising the issue of compatibility between Islam and Western democracy, their argument is simply incomplete. Yet it must be underscored that this is not a comparative study between East and West, democracy and Islam; but a political/historical investigation into the roots and origins of democracy in a Muslim/Arab state.

Accordingly, the question facing the researcher was: What would be the best methodological and conceptual approaches of examining democracy in the Kuwaiti Constitution? That this would involve looking at one concept, 'democracy', in two different worlds, posed an exciting challenge.

To determine the most appropriate data collection methods, it was essential first to identify the theoretical trajectory, and the reasons for its selection. One of the chief theoretical approaches we adopt is to examine the concept of democracy according to Western political thought, for democracy itself first originated in the West. Western scholars found democracy a controversial term to define; they could not agree on anything significant beyond the literal meaning of democracy: 'Rule by people'. Some even repudiate the idea of any rapport between old and modern democracy (see Chapter 3).

In Chapter 4: *Classical Models of Democracy*, the theoretical approach shifts from concepts and definitions to democratic governing systems and institutions in the ancient world. Studies on Kuwaiti democracy usually adopt theories of modern/liberal democracy, as these are more inclined to measuring democracy instead of understanding it from a conceptual point of view. For example, Robert Dahl and Georg Sorenson's works are often applied as theoretical frameworks to studies on democracy. In *Democracy and Its Critics* (1989), Dahl argues that 'no modern country meets the ideal of democracy, which is as a theoretical utopia'. He coined the



term 'polyarchy' to describe advanced governments which invest substantially in the pursuit of effective participation; voting equality; enlightened understanding; control of the agenda; inclusiveness or equality. Meanwhile, Sorenson's measuring scale of political democracy is based on three dimensions: completion; participation; civil and political liberties (1998, p. 23).

Conversely, in his *Models of Democracy* (2006), Held divides the classical period of democratic theory into three stages: Classical Athens; the Italian Republics; and the Renaissance period. Each model is a narrative of how democratic ideals evolved as a system of government and institution.

This study selected classical over modern models of democracy as its theoretical framework for the following reasons:

1. The conceptual approach of the Kuwait government system is based on a hybrid of ancient ideals and systems. Yet political studies have either undermined or ignored the theoretical framework adopted by experts in Kuwaiti constitutional law (see Chapter 6).
2. This study was structured to examine the concept and system of democracy in the state of Kuwait. Seeking to measure democracy before testing the origins of the term was unsustainable against such a backdrop.
3. By examining the theoretical framework adopted by Kuwait constitutional experts, it rapidly becomes apparent that Kuwait did not adopt a particular model or form of government. Most explanations relied upon the Egyptian school of thought, heavily influenced by the French system (see Chapters 5 and 6).
4. The philosophical foundations of the Kuwaiti governing system are based on democratic ideals, not models, of freedom, justice and equality. Yet precisely the same principles are

embraced by Islam too. In other words, the Constitution of Kuwait adopted common features between Islam (the religion) and democracy (the governing system).

5. There are parallels between ancient and Kuwaiti democracy.
6. The theoretical framework of Kuwait's government system was merely a means to the end of providing legal justification for it.
7. Ignoring the theoretical framework has led to a substantial gap in academic studies of Kuwaiti politics, rendering Arabic publications either rhetorical or descriptive. This study represents an attempt to revive the significance of incorporating theory in social studies, and an invitation for further research on Kuwaiti politics.

In similar vein, this study would be wholly incomplete if it did not shed light on the concepts of democracy in Kuwait, a case study from the Arab-Islamic world. As a primary source of information, it relies mainly on examining the articles of the Constitution of Kuwait (see Appendix). Kuwait identifies itself as a Muslim/Arab state<sup>6</sup>, its governing system is democratic<sup>7</sup>, and Sharia is a main source of legislation.<sup>8</sup> Highlighting only Kuwaiti perspectives, without explaining where Islamic Sharia stands on democracy itself, would be woefully insufficient.

Islamic perspectives are vital, for the following reasons:

1. To elucidate the different viewpoints of scholars on the compatibility of Islam with democracy. It is also essential to rectify the confusion over whether the Shura tradition or the principle of consultations in a Muslim culture is an Islamic replication of Western democracy (see Chapter 3).

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<sup>6</sup> **Article 1** of the Constitution of Kuwait enacts: 'Kuwait is an Arab state, independent and fully sovereign. Neither its sovereignty nor any part of its territory may be relinquished. The people of Kuwait are part of the Arab nation'.

<sup>7</sup> **Article 6** promulgates: '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'.

<sup>8</sup> **Article 2** states: 'The religion of the state is Islam, and the Islamic Sharia shall be a main source of legislation'.

2. The literature on Arab constitutions highlights the long-lasting controversy between Sharia and democratic constitutional clauses (see Chapter 5). The Constitution of Kuwait represents empirical proof of this controversy: it enacted Islamic Sharia as ‘a main source of legislation’, as well as democracy. The debate on the Sharia clause is one of the most continually recurring arguments in both Kuwait and the Arab world in general. Moreover, the discussions on democracy and Sharia in the Constituent Council provide further evidence that truly separating democracy from Islam continues to prove elusive; while liberal values continue to be viewed as a threat to Muslim societies (see Chapter 5).

This study employs a qualitative approach to collect its data and conduct the research process. Quantitative methods, by contrast, are primarily based on numbers, statistics and ‘quantifying data and extrapolating results to a broader population’ (Hennink, et al., 2011, p. 16). Yet the nature of this research coincides a great deal more with the qualitative approach, for the reasons set out below:

1. Qualitative research deals with concepts and ideas, not numbers and figures; ‘textual data’, not ‘numerical data’.
2. It aims to understand, examine, identify and make sense of actions, motives, notions, causes and beliefs; not merely measure, count and quantify a problem.
3. It seeks detailed ‘interpretive analysis’, raising questions such as: ‘What? Why? Where? When? How?’ It underpins the depth and detail of a particular context, reflecting on its variants and impacts. By contrast, the analysis of quantitative research is statistical.
4. The targeted audience or ‘study population’ in qualitative research are known as participants, interviewees or informants. They are limited in number and schema;

selected carefully and for a definite purpose. Conversely, a quantitative approach requires a broader, more general portion of the population.

5. Interviews, focus groups and observation are the key techniques of collecting data in qualitative research. Quantitative methods are more relevant to ‘population surveys, opinion polls and exit interviews’ (Hennink, et al., 2011, pp. 16-7).

This study conducts various in-depth interviews, in accordance with the research objectives.

Before explaining and reflecting on the process, the advantages and disadvantages of applying the unstructured or unstandardized in-depth interview method, it is vital to define interviewing, its different forms, and significance as one of the most popular qualitative techniques of collecting data.

Interviewing may be defined simply as a conversation with a purpose. Specifically, the purpose is to gather information... the interview is an especially effective method of collecting information for certain types of research and ... for addressing certain types of assumptions, particularly when investigators are interested in understanding the perceptions of participants or learning how participants come to attach certain meanings to phenomena or events, interviewing provides a useful means of access. However, interviewing is only one of a number of ways researchers can obtain answers to questions. The determination of which data gathering technique to use is necessary linked to the type of research question being studied (Berg and Lune, 2012, pp. 105, 115).

There are three types of interview. First, the standardized or structured interview: a set of fixed and previously prepared questions, which allows interviewers to use the same format and structure to collect the requested data. This kind of interview is rigid, direct, lacking all forms of flexibility, and almost akin to a questionnaire. Hence, it is known as a ‘survey research interview’. For Berg and Lune (2012), standardized interviews are highly structured, to the extent that the interviewer should adhere to their list of questions without any form of deviation from question order and language used. The interviewer should read the questions as written, not raise any further questions or candidly provide any clarification to the informants. In this regard, it is ‘similar to a pencil and paper survey’ (Berg and Lune, 2012, pp. 108-10).

Second, the semi-structured interview, a standard interview with some flexibility for both interviewer and interviewee. Most research in social sciences falls between the two extremes of interviews, structured and unstructured (Haralambos and Holborn, 1991, p. 737). Many researchers find the semi-structured interviews to be most suitable, and it is an advantage to prepare guided, semi-structured, formal questions ahead of time. They also count on the flexibility which both interviewer and interviewee enjoy when discussing the questions further.

Third, the unstandardized/unstructured/in-depth/open-ended/field research interview. 'It is a one to one method of data collection that involves an interviewer and an interviewee discussing specific topics in depth. [It] may be described as a conversation with a purpose. The researcher's purpose is to gain insight into certain issues using a semi-structured interview guide' (Hennink, et al., 2011, p. 109).

Unlike the standardized interview, it is informal, long, and if effective enough, the interviewee will subconsciously feel they are having a conversation with the interviewer. The focus is mainly on the interviewee: 'It is not a two-way dialogue as only the interviewee shares his/her story and the interviewer's role is to elicit the story' (Ibid, p. 109).

The unstructured or open-ended feature of such interviews does not mean that the interviewer is unprepared. In fact, one of the requirements is a semi-structured interview guide, which includes the key questions and information which the interviewer needs to address during the interview.

Many researchers choose to conduct unstandardized interviews, either because they are seeking personal experiences or perspectives from their interviewees, or they aim to discuss sensitive

issues. 'In depth interviews are commonly conducted in people's homes where they may feel most comfortable' (Ibid, p.110).

The flexible and informal nature of the unstandardized interviews gives the interviewee more room and time to reflect on their own beliefs and perceptions. This might not be the case for the interviewer, for whom the ample amount of data could prove overwhelming - especially if the interview was not recorded as per the request of the interviewee. Recording the interview is acceptable in unstructured interviews, so long as the interviewee allows it.<sup>9</sup>

This study employs in-depth interviews as the methodological instrument of collecting data and documenting the unpublished story of Kuwaiti democracy. The political, cultural and professional reasons which led the researcher to avoid structured and semi-structured interviews and utilise the unstructured style instead were many and detailed:

1. It was of high priority for this research to consult with Kuwaiti scholars, officials and political activists, connected one way or another to the primary sources accessed by the researcher at the Kuwait National Assembly archives, or other specialized libraries in Kuwait. Some of these sources were one of a kind autobiographies, biographies or historical books, from a time when publishing in Kuwait was rare. Some sources were out of print, or never published by their author for political reasons, but later collected and printed anonymously.<sup>10</sup> Other sources were either banned in Kuwait or had yet to have

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<sup>9</sup> For more details on in-depth interviews and qualitative research, see Hennink, et al., 2011, pp. 108-34; Neuman, 2003, pp. 449-59, Wengraf, 2001; and Berg and Lune, 2012.

<sup>10</sup> Despite its significance, the memoir of Khalid Sulaiman al-Adsani, Secretary of the Legislative Council in 1938 and 1939, is a good example of work which went unpublished for political reasons. In his memoir, which he wrote during the political events of 1939, he stated in the introduction: 'Inside a tin, I had buried these papers at the threshold of my bedroom in my father's house in Fahad Street, previously the *Salhiya* [name of the neighborhood]. When the second Legislative council was dissolved in 1939, I was certain that the authorities would arrest me not because I was the secretary of the two councils, but because they knew that I was the mastermind behind

been authorized by the public authorities. Therefore, the researcher needed the flexibility and dialogue provided by unstructured interviews to attain the deep insight of interviewees on democracy in Kuwait.

2. This is the first occasion on which the Minutes of Proceedings of the Constituent Council and Constitution Committee, responsible for drafting and ratifying Kuwait's first Constitution of 1962, have been examined. When the MOPs were opened to the public in 1999<sup>11</sup>, the original script was typewritten in Arabic, with only the Constitution translated at that time. Yet the translations are essentially inadequate. Reading them were simple enough, but some information was omitted, while other phrases were written as colloquialisms.

Moreover, the MOPs referred to a variety of studies and reports designed specifically for the Constituent Council, but none of these were included or available to access.

Therefore, it was essential to meet a specialist who could answer questions relating to the MOPs and provide guidance and advice on exploring the Kuwaiti archives. Best placed to do this was Ghanim al-Najjar, a political scientist, whose article, 'The Challenges Facing Kuwaiti Democracy' (2000), first inspired the researcher to delve into the MOPs and Kuwaiti democracy itself.

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establishing the councils, organizing all events and documenting them. My doubts were in its place: the police raided my house looking for my papers, but they could not find anything. After the Amir's amnesty in 1944, I returned to Kuwait after living in Iraq for years. I found my papers, where I buried them and since then they travelled with me everywhere hoping that I can publish them in a book at certain point'.

<sup>11</sup> During a telephone interview with Ghanim al-Najjar, Professor of Political Science at Kuwait University, on 14 October 2017, he indicated that the first time the MOPs were published was through a supplement issued by the Journal of Law (issue 3, 23 September 1999), published by Kuwait University Academic Publication Council.

3. In-depth interviews are usually conducted to discuss sensitive issues. In this case, the subject of democracy can be critical and sensitive in many parts of the Arab world, especially when freedoms and minority rights are raised. This is not normally the case in Kuwait, where the political culture is open, and the people express their views freely. However, the timing of the field trip to Kuwait was sensitive. In spring/summer 2013 and 2014, politics were at a highly critical juncture. Between 2006 and 2013, the Kuwaiti parliament was dissolved six times, owing to continuous rifts and disagreements between the legislative and the executive (Toumi, 2016). At regional level, the Arab uprisings continued to erupt and spiral out of control. Therefore, the researcher faced the danger of not securing a substantial number of interviewees in the midst of an election season. The outcome was 11 unstructured interviews. Most were lengthy, and conducted in the evening, at interviewees' houses. The sensitive timing, though, effectively gave interviewees the opportunity to vent and address their concerns about the future of democracy in Kuwait and the Arab world. At all times, the interviewer abided by the key feature of in-depth interviews: allowing the interviewee to lead the conversation and express their thoughts only as far as the information they provided was pertinent to the subject of study.
4. The interviews were lengthy because of mostly professional factors. The researcher had developed professional relationships with a majority of the interviewees during her time at the Kuwait Ministry of Information and the Embassy of Kuwait in Washington DC. These links undoubtedly helped facilitate the arrangement of the interviews; but such were their 'icebreaking' nature in terms of starting the conversation, also led them to prove longer than expected.



5. An ethical requirement of any interview is to respect and take into consideration cultural aspects in the country where the interviews are conducted. Berg and Lune advise

interviewers to familiarize themselves with their audience as follows:

When interviewing, it is likewise advisable to know your audience. In this case, however, it means understanding the group or groups from which you draw your subjects. ...to work in different cultures means it is very important to understand the culture of your research subjects. Often the kinds of questions that we in the West take for granted create significant cultural dilemmas for certain groups (Berg and Lune, 2012, p. 152).

In Kuwait, hosting the interviewer in the interviewees' home, rather than the office, is in many cases an act of hospitality. It is also part of the culture that both the interviewer and interviewee exchange personal greetings and find common ground, which could be a mutual friend or point of contact. This kind of cordial introduction is recommended in unstructured interviews; but when it is part of the culture, the interviewer must possess the communication skills necessary to win the interviewee's trust.

6. The researcher's objective in conducting the interviews in Kuwait went beyond the mere collection of data. When a researcher is working on primary sources, interviews are necessary, 'because it is possible that most of the examples and data given here would be hopelessly out of date in a contemporary interview, possibly undermining the researcher's credibility. Hence, it is often useful to adapt your actual wording to the context of the interview' (Berg and Lune, 2012, pp. 112-3). In the case of this study, the researcher treated the interviews as a platform for self-education in terms of how a selection of officials, academics and political activists view democracy in Kuwait.

The data were collected and accessed in various libraries, archives and research centres. The primary sources included: The Minutes of Proceedings of the Constituent Council; Minutes of

Proceedings of the Constitution Committee; Kuwaiti, Arabic and English newspapers, such as al-Qabas, al-Anbaa, al-Rai, al-Taleleea, al-Seyassah; al-Hayat; Asharq al-Awsat; the Arab Times; the Kuwait Times; and memoirs written in Arabic, based on personal observation by pioneers and statesmen directly involved in the main events behind Kuwaiti democracy. Secondary sources in English and Arabic included books, journals and articles.

The primary source collection was performed via two field trips to Kuwait in 2013 and 2014, where the author accessed the Archives of the Kuwait National Assembly; Kuwait National Library; Kuwait University Library; Faculty of Law Library; Centre of the Gulf and Arabian Peninsula Studies; and Al-Qabas Newspaper Archives. Permission to access the Archives and Library of the Kuwait National Assembly was arranged by the International Media Department at the Kuwait Ministry of Information.

The list of interviewees included Sulaiman Majed al-Shaheen, member of the Consultative Committee at the Office of the Deputy Prime Minister, Minister of Foreign Affairs and former Minister of State for Foreign Affairs; Ghanim al-Najjar, Professor of Political Science at Kuwait University and the UN's independent expert on human rights in Somalia; Kawther al-Joan, Head of Kuwait's Women's Development and Peace Institute, advocate and activist in women's rights; Shafeeq al-Ghabra, Professor of Political Science at Kuwait University and former founding President of the American University of Kuwait (2003-2006); Nada al-Mutawa, Head of the Strategic Studies division at the Centre of the Gulf and Arabian Peninsula at Kuwait University; Abdullah al-Khalidi, Director of the Foreign Media department at the Kuwait Ministry of Information; Nouria al-Sadani, historian and writer from Kuwait, activist in women's rights, who

in 1971, became the first female to appeal for women's political rights in the Kuwait National Assembly; Hasan Johar, Professor of Political Science at Kuwait University and a former member of the Kuwait National Assembly; Khalid al-Awadhi, columnist at al-Qabas newspaper; Fajer al-Khaleefa, columnist at al-Taleea newspaper; and Ghanimah al-Otaibi, communications specialist at the World Bank, the Middle East and North Africa External Communications Unit, and a former journalist from Kuwait.

### **1.5 Study Outline**

The study is organized into seven chapters, set out as follows. Chapter 1, the *Introduction*, identifies the subject of this study: *The Constitutional and Conceptual Underpinnings of Kuwait's System of Government*. It is mainly devoted to addressing the research questions, problems and arguments. It also highlights the rationale behind the study and its significance; as well as the methodology, based on a qualitative approach.

Chapter 2, *The Development of Kuwait's Political System*, provides a historical narrative: focusing on how Kuwait's political system developed from a simple tribal Sheikhdom in Eastern Arabia, to an evolving emirate under British protection between 1899 and 1961, and finally to a modern independent state. The chapter also details the history of the country's representative councils, including the 1921 Shura Council, 1938 Legislative Council, and 1961 Constituent Council: which was responsible of drafting and ratifying Kuwait's first Constitution.

Chapter 3, *Concepts and Definitions of Democracy*, is the first of two chapters which identifies the theoretical framework of this study. The chapter is divided into two major sections. The first section examines the concept of democracy – covering both its literal meaning and key debates on why Western scholars find it so difficult to explain and define. The second section looks at

Islamic-Arab perspectives, focusing mainly on Islamic scholars and Kuwaiti intellectuals, and where they stand on both democracy and its implications for Kuwait.

Chapter 4, *Classical Models of Democracy*, adopts David Held's models of democracy, and explores the concept of democracy beyond both its literal meaning and the controversy surrounding it in both East and West. By looking at the examples of classical Athens, Italian republicanism and the rise of liberal thought during the Renaissance, the chapter argues that there are parallels between ancient democracy and the case of Kuwait. It includes a historical survey of the institutional and constitutional characteristics of each of Held's models, which address the works and ideas of prominent thinkers and political theorists.

Chapter 5, *The Constitutional Underpinnings of Kuwait's System of Government*, is the story behind the Constitution of Kuwait and its ratification in 1962. The chapter is divided into three parts. The first part outlines the mission of the Constituent Council, its structure and functions, including the role of Egyptian jurists in drafting the Constitution. The second part sets out the debates on democracy and Islamic Sharia; and especially, how government and Council members perceived these. The third part elaborates on the historical background in the Arab world regarding the Islamic Sharia clause in the Kuwaiti Constitution. The chapter concludes by shedding light on the 'Sanhuri Code': the legal theory which ended the difficulty which Arab constitutions (including Kuwait) continually faced in achieving a balance between Western and Islamic laws without legal or constitutional constraints.

Chapter 6, *The Conceptual Underpinnings of Kuwait's System of Government*, defines and explains democracy based on the Constitution of Kuwait, Explanatory Memorandum, and Kuwaiti constitutional law scholars. The chapter explains the theoretical framework developed by the latter by focusing on the philosophical foundations of Kuwait's system of government.

Finally, Chapter 7, the *Conclusion*, summarizes how the study answers the main research question, 'Is Kuwait a democracy?', and reflects on the historical, constitutional and conceptual factors covered by this research. It finds that the failure to define democracy contributed greatly to the confusion and vagueness around Kuwait's system of government. Democracy is often an intricate and perplexing concept to define; in Kuwait's case, especially.

## **Chapter 2: The Development of Kuwait's Political System**

### **2.1 Introduction**

The Constitution of Kuwait states in Article 6 that, 'The system of government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers' (see Appendix). This article is the very core of this thesis: *The Conceptual and Constitutional Underpinnings of Kuwait's System of Government*.

Kuwait was once a tribal Sheikdom in Eastern Arabia, before becoming an evolving emirate under British protection by 1899, and a modern independent state by 1961. This chapter seeks to answer the following key questions: (1) What ruling traditions and forms of governance did Kuwait adopt before its independence in 1961? (2) What are the roots of democracy in Kuwait? (3) What historical and political factors led what was once a small emerging town in the seventeenth century to adopt democracy as its political system three centuries later? (4) How did the political system evolve in Kuwait?

To achieve this, the chapter aims first, to demonstrate how Kuwaiti governance evolved from a simple, traditional, tribal system to a modern, independent, democratic one; second, to explain the concept of Shura and its practice before independence; third, to account for the political partnership and alliance between Kuwait's merchants and ruling family and the consequences of breaking up this coalition of interests; and fourth, to shed light on the history of representative councils in Kuwait and evolution of its Shura Council, Legislative Council, Constituent Council, and an elected National Assembly.

## 2.2 What's in a Word?

The name, Kuwait, is a 'diminutive of *Kūt* or fortress' and it means 'small castle' or 'fort' (Crystal, 1995, p. 18). According to a local tradition, before the migration of al-Utub to Eastern Arabia, a Sheikh of Bani Khalid built *kūt* for the purposes of hoarding food and weapons supplies ahead of times of war. What are the origins of the word *Kūt* or Kuwait? In *Min tārīkh al-Kuwait*, Saif Marzooq al-Shamlan suggested first that the word *Kūt* might be of Persian origins; and if so, is derived from the Persian word, *Kuwa*, meaning rural village. The second possibility is that *Kūt* has Portuguese origins and means a castle or fortress. Al-Shamlan (1983, p. 100) believes that the latter is more applicable, given that the Portuguese dominated the region in the sixteenth century.

A further elaboration on the Portuguese origins of the word *Kūt* reads as follows: 'During the sixteenth century, the Portuguese resided on the land of Kuwait and established several castles along the coast. None of the castles remained except one in Um an-Naml (the mother of ants) island<sup>12</sup> ... European sailors used to call the remaining small castle *Qurayn*' (al-Saleh, 2003, p. 12). Like *Kūt*, *Qurayn* is an old name of Kuwait; a diminutive of the Arabic word *Qarn*, it means 'the high hill'.

Both Ahmad M. Abu Hakima and al-Saleh argue, however, that *Kūt* has Iraqi roots. For the former, *Kūt* was a popular word in southern Iraq and neighbouring areas of Arabia and Persia. The latter suggests that Iraqis inherited *Kūt* from the Babylonians and Assyrians. For both, *Kūt* is a name that can be given to any house built in the shape of a fortress, to secure protection from

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<sup>12</sup> It is also known as the Giant Island, located in the bay of Kuwait towards the north-west of Kuwait City. Traditionally, it is named 'the mother of ants', as it is crowded with ants all summer, which disappear in the winter season (Al-Shamlan, 1983, p. 98).

any sort of aggression. This kind of construction is usually surrounded by other houses and must be located near the water: whether sea, river or lake (Abu Hakima, 1984, p. 1; al-Saleh, 2003, pp. 9-10). Moreover, al-Saleh states that the land of Kuwait was named *Kūt*, because there was a fortress built and established by Mohammad bin Urayer, Amir of Bani Khalid, who had been ruling Eastern Arabia since 1660. *Kūt* was a gift from Bani Khalid to the al-Sabah family: the starting point for them to establish their own town (al-Saleh, 2003, pp. 9-10). According to Crystal (1992, p. 7) the Arab tradition tends to abbreviate names; thus, by the mid-eighteenth century, *Kūt* had become known as Kuwait.

### **2.3 The Establishment of Kuwait**

When was Kuwait established? The debate over this is vague, with historians making wildly differing claims over the exact year of its foundation. Maymuna al-Sabah argues that before the arrival of al-Utub, Kuwait was a deserted piece of land inhabited by a small number of fishermen and Arab nomads. Al-Sabah claims that *Kūt* was established and named by Sabah bin Jaber, the first ruler of Kuwait in 1613, as a shield from possible aggression and to ensure security. It was used to hoard food and weapons in case of emergencies. Unlike al-Saleh, al-Sabah strongly opposes the idea that *Kūt* was built by either Barrak bin Urayer, Amir of Bani Khalid, or Mohammad bin Naflah bin Urayer. Although history books are still uncertain over whether Bani Khalid ruled Eastern Arabia in 1669 or 1671, al-Sabah dates things back to 1613, when she argues that the al-Sabah family established what is known today as Kuwait. Moreover, old European maps identified Kuwait through its old names such as *Kathima*<sup>13</sup> and *Qurayn*, and the al-Sabah family named the small fortress, *Kūt* (al-Sabah, 2003, pp. 71-74).

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<sup>13</sup> According to Ismael and Slot, the first recorded European presence on Kuwaiti territory was that of Dutch sailors in 1645. The expedition was heading to al-Başrah on its first trading mission. By mistake, the Dutch sailors took the wrong nautical route and found themselves along the coast of Būbyān. Today, Būbyān is the largest of nine islands on the coast of Kuwait (Slot, 1991, p. 18; Ismael, 1982).



Many historians followed British records of English and Dutch establishments in the Gulf. For example, Abu Hakima adopted 1716 as the year of Kuwait's establishment, thanks to the East India Company's records (Abu Hakima, 1984, p. 1). In *The Origins of Kuwait*, B. J. Slot translated part of a report written in 1756 by Tiddo Frederik van Knipphausen, head of the Dutch East India Company, on Kharj Island, describing Kuwait (then known as *Qurayn*) as follows:

...Leaving the Euphrates and going along the Arabian coast one encounters the small island of Feltschah (Faylaka), and opposite it, on the shore, *Qurayn* (Kuwait). Both are inhabited by an Arab tribe... the Etoubis (Utubs). They are formally dependent on the sheikh of the desert<sup>14</sup> although they pay him only a very small contribution. They have some 300 vessels but almost all of them are small, because they employ them only for pearl diving. During the bad monsoon, pearl diving and fishing are their only occupations. They amount to 4000 men, all armed with swords, shields, and lances. They have almost no firearms and are even incapable of handling them. This nation is almost continually in conflict with the Huwala, who are their deadly enemies. Because of this and because of the small size of their vessels, they hardly extend their navigation beyond the Bahrain pearl banks on one side and Cape Berdistan on the other side of the Gulf. Several different Sheikhs rule them, all living in relative unity. The highest ranking sheikh is Mobarak Eben Saback (Mubarak bin Sabah), but because he is poor and still young, another, called Mahometh Eben Khalifah (Muhammad bin Khalifah), who is rich and possesses many vessels, enjoys almost equal respect among them. Beyond *Qurayn* there is the ruin of a Portuguese fortress, and there are no other inhabited places on the way down to Qatīf (Slot, 1991, pp. 86-9).

The records of Carsten Niebuhr,<sup>15</sup> the German traveller who, according to Jacqueline Ismael, visited Kuwait in 1760, provide further contradictions on when Kuwait came into being. Niebuhr found Kuwait both an emerging commercial town with 10,000 inhabitants, and a flourishing port with 800 boats. Fishing, pearl diving and trading were the main crafts and sources of income (Ismael, 1982, p. 22). Abu Hakima referred to Neibuhr as a Danish traveller who was the first to put the name of Kuwait on a map, dated 1765. Therefore, according to Abu

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<sup>14</sup> According to Slot 'Sheikh of the desert is the title Dutch sources used to refer to the Sheikh of the Bani Khalid of al-Ahsa' (Slot, 1991 , p. 86)

<sup>15</sup> In *Modern History of Kuwait*, Abu Hakima notes that in 1765, Neibuhr was first to put the name of Kuwait on a map. Yet there is confusion over the exact years. According to Slot, the first recorded presence of Europeans on the coast of Kuwait was in 1645. Three logbooks of the first Dutch expedition to Basra can be found in the General State Archives of the Netherlands. Roobacker, commanding officer of the *Delfshaven*, one of two ships used for this trip, 'made a chart of his travels between Laraq and Basra, with marks of depths and accurate notes on geographical latitude. This chart shows his progress to Bubiyan' (Ibid, p. 18). Slot also referred to Niebuhr as a Danish traveller; not German, as Ismael had stated.

Hakima's records, Kuwait was not born until 1765.

Historians, then, can only agree to disagree on when exactly Kuwait was established, despite there being more than a century between al-Sabah and Abu Hakima's arguments. There is also uncertainty about when al-Utub migrated to and lived in Kuwait, as well as when Sabah bin Jaber (Sabah I) became ruler of Kuwait. The scepticism over the chronology of significant events in Kuwait led historians like Abdulmalik al-Tamimi to raise the following questions:

Is 1669 the establishment year of Kuwait when Barrak bin Aziz al-Hameed, the Amir of Eastern Arabia built the fortress as a shelter for his forces to provide them with food and weapons in war times, or was Kuwait first established when it was inhabited by a group of Arab tribes who took it as their hometown; and could this be before or after building the fortress? (al-Tamimi, 2012, p. 12)

### **2.3.1 Bani Khalid and Al-Utub**

Before the rule of al-Sabah, the land of Kuwait was under the pre-eminence of Bani Khalid, rulers of Eastern Arabia. During the seventeenth century, the power of the Ottoman Empire began to shrink; it was in a constant state of war and conflict with Arab tribes residing in the outskirts of al-Basra province. Kuwait was described as 'The Land of Tribes' by Ottoman legal records. This might suggest that Arab tribes under the leadership of Bani Khalid were independent entities under Ottoman sovereignty. According to Slot, 'the Basha of al-Basra had an independent policy: only nominally recognizing Ottoman sovereignty. In reality, al-Basra was a beleaguered fortress. Arab tribesmen controlled most of the area outside the walls of the town' (Slot, 199, p. 10).

Al-Yousifi, though, states that in 1650, Hussein Basha occupied Qaṭīf and delegated Barrak bin Urayer, Amir of Bani Khalid, to conquer al-Ahsa in 1663; but Barrak decided to expand his regional power by conquering al-Ahsa independently. Therefore, Bani Khalid took over al-Ahsa and areas around it in 1669; and had a grip over Qaṭīf by 1671.

Among Arab tribes, Bani Khalid was known as strong, especially under the reign of Barrak bin Urayer. Eastern Arabia flourished economically and rose politically. Records indicate that his power extended from north of Basra to South of Qatar (Al-Yousifi, 2013, pp. 26-7).

Who, though, were al-Utub? In the second half of the seventeenth century, a great drought and myriad tribal conflicts led three families – al-Sabah, al-Khalifa and al-Jalahma - to migrate from Najd to Kuwait, seeking shelter and the protection of Bani Khalid.<sup>16</sup> The word ‘al-Utub’ is derived from the Arabic verb *atab*/ move to; in this context, it means ‘migrate’. Local traditions state that al-Sabah and the other families *‘atabū`ilā ash-shamāl*: meaning they migrated to the north<sup>17</sup>. Some might be confused and relate the al-Utub to the tribe of Bani Utbah; but in fact, al-Utub are from the *Inizah* tribe, and the word ‘al-Utub’ is not derived from the tribe’s name Utbah - but related to the route which the three families undertook when migrating from Najd.

According to Mohammad al-Yousifi, what paved the way for the al-Utub to reside in Kuwait was the rejection they encountered from Ali Basha, ruler of Basra, who did not permit them to live under the umbrella of Ottoman power. Instead, he allowed them to move to Umm Qasr, under the rule of Bani Khalid. Eventually, al-Utub moved to *Qurayn* (now Kuwait) and they pledged allegiance to Bani Khalid. Given the cordial ties between Bani Khalid and al-Utub, the former granted the latter some form of independence to run town affairs, as long as they paid the annual

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<sup>16</sup> According to Abdulridha Aseeri, al-Utub moved to Kuwait in 1716 (1993, p. 29). For Slot, the three families migrated firstly to Qatar, where tribal disputes started. Then al-Utub lived temporarily in Basra, with other accounts stating that they settled for a while in Southern Persia (Slot, 1991, p. 70; Abu Hakima, 1984, p. 4; Dickson, 1956, p. 26).

<sup>17</sup> In *Kuwait and Her Neighbours*, Dickson (1956) relates that Sheikh Abdullah al-Salim al-Sabah, the eleventh ruler of Kuwait (1950-65) shared with him the meaning of al-Utub: ‘During the October of the year of his succession. H. H. Sheikh Abdullah al-Salim informed me in the course of conversation that in about A.D. 1710 a terrible and continuous drought drove the al-Sabah, then enjoying predominance over the whole great tribe of *Inizah*, to migrate from inner Najd in search of a less difficult place in which to live. With them went the al-Khalifa, another family of the Emirates’ (p. 26).

tax to the Amir of al-Ahsa.

The few inhabitants of *Qurayn* facilitated al-Utub's mission. The Sheikh of each family decided to handle the domain they were most skilled in, while consulting with one another on key issues. Sabah was allocated political affairs, Khalifa put in charge of financial and commercial affairs, and Jaber al-Jalahma was responsible for maritime affairs (Al-Yousifi, 2013, pp. 30-1).

In 1752, the Amir of Bani Khalid passed away. His death led to a succession crisis. The constant disputes among the sheikhs affected the authority of Bani Khalid over Eastern Arabia and shattered their dominion. This political vacuum provided an opportunity for al-Utub and Sheikh Sabah to become more independent, paving the way for the latter's appointment as the first ruler of Kuwait (Abu Hakima, 1984, p. 5; al-Yousifi, 2013, p. 31).

### **2.3.2 Appointment of Sabah I**

In 1752, the number of Kuwaiti inhabitants was limited; there was no form of government or political entity among them. During disputes and problems, people sought advice and resolution from the trustworthy/wise men of the tribe; and in serious cases, the judgement of *Sheikh al-Qabīlah*/ head of the tribe. In *Tārīkh al-Kuwait*, Abdulaziz al-Rushaid notes:

Ruling was not that important when Kuwait was first established. People were dealing with each other on a family basis. Laws and regulations *ahkām* were issued in the absence of government institutions, and different issues were solved cordially. Eventually, the growing population of immigrants and foreigners changed the simple ruling norms and a ruler's appointment became a must to manage the town's affairs (al-Rushaid, 1926, p. 90).

Following tribal and Islamic traditions - or 'tribal ideology', as Jacqueline Ismael described it (1982, p. 18) - the notables of Kuwait agreed to appoint Sabah as their first ruler. This followed the principles of Islamic Shura, based on consultation, negotiation and consensus. Al-Saleh explains this as follows:

The ritual starts by nominating the ruler by the consent of the prominent members of al-Sabah family. The next day, the notables along with all members of al-Sabah family convene to pledge allegiance to the Sheikh known as *al-Bay'ah*. From his side, the Sheikh gives his assurances to treat people equally and in justice. The Sheikh also pledges his commitment to consult with the notables on all major issues without any totalitarian decisions. From their side, the notables approve *al-Bay'ah* by giving the appointed Sheikh the allegiance and obedience known in Islamic tradition as *as-sam waat-tāah* (al-Saleh, 2003, p. 34).

The political traditions around the Sheikh's appointment are derived from Islamic teachings; the emphasis on the principles of Shura inspired by a verse from the Quran: وَأَمْرُهُمْ شُورَى بَيْنَهُمْ<sup>18</sup>. Yet one must question whether the political traditions of eighteenth century Kuwait are relevant to the modern world. Most scholars have built their arguments around Islamic Shura principles. Al-Saleh, for example, describes the political tradition of *bay'ah* as a combination of two major political systems: autocratic, limiting the procedure of appointing the Sheikh to one family; and oligarchic, because the Sheikh is appointed by the notables (al-Saleh, 2003, p. 36).

The literature provides several reasons why Kuwaiti notables nominated Sabah bin Jaber. Some of these involved social status and reputation; others owed to diplomatic and political skills. In terms of reputation, al-Shamlan states that Sabah's father was known as influential and in control of his clan while in Najd; Sabah's appointment was therefore based on his father's reputation (1986, p. 116).

The notables also sought the Sheikh's residency in town while they were away on long trips diving for pearls. His presence was a necessity to manage the town's affairs, solve internal disputes and maintain peaceful ties with regional tribes - unlike the merchants, who were constant travellers: 'Sabah I was present all year long, as a notable; he was based in Kuwait,

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<sup>18</sup> From verse 38 in Surah Ash-Shura (Consultation). The complete verse states: 'And those who respond to their Lord, and pray regularly, and conduct their affairs by mutual consultation, and give of what we have provided them' (42.38).

unlike the majority of merchants who were absent most of the year. Sabah agreed to rule Kuwait under one condition that people of Kuwait would comply with his orders as far as they serve the town's welfare' (al-Shamlan, 1986, p. 116).

Jill Crystal asserts that Sabah's diplomatic and political skills helped him become a rising leader in Eastern Arabia, while the power of Bani Khalid waned. The rulers of Eastern Arabia were threatened by the rise of al-Utub. To reassure them, al-Utub nominated Sabah to resolve any possible friction; by convincing the Bani Khalid Sheikhs of their goodwill and peaceful, he could help secure cordial relations. Sabah succeeded in his diplomatic mission, 'necessary with neighbouring tribes... The common element in all these accounts is that the basis of Sabah's power was from the start political' (Crystal, 1995, p. 20).

### **2.3.3 Joint Governing: The Merchants and Al-Sabah**

The notables of Kuwait comprised a small number of leading merchants, whose wealth contributed hugely in shaping Kuwaiti politics and economy. According to Jill Crystal:

Kuwait had a narrow and well-established elite: wealthy trading families who were linked by marriage and shared economic interests. They were long settled, urban, Sunni families, most of whom claimed descent from ... al-Utub. In a mosaic society stratified by origin, sect and historical occupation, these families formed homogeneous elite: sedentary not nomadic, Sunni not Shia, *asil* (original, i.e., noble descendants) of the first migrants. They married each other and, sometimes, the Sabahs, whom they considered their peers. The patriarchs of these wealthiest families were merchants by trade, men who had acquired their fortunes from pearling, shipbuilding, and long-distance commerce. There were cosmopolitan elite. Most have travelled extensively, to India, Africa, even Europe, where they sold pearls. They educated their sons abroad more than other Gulf Arabs (1995, p. 37).

Economic power was held by the merchants, whose high social status entitled them to select and elect the first ruler of Kuwait. The appointment of Sabah was an agreement between the ruler and the merchants. The core was based on the principle that 'the ruler governs and the notables get consulted'<sup>19</sup>. Ghanim al-Najjar coined this political arrangement as 'joint governing'. Arguably, this model continued until Sheikh Mubarak, the seventh ruler of Kuwait, became ruler. Its

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<sup>19</sup> See also al-Saleh (2003), p. 20.

characteristics are therefore worth considering:

1. The power of the Sheikh was limited, as his position was more of a political assignment than one of social privilege or political prestige:

From Sabah I to Mubarak al-Sabah, there were not any kind of privileges that used to distinguish the sheikhs from the people of Kuwait. The Sheikh's position was similar to the head of the tribe who was equal to his own people. . . Some notables of Kuwait had more power and authority than the ruler himself (al-Shamlan, 1986, p. 117).

Therefore, the merchants:

Agreed that he [the ruler] would handle the daily affairs of the society, and that they [the merchants] would support him financially, provided that he consulted with them on major decisions. This political formula created complete interdependence between the ruler and the ruled (al-Najjar, 2000, p. 243).

2. Financially, the ruler was dependent on the merchants. For most Kuwaitis, diving for pearls represented their main source of income; thus, the merchants were either *'nuwākhdhah'* / ship captains or *'ṭawāwīsh'* / pearl merchants. When Sabah was appointed, they willingly agreed to pay the ruler a 'portion of [the] extracted revenues ... through custom dues, pearl boat taxes, and personal loans' (Crystal, 1995, p. 4). Regarding that percentage, there was no fixed rate when this began; rather, it was complimentary, but during the reign of Mubarak, it was fixed at 2% (al-Shamlan, 1986, pp. 116-7).
3. The joint governing tradition enshrined the relationship between ruler and ruled. It created bridges of communication and transparency between the people and their ruler. This openness contributed to the prosperity of the small town of Kuwait. For al-Najjar, the partnership fostered a mutual understanding; people became used to communicating with their ruler, sharing their problems and concerns (al-Najjar, 2000, p. 8).

#### **2.3.4 Breaking the Rules: Mubarak and his Sons**

From the reign of Sabah I (1752-1762) to that of Muhammad (1892-1896), joint governing

remained in place in Kuwait. The turning point came in 1896: Muhammad's successor was a tyrant. Does the personality of the ruler affect the ruling system? According to al-Saleh, 'the political history of this region gets affected by the personalities of its rulers' (2003, p. 16). We can clearly observe that rule was based on simple tribal Islamic traditions, and not subject to the rule of law and separation of powers, which predominate in modern democracies. But on 8 May 1896, Mubarak, aided by his sons Jaber and Salim, assassinated his two brothers, Muhammad and Jarrah, and declared himself the seventh ruler of Kuwait (al-Yousifi, 2013, p. 99).

Mubarak was regarded as an authoritarian ruler by his people and respected for his political intelligence and ambitions among the tribes of Arabia. During his reign, three major events changed the history of Kuwait:

1. The Rituals of Succession: according to al-Saleh, before the reign of Mubarak, the tradition was that the wise, trustworthy and elderly of the al-Sabah family convened after the death of the ruler to discuss and select the next heir, who must have been from the al-Sabah family, regardless of lineage (al-Saleh, 2003, p. 36). Sabah I had five sons: Khalifa, Malik, Muhammad, Salman and Mubarak. When Mubarak took power, he altered this tradition and limited it to his lineage.

This decision was accepted without any opposition among the people of Kuwait.

Indeed, it went on to become a constitutional article of faith. Article 4 of the Constitution of Kuwait of 1962 states: 'Kuwait is a hereditary Emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah' (see Appendix).

2. The 1899 Treaty: on 22 January 1899, Mubarak signed the Anglo-Kuwaiti Treaty and Kuwait became a British protectorate. The treaty terminated all sorts of international



competence among other leading world powers and was the most significant achievement of Mubarak's foreign policy.<sup>20</sup>

3. Breaking the tradition of joint governing: Mubarak's authoritarian rule left the notables no longer in alliance with the ruler. He stopped consulting with them by enforcing absolute decisions and expected complete compliance. His actions irritated not only the merchants, but also the working class, who expressed their resentment at import taxes being increased. In response, Mubarak rebuked his own people by banning divers and merchants from their annual diving season. Yet this constituted an act of economic self-harm, depriving Kuwaitis from their only source of income. In response, three prominent merchants, Helal al-Mutairi, Ibrahim al-Mudhaf and Shamlan bin Ali, raised the issue with the Sheikh, but this resulted in stalemate.<sup>21</sup>

Mubarak would later overstep his bounds by offending the three merchants verbally. To save face, the three merchants, their families and followers decided to migrate from Kuwait to Bahrain; with the exception of Shamlan bin Ali, who migrated to Jinā Island in al-Ahsa (al-Yousifi, 2013, pp. 121-2; al-Shamlan, 1986, pp. 151-2). Breaking the tradition of joint governing resulted in friction and resentment among the people of

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<sup>20</sup>For more on the Anglo-Kuwaiti Treaty of 1899, see: aṣ-Ṣubāḥ, Maymūnah al-Khalīfah (1988), *al-Kuwayt fī Zill al-Ḥimāyah al-Birīṭāniyyah* (1<sup>st</sup> ed.). Also see: Soud M. Al-Sabah (2014), *Mubarak Al-Sabah: The Foundation of Kuwait*, Laila Asser (trans.), John King (ed.).

<sup>21</sup> According to al-Yousifi, the three merchants had two meetings with Sheikh Mubarak to express their resentment and urge him to cancel the tax rise. The first meeting took place in late August; the second, in early September 1910 (Al-Yousifi, 2013, p. 122). In response, Mubarak not only verbally insulted three of the most prominent notables and pearl merchants in town, but also disdained their tribes. According to local records, this was the first confrontation of its kind between Mubarak and the merchants, whose decision to leave Kuwait was an act of objection and form of protest. In *Min Tārīkh al-Kuwayt*, al-Shamlan recounted the conversation between the three merchants, when Shamlan bin Ali urged al-Mutairi and al-Mudhaf to take an opposing stand against Mubarak's actions: 'If Mubarak does not admit his mistakes and apologize, we should react, because Kuwait is our country and it has our relatives, friends and our money'. Both al-Mutairi and al-Mudhaf supported their fellow merchant, and agreed to break Mubarak's rule by joining the diving season and migrating to neighboring towns, and not returning to Kuwait (al-Shamlan, 1986, pp. 151-2).

Kuwait.

Mubarak passed away in 1915; his heirs were his sons, Jaber (1915-1917), and Salim (1917-1921). Both followed in the footsteps of their autocratic father; however, Jaber at least reduced the rate of import taxes (al-Saleh, 2003, p. 18). Salim did not possess the political acumen of his father. On the contrary, he risked relations with the British: during his reign, Kuwait became involved in several wars, raising concerns about the future of this still small town.

Salim died in 1921, leaving Kuwait facing a succession crisis. The notables, who had remained remarkably patient during the authoritarian rule of Mubarak and his sons, could not stand aside. They decided to confront the ruling family with a list of appeals and political demands. The hallmark was the establishment of a Consultative Council, to be called *Majlis ash-Shūrā* (Shura Council), which would hear the notables' voices and restore the principles of joint governing.

## **2.4 The Road to a National Assembly: A History of Representative Councils in Kuwait**

Representative councils are at the very core of democracy in Kuwait. In 1921, the idea of consultation and Shura – hitherto an informal governing system – was crystallized by a formal body representing the people. This section examines the three major representative councils, looking at their historical importance, and their role in entrenching democracy in Kuwait.

### **2.4.1 Council of 1921**

As we have seen, before his death, the notables had become increasingly critical of Sheikh Salim's autocratic rule. The succession crisis that followed posed serious challenges for the future of Kuwaiti politics. According to Ahmad al-Khatib, five elites held a meeting in Nasser al-Bader<sup>22</sup>. Diwaniya decided to lead a reform campaign and sign a petition. The petition included

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<sup>22</sup> According to Mohammad al-Yousifi (2013, p. 172), the notables gathered in the Nasser al-Badri *diwaniya*.

five appeals. First, the house of al-Sabah should reconcile and find a pattern for succession to avoid inter-conflicts. Second, the notables limited the al-Sabah family to three nominations: Abdullah al-Salim, Ahmad al-Jaber, and Hamad al-Mubarak. The notables' decision to confront the ruling family represented a declaration that running the town's affairs could not be autocratic, and a call to restore the old tradition of 'joint governing'<sup>23</sup>.

Third, the government should approve and announce the ruler's name. Fourth, the new ruler would be Head of the Shura Council. Fifth, the first Shura Council would be based on free and equal elections, where nationals would elect their representatives<sup>24</sup> (al-Yousifi, 2013, pp. 172-3). By consensus, the al-Sabah family selected Ahmad al-Jaber to be the tenth ruler of Kuwait. His appointment resolved the 1921 crisis, since when rulers have descended from Mubarak the Great, particularly the al-Salim and al-Jaber branches.

The new Amir was not in favour of an elected council; however, he approved its establishment by appointing twelve members. The Amir changed political tactics and the Council only lasted for two months, but the disparity among members was the main reason for its demise. Al-Farhan confirms that the Council failed because of constant disputes among members. Indeed, an anonymous letter signed by *al-'Ummah* (the nation) was sent to the Council, condemning its record. This severely affected members' morale; and ultimately, the Council was dissolved (al-Farhan, 2012, p. 126).

Yet several lessons drawn from this trial contributed significantly to shaping the future of the

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<sup>23</sup> This study adopts the term 'joint governing', coined by Ghanim al-Najjar, political scientist at Kuwait University, to describe the first political agreement and tradition between the ruling family and the notables (see Chapter 2, pp. 10-11). For more details on the history of democracy in Kuwait and the tradition of joint governing, see: *Nash'at wa Taṭawwur ad-Dīmuqrāṭiyyah fī al-Kuwayt*, February 2010, pp. 2-4; and al-Najjar (2000), *The Challenges Facing Kuwaiti Democracy*.

<sup>24</sup> The petition was signed by Mohammad bin Shamlan, Mubarak Mohammad Bourisly, Jassem Mohammad Ahmed, Salim Ali Bugamaz, and Nasser Ibrahim (al-Khatib, 2007, p. 99).

governmental system in Kuwait:

1. When ‘joint governing’ was threatened and prominent merchants excluded from decision-making, the Shura Council became a guarantor of people’s rights. Later, this right was incorporated into Article 6 of Kuwait’s 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’ (see Appendix).

We can also infer that the initiative to establish the Council was not a transient attempt to heal the rift between ruler and ruled. In fact, the breaking of the joint governing tradition by Mubarak and his sons led the notables to mistrust the ruling family. Hence, the notables aimed not only to restore joint governing, but to institutionalize it in an independent body representing the people of Kuwait.

2. Without imposing political pressure on the ruling family, the notables would not have won approval to establish the Shura Council as their first elected representative body. The notables took advantage of the succession crisis, and presented a list of demands to the ruling family: including the establishment of the Council and appointment of one of the three descendants of Mubarak as the next Amir. Local records indicate that the al-Sabah family did not choose Abdullah al-Salim, the son of the late Amir, who was eager to succeed his father. They instead selected Ahmad al-Jaber, who was eligible to rule by seniority.

The rivalry between Ahmad al-Jaber and Abdullah al-Salim became a political symbol for the ongoing friction and competition between the al-Ahmad and al-Salim branches of the al-Sabah family. In the Anglo-Kuwaiti Treaty, Mubarak had changed the tradition of

ruling and limited it to his descendants. This proved highly effective and was ultimately adopted by the Constitution of Kuwait in Article 4: ‘Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah (see Appendix).

Yet the dispute over the succession recurred in 2006, when Jaber al-Ahmad al-Sabah (1977-2006) died in January. The ailing Crown Prince Saad al-Abdullah al-Sabah, who came from the al-Salim branch, ruled Kuwait for just ten days (15-24 January 2006) – but ultimately, matters were resolved in favour of Sabah al-Ahmad al-Jaber al-Sabah (2006-present), from the al-Jaber branch. According to Hassan Fattah, ‘some of the Amir’s supporters saw the constitutional battle as a ruse to settle old scores and concrete power in the Salim branch of the family, now led by Sheikh Sabah, who has been de facto ruler of Kuwait ever since Amir Jaber fell ill in 2000’ (Fattah, 2006).

3. The name of the Shura Council is derived from Sharia law and refers to Islamic principles of consultations. This automatically begs the question: what have been the reasons behind the transition from Shura to democracy? It should be noted, though, that following the dissolution of the Council in 1921, no form of public representation existed in Kuwait until 1938.

#### **2.4.2 Council of 1938**

In 1938, several regional and international triggers ignited turmoil in Kuwait, changing the political arrangements between its ruler and merchants. Internationally, the Great Depression and the invention of Japanese cultured pearls in the late 1920s threatened the merchants’ economic power, leading to a confrontation with the ruling family. Domestically, the ruler exploited the economic crisis to his own advantage, increasing taxation and ignoring the corruption of leading

members of the ruling family in the Emirate's major departments (Crystal, 1995, p. 44). It was obvious that Ahmad was paving the way towards ending the partnership with the merchants, but his momentum intensified when oil was discovered in 1936. The ability to control lucrative revenues resulting from this would end his dependence on the merchants.

This rendered the oil discovery both blessing and curse. Oil became Kuwait's main source of revenue, and the economic gateway with which to establish a modern state; but the political coalition between the Amir and the merchants came to an end. By 1950, the ruling family had paid off its debts to the merchants, and 'no longer would the rulers or the state have to rely on port dues paid by traders' (Crystal, 1995, p. 7). Oil gave the al-Sabahs the leverage and the ambition to undermine the economic power of the merchants and diminish the political partnership between both. Towards this objective, the ruler established new coalitions with other factions in society (mainly tribes), to undercut the merchants. The success of this provided further evidence of the al-Sabahs' pre-eminence in Kuwaiti politics.<sup>25</sup>

In turn, other members of the ruling family began demanding more in the way of financial allowances. Abdullah al-Salim<sup>26</sup> and his brothers became rivals, even dissidents: objecting to the Amir's appointment. To obtain more allies within his own family, Ahmad provided land distributions and financial allowances, while increasing import taxes on the merchants (al-Sabah,

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<sup>25</sup> According to Ahmad al-Khatib (2007, p. 101), the combination of oil and revenue severely affected the traditional equilibrium between the rulers and merchants which had underpinned the development of Kuwait. Financially, the ruling family was no longer dependent on the merchants. In contrast, the merchants became dependent on the government after the great pearl market crash and the Great Depression, which hit the economy severely and led to the abandonment of ship manufacturing. The ruling family no longer needed their support. Public participation in decision-making declined, while the ruler became far more dominant. Both Crystal (1995) and Ahmad al-Khatib (2007) view this period as a failure; yet in fact, as this thesis argues, it provided the main pivot behind the evolution of democratic institutions in Kuwait.

<sup>26</sup> Abdullah al-Salim was Ahmad al-Jaber's rival during the 1921 succession crisis. He was the son of the late Amir (Salim al-Sabah) and one of Mubarak's three descendants. Although the al-Sabah family appointed Ahmed as the Amir, Abdallah and his brothers continued to be rivals: opposing Ahmad's policies and supporting the new wave of opposition formed in 1938.

1980, p. 3; Crystal, 1995, p. 44).

The political events surrounding the 1938 *Majlis* (Legislative Council) broke the alliance between rulers and merchants and led to the formation of the first opposition group in the history of Kuwait. Unlike with the 1920 *Majlis*/ Council, the merchants re-organized themselves as an opposition party, known as ‘the 1938 Movement’. Their tactics did not involve petitioning the ruler to constitute a representative council; instead, they focused on the broader public. They established and funded specialized councils in education, municipality, health and justice to reach public opinion and win its support. According to al-Najjar, the movement was also known as the ‘National Youth Bloc’. It represented nationalists, who were highly politically organized, and appeared at first to have learnt from the mistakes of 1921. ‘They were mainly merchants yet reformists, in addition to a rising class of young and educated Kuwaitis. As a political bloc, they were coming from different economic and social classes’ (al-Najjar, 2010, p. 4).

Objecting to the Amir’s policies, the new opposition convened a meeting, which secretly circulated leaflets appealing for political reform. As noted above, rather than approach the ruler, the merchants instead spread political awareness and appealed to public opinion on issues such as healthcare, education and public services. They circulated leaflets and used anti-government graffiti to express their antagonism. The government responded by arresting key figures of the opposition; Mohammad al-Barrak was tortured.

The opposition now chose to form a delegation to petition the ruler on the urgency of an elected council. It went on to constitute an electorate of 150 representatives of leading Kuwaiti families, and elect a Legislative Assembly comprising 14 members (Crystal, 1995, p. 47). It asked Abdallah al-Salim, the Crown Prince and rival of the Amir, to head this Assembly. In July 1938,

the Amir gave in to this pressure and approved the principle of an elected council. The opposition was increasingly dynamic; it had a clear vision, proposed a number of national projects, and its main objective involved drafting the Basic Law of the Legislative Council in preparation for a new constitution. This law granted the Council absolute powers to enact legislation, run and control different departments: from finance, justice and public security to education, health and public works.

The Amir was reluctant to approve the new law; but again, the stalemate that resulted ended in the ruler conceding the argument. Thus, the huge determination of the opposition led to the establishment of the first pillar of democracy in Kuwait, the Legislative Council. Had it not been for these enlightened notables and merchants, perhaps the political institutions of Kuwait might never have been reformed. As it was, the opposition's desire to run and control all state departments restrained the Amir's powers.

Yet the 1938 Council only lasted for six months. The ruler's agreement for an elected council and a constitutional law might have represented the ideal opportunity to return to the earlier approach of joint governing – but in practice, the opposition committed largely the same mistakes as Salim and Ahmad had. Regardless of their very different political roles, both the opposition and those two rulers disregarded the separation of powers and attempted to rule Kuwait unilaterally.

This also raises questions regarding the ruler's intentions. Were his concessions part of a genuine initiative to start a new beginning, or merely a response to huge political pressure? The opposition, in any case, continued to overplay their hand. According to Crystal, the ruler was not pleased with the new political arrangements; yet the Council immediately began to run the



country's finances and distribute the Amir and ruling family's allowances. The last straw was when the Council requested the December cheque for the country's oil revenues. In response, Ahmad al-Jaber al-Sabah dissolved it on 17 December 1938 (Crystal, 1995, p. 48).

The Amir called for elections of another Council on 24 December 1938, but this time with a larger electorate of 400. His intention was to have a grip on this new Council by proposing a new law changing it from legislative to consultative; and drafting a new constitution, which would restrict the Council's powers to monitor the Amir's expenses and hire officials (Tetreault, 2000, p. 64). The 20 members of the new Council, 12 of whom were dissidents from the previous one, promptly rejected the Amir's new amendments. Their opposition led the Amir to dissolve the 1939 Council on 7 March.

Mary Ann Tetreault views the members' opposition to the amendments as a major mistake. Not only did it lead to the Council's dissolution, but also to the establishment of a wholly appointed council, whose members were mainly from the ruling family (Tetreault, 2000, p. 65). Moreover, the government now started pursuing opposition members. Some fled to Iraq; others were arrested.

Two days after the dissolution of the second Council, Ahmad bin Munayes, a Kuwaiti resident in al-Basra, expressed his doubts about the efficacy of the al-Sabahs in ruling Kuwait, and urged the Council to resist until the arrival of the Iraqi army. Bin Munayes was immediately arrested, leading to a confrontation in the street between the opposition and the police. This violence killed three Kuwaitis; several were injured. Tetreault explains that: 'Ahmad bin Munayes was taken to jail where he was tried and convicted in a matter of minutes, shot and then hanged in the main square until [the] evening'. These events jolted the opposition severely. Many council

members and supporters fled - although an amnesty in 1944 freed all prisoners and allowed those in exile to return to Kuwait (Tetreault, 2000, p. 65).

### **2.4.3 Council of 1962**

Locals describe the 1950s as the renaissance era of Kuwait. This was the reign of Abdullah al-Salim, eleventh ruler of Kuwait, known as *'Abū ad-Dustūr* (the Father of the Constitution). During his rule (1950-1965), Kuwait adopted one of the most liberal constitutions in the Arab world and established an elected parliament in 1963. As a dissident himself towards his predecessor, Abdullah had always been the opposition's preferred candidate. He had been one of the three nominees to rule Kuwait after his father Salim's death, and was asked by the opposition to lead the Legislative Assembly in 1938.

The reign of Abdullah al-Salim was notable for lacking the tension and rivalry which the previous councils had endured. Abdullah restored the equilibrium between government and opposition and devoted all his endeavours to the development and prosperity of Kuwait. He was a friend, not a foe, of the opposition. Indeed, members of the ruling family criticized him for his cooperation with the latter. Moreover, it was his personal initiative to hold elections for the Municipal and Educational / *Ma'ārif* Councils on 25 November 1951; and the Health and Religious Endowment Councils on 1 December 1951.

A new wing began to emerge among the opposition too. This was a group of educated young men, who believed in Arab nationalism, echoed the views of President Nasser of Egypt, and hailed from different social classes in Kuwait. Some were from the merchants' class, such as Jasim al-Qatami; others were from the middle class, such as Ahmad al-Khatib, the first Kuwaiti physician to be educated in Beirut and London. According to al-Najjar, these men were very active: writing regularly in the press, present at public gatherings and above all, were intrepid

and determined to lead the reform movement in Kuwait (al-Najjar, 2010, p. 4).

On 19 June 1961, Kuwait gained its independence and was no longer a British Protectorate. A few days later, the Iraqi President, Abdulkarim Qasim, refused to accept Kuwait as an independent state, asserted Iraq's sovereignty over it, and threatened the use of force. Neither the international community nor the Arab League welcomed these developments, but the threats helped trigger Kuwait's rapid adoption of democracy. There were other reasons too, however:

1. The calls for political reform and representative councils were rooted among opposition members: merchants and nationalists. The events of the 1921 and 1938 Councils proved that the Kuwaiti opposition would continue fighting all forms of absolute rule as long as their voices went unheard and a representative council was not given the tools to be effective. We should remember how embedded the principles of joint governing had been; the challenge for the opposition was to maintain them.
2. The events of 1961 also provide a hugely important historical lesson about Kuwaiti politics. Qasim's threats led both the government and opposition to be in one trench. Despite their political disagreements, their aim was to defend Kuwait and refute Qasim. Both the government and opposition agreed to form a delegation consisting mainly of merchants and led by Jaber al-Ahmad al-Sabah (Minister of Finance), which visited Cairo to obtain Nasser's support against Qasim. The outcome of this visit led to the delegation presenting a detailed report to the Amir, urging the government to adopt a parliamentary system (al-Najjar, 2010, p. 9). The concerted efforts of both government and opposition had focused, above all, on Kuwaiti sovereignty and the national interest; prior political disagreements were put aside, with democracy viewed as their political salvation.

3. Ahmad al-Khatib and Jasim al-Qatami, leading figures in the opposition and prominent members of the Arab Nationalist Movement, pledged full support to the Amir of Kuwait and the government, if it adopted a parliamentary system. This later resulted in the appointment of al-Qatami as Kuwait's first under-secretary at the Foreign Service Department. The Amir, who was supportive of Arab Nationalism himself, knew that both al-Qatami and al-Khatib would invest their ties with Arab nations in general, Nasser in particular, for the good of Kuwait (al-Najjar, 2010, p. 9).

The opening session of the Constituent Council took place on 20 January 1962, through the election of 20 members. Its mission was to draft, discuss and promulgate the new Constitution of Kuwait. The next step was ratification of the Constitution by the Amir; before announcement of the election date. The newly elected legislators also issued a law covering the transitional period. A dispute over the number of constituencies occurred between the government and members of the Constituent Council. At length, it was agreed to divide Kuwait into 10 constituencies instead of 20. Abdullatif Thunayan al-Ghanim, a leading merchant, became Speaker of the Council; while the new Deputy Speaker was Ahmad al-Khatib, a nationalist and physician.

Within the Constitutional Council, five members were elected onto a sub-committee, known as the Constitution Committee, to discuss the draft prepared by constitutional experts from Egypt. Four members were elected within the Constituent Council body; the fifth was Saad al-Abdullah al-Sabah, son of the Amir and Minister of the Interior, representing the government and ruling family. Confrontations between government and opposition did continue to take place in the newly elected Council. Most government members came from the al-Sabah family and were not in favour of drafting the Constitution. Conversely, the Council was mostly made up of opposition representatives. For them, endorsement of the Constitution, Parliament and democracy were

dreams come true. Therefore, disagreement was constant; but the Amir always defused these in the name of completing the draft Constitution.

Abdullah al-Salim al-Sabah (the Amir) believed that the Constitution, a national project, should be ‘about the people, by the people and for the people’, upheld within a nationally elected commission. The achievements of the Constituent Council and the mechanisms of drafting the Articles will be discussed in further detail in Chapter 5.

#### **2.4.4 Representative Councils: Reflections and Implications**

Given the grim examples of 1921 and 1938, the early 1960s clearly represented a huge sea change in Kuwaiti politics. Why was this? Escalating oil revenues made Kuwait a target for British companies and local merchants. The British were keen to sponsor and supervise all infrastructure projects and development. They made it very clear to Abdullah al-Salim al-Sabah that he had to hire British consultants in all fields. The Amir was very cautious, approving the hiring of experts, not consultants; and insisting that the British government would have no say on their hiring or firing. ‘The British were very keen to supervise and sponsor any plan or project of development in Kuwait. Therefore, the British were very clear to appoint British consultants in all fields which had to do with running the country’s affairs’ (al-Najjar, 2000, p. 39).

Most merchants, though, were drawn from the 1938 opposition, and felt very sensitive regarding the British proposals. Yet Abdullah not only proved supportive of these business notables; he was shifting his stance towards one of *takwīt* (Kuwaitization) - nationalizing the Kuwaiti economy. For example, when British companies started to compete over Kuwaiti projects, he made it a condition that they could not work in Kuwait without a Kuwaiti partner, and shares would be 50/50. Another example occurred in 1952, when the British government rejected the establishment of the first local National Bank of Kuwait, considering this a violation of the

contract with the British Bank, which terminated in 1971. The Amir again employed his renowned intelligence and diplomatic tact, affirming that the contract prohibited the existence of any other foreign bank in Kuwait, not a local one<sup>27</sup> (al-Najjar, 2010, pp. 5-6).

As we noted earlier, Ahmad al-Jaber al-Sabah (1921-1950) had attempted to change the joint governing system for the sake of building new coalitions with other sectors of society, at a time when the ruling family felt more independent with the advent of oil. His successor, Abdullah al-Salim al-Sabah, had a very different background: a dissident for 29 years, great supporter of the opposition in general, and merchants in particular. His period at the helm won back the alliance between the ruler and merchants. Not only did he believe that ‘the merchants can play a pivotal role in developing the country, but he was always on their defence to a larger extent’ (al-Najjar, 2010, p. 6). He shared the merchants’ concerns over the backwardness of the public and administrative situation. The resulting collaboration led to a period of prosperity, during which the country developed in all aspects. He also encouraged the elections of specialized councils in major fields such as education, health and municipalities.

Huge oil revenues, transforming the country’s potential, also led to the start of major changes in social and political infrastructure, in which merchants played an important, influential role.

Abdullah, a leading rival of Ahmad and his allies, supported the merchants and reformists unconditionally. Without his contribution, this huge transition in Kuwait’s political history could surely not have happened.

The rise of Arab Nationalism (*al-Qawmiyyah al-‘Arabiyyah*) and connections of Kuwaiti nationalists with President Nasser of Egypt also played a key role in garnering regional support

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<sup>27</sup> See also al-Najjar (2000), pp. 42-5.

against Iraq. During the early 1950s, according to al-Najjar, the deterioration in public sector performance under some members of the ruling family led some to be attracted towards nationalism and reform. The merchants began to support and sympathize with this (al-Najjar, 2010, p. 6). What made Arab nationalists especially popular was their courage. Not all of them belonged to the merchant class, yet their activities were visible and effective: including in the press, at public gatherings and through the circulation of secret statements or releases.

The Amir, a supporter of this movement in general, urged the revival or re-election of the specialized councils. Yet it should be acknowledged at this point that these did not endure and did not accomplish their objectives. This was mostly due to constant altercations and disputes with the heads, who were drawn from the ruling family and appointed, not elected.

Since coming to power in 1950, Abdullah al-Salim al-Sabah had been an advocate of electing specialized councils. For example, in 1952, it was his initiative to elect the education, health, municipality and Islamic Endowment Councils. His vision was that elected councils would encourage Kuwaiti citizens to become more engaged in building their nation, as well as help the government run local affairs. These councils were the first pillar in establishing the public sector; yet these were plagued by instability, even within the ruling family itself.

The Amir, indeed, grappled with his own family, who were against the elected councils and not content with their limited authority. This led a delegation of six elected members (two from each council) to petition the Amir in 1954 for reform, and to suggest establishing a consultative council to assist him in running the country's affairs. The petition formed an objection to the interference of some members of the ruling family, who were obstructing the work of the elected councils. Both parties, the Amir and the delegates, reached a stalemate and could not come to an

agreement: which led to the immediate resignation of all members of all four councils, and resulted in a major political crisis between the Amir and the elected members (see al-Najjar, 2010, pp. 5-7; al-Khatib, 2007, pp. 173-181).

In early 1957, it was agreed to re-run elections for specialized councils. The elected members would establish a Consultative Council, an equivalent of a parliament, which would then present any matter to The Higher Council, consisting of the ruling family only. This proposal was approved with one condition: namely, that Ahmad al-Khatib could not run for election. When the results were released, The Higher Council requested that the two most successful candidates, Jasim al-Qatami and Abdulrazaq al-Khalid, withdraw. The 56 new members collectively resigned in protest at government interference (Ibid.).

Public gatherings, the formation of clubs and discussion of regional and national issues continued to be permitted until 1959, when the Committee of Kuwaiti Clubs called for a major festival to celebrate the establishment of the United Arab Republic (1958-1961). During the celebration, there were calls for Arab unity and coalition, criticism and even condemnation of backward regimes. Although the government approved the festival, this did not prevent clashes between the police and participants, which led to many arrests. The Amir felt that the opposition did not value his support and good intentions; thus, he suspended all paper publications, shut down all cultural and sports clubs, and froze all public and political activities. This would last until 1961, shortly before independence (Ibid., pp. 7-8).

According to al-Khatib, the 1959 events represented a new page in Kuwait's national political movement and were a sign of its growing political awareness: 'For the first time in the history of Kuwait, the national movement included labourers, employees and junior merchants and workers



from all sects of society, Sunni and Shia' (al-Khatib, 2007, p. 149). The movement continued through the political clubs, whose Committee (*lajnat alandeya*) did not include any merchants. In June 1958, the members invited 18 merchants interested in politics to join them. Their objective was to conduct scientific studies aimed at resolving Kuwait's housing and water problems. Membership was opened until 2 February 1959, when the Committee was dissolved in tandem with other organizations by the Amir.

Ultimately, the prominent role played by the opposition in the establishment of the representative council, made up of merchants, nationalists and representatives of non-governmental organizations, was historically remarkable. Not only did this help institutionalize civil society in Kuwait, but it played a major part in establishing the only democracy in the Gulf region.<sup>28</sup>

## **2.5 Conclusion**

Between the establishment of Kuwait in 1756 and its eventual independence in 1961, regional and international coalitions, power vacuums and an absence of a joint form of governing all played various parts in the gradual development of the government system. Initially, the tribal alliance between Bani Khalid and al-Utub allowed the latter families to settle in Kuwait. Al-Utub's tribal fame, wealth and power entitled it to run the town's affairs collectively. In 1756, by consensus and based on Shura traditions, the notables appointed Sabah I as ruler of Kuwait. Domestically, Sabah I proved both highly politically involved and respected; while regionally, he managed negotiations and disputes with other tribes with wisdom and diplomacy.

Signing the Anglo-Kuwait Treaty in 1899 proved the highlight of Mubarak the Great's reign.

This alliance with a global power provided security and protection for the small, emerging

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<sup>28</sup> The reflections on representative councils of Kuwait were collected and reinforced in an interview with Ghanim al-Najjar, political scientist at Kuwait University in Kuwait City, 24 March 2014.

emirate. A booming commercial centre, located at the northern tip of Eastern Arabia and with a vivid harbour with great potential for trade and business, Kuwait was now coveted by several international powers, particularly Britain. Later, alliances with Nasser's Egypt and other Arab states, which advised Kuwait to swiftly adopt a parliamentary system, helped it survive Iraq's threats when independence was declared.

Just as important as the above were the power vacuums which occurred on several occasions.

The three al-Utub families (al-Sabah, al-Khalifa and al-Jalahma), all exploited the deterioration of Bani Khalid's power, employing their tribal influence and authority to rule Kuwait. They also assigned themselves as the prominent Sheikhs of Kuwait to run the town's affairs and achieve their political ambitions of ruling over Eastern Arabia. The primacy of Sabah I over political affairs and the al-Khalifas' flight entitled Sabah I to be the territory's first ruler.

The first form of governance was performed jointly: the ruler and merchants were treated as partners. This was part of the Shura tradition, based on consultation and consensus, and remained in place between 1756 and 1896. Yet the authoritarian Mubarak's violation of this partnership led the merchants of Kuwait to gradually organize themselves as an opposition party and begin to call for representation. Since then, Kuwait has overseen three different forms of representation: first a Consultative, then a Legislative, and finally a Constituent Council, which ultimately resulted in the election of the National Assembly in 1963.

The development of Kuwait's political system has undergone a great leap from simple, tribal, Shura traditions to a modern, democratic, parliamentary one. This raises questions about the

interdependence between the principles of Shura and democracy: and whether any parallels or correlation between democratic values and Islamic sharia teachings led a Muslim/Arab state, to adopt democracy as its governing system. In practice, the roots of the Shura tradition are purely Islamic; the roots of democracy are thoroughly Western. Accordingly, the task of the next Chapter is to examine the concepts and definitions of both democracy and Shura, to more fully understand the sources of democracy in Kuwait.

## Chapter 3: Concepts and Definitions of Democracy

### 3.1 Introduction

The core of this thesis unveils the roots and origins of democracy in Kuwait. In such regard, it is critical to define the concept of democracy and understand the most common debates about it.

Any research on Kuwaiti democracy is incomplete without defining and examining democracy from its Western roots. This chapter sheds light on the concept of democracy based on different perspectives from two different worlds: The West and the East.

When debating democracy, scholars of democratic theory usually pay great attention to the origins of the word and how *demokratia* (in Greek, ‘rule by people’) became one of the most appealing governmental systems worldwide:

Throughout the world’s major regions there has been a consolidation of democratic processes and procedures. In the mid-1970s, over two-thirds of all states could reasonably be called authoritarian. This percentage has fallen dramatically; less than a third of all states are now authoritarian, and the number of democracies has grown. Democracy has become the leading standard of political legitimacy in the current era (Held, 2006, p. X).

This chapter demonstrates how scholars of the two worlds, East and West, define and debate the concept of democracy by answering the following questions: (1) How do Western scholars define democracy? (2) What are the main debates on democracy in Western thought? (3) Where do scholars of Islamic studies stand on democracy? (4) Is democracy accepted in Muslim cultures? (5) Where do Kuwaiti scholars stand on the concept of democracy?

However, the chapter does not draw a comparison between democracy in West and East; nor does it consider whether Islam is compatible with democracy. Rather, it merely sets out the debates, concepts and definitions of democracy from these two worlds’ perspectives: to better understand democracy in Kuwait; examine democracy from Islamic perspectives, especially

important given this thesis' contention that the Kuwaiti Constitution contains contradictions between democracy and Islamic Sharia; demonstrate the views of Kuwaiti scholars; and enrich the literature on democracy in the Arab world. All Arabic and primary data and quotes cited in this chapter were translated by the author.

The chapter is divided into two major sections. The first section examines the concept of democracy: starting from its literal meaning, before moving on to discuss why scholars of democratic theory find this misleading. The second section looks at Islamic-Arab perspectives and focuses mainly on Islamic scholars and Kuwaiti intellectuals. This is the first of two chapters which identify the theoretical framework of this thesis.

### **3.2 Democracy: The Literal Meaning**

The Greek word, *dēmokratia* (rule by the people) is derived from *dēmos* (people), and *kratos* (rule or power). Held explains that 'democracy' came into the English language from the French *démocratie* (2006, p. 1) during the sixteenth century. Nowadays, most dictionaries define democracy as: 'Government by the people; a form of government in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system'<sup>29</sup>.

In other words, democracy is defined as a political terminology in which 'majority rules', and measured on a scale of participation, liberty and equality, with less focus on the etymology of the

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<sup>29</sup> Although other dictionaries, like the Oxford or Cambridge English Dictionaries, use a different wording in defining 'democracy', there is a consensus in viewing it as a political system. According to Oxford, democracy is a system of government by the whole population or all eligible members of a state, typically through elected representatives. Cambridge, meanwhile, defines it as: 'The belief in freedom and equality between people, or a system of government based on this belief, in which power is either held by elected representatives or directly by the people themselves'.

word.<sup>30</sup> Yet for a variety of reasons, this very modern definition is highly problematic. First, it undermines the roots of the term, which detracts from the historical pre-eminence of Greek democracy. This helps justify the unresolved intellectual dispute on whether old democracy is an extension of modern democracy or not.<sup>31</sup> Second, it raises questions and scepticism over whether democracy can exist in non-political contexts; for example, does having a democratic idea or society relate in any way to democracy as a political system? Can democracy be an idea or practice in a non-political context? Third, research students today apply modern models of democracy as their theoretical framework, while displaying apathy towards classical theories. Is this related to how we define democracy? Is classical democracy now obsolete?

Scholars of democracy argue that the prevalent definition of ‘rule by people’ does not seem as intricate as might be implied. In search of better understanding and analysis, some academics began examining the words ‘rule’ and ‘people’ for a definitive definition (see Section 2.2). Yet ultimately, there is ‘no single definition of democracy once you move beyond rule by people’ (Catt, 1999, p. 1).

In the same context, Giovanni Sartori argues that the problem in defining democracy is not terminological. If that is the case, the literal definition is ‘power of the people’, meaning that the problem is solved as far as finding an equivalent from another language; but the term has broader implications. It can be descriptive and prescriptive, normative and persuasive (1962, pp. 3-5).

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<sup>30</sup> In such regard, Held addressed the etymology of democracy in his book, *Models of Democracy*; but his definition was entirely devoted to democracy as a political system, not the ideal *per se*. ‘Democracy means a form of government in which in contradiction to monarchies and aristocracies, the people rule’ (Held, 2006, p. 1).

<sup>31</sup> Norberto Bobbio is among the advocates of old and modern democracy sharing the same roots. In *Liberalism and Democracy*, he states: ‘Whatever may be said, and despite the passage of centuries and the innumerable arguments that have taken place about the difference between the democracy of the ancients and that of moderns, the general descriptive significance of the term has not changed, though its evaluative load has altered with changing times and beliefs, and in response to the degree of support for popular as opposed to monarchical or oligarchical government’ (1990, p. 25).

Thus, the search for a definition resulted in abundant explanations and analyses of democracy<sup>32</sup>; as well as significant conceptual problems. The literal definition - rule by people - is very far from being simple and straightforward; and in fact, increasingly vague and controversial.

### 3.3 Democracy: Conceptual Confusion

What is so complicated about ‘rule by people’? Why did scholars change their minds? What makes one of the most appealing terms in politics so controversial?

According to Catt, the definition of ‘rule by people’, ‘gives no indication of how to put the idea into practice’ (1999, p. 1). Held considers that, in terms of complexity beyond the literal meaning of ‘democracy’, ‘appearances are deceptive’. He describes the meaning as ‘unambiguous’, but immediately gets himself into a muddle, as we shall discuss below.

An immediate conceptual problem can be found in every single element of the phrase: ‘rule’, ‘rule by’, and ‘the people’. To begin with ‘rule’, what does it mean? Does ‘rule’ mean govern, control or judge? If yes, in which spectrum can people exercise their power to rule? What are the limits of ‘rule’ in democracy? If ‘rule’ covers the political sphere, what about the rule of law, or diplomatic ties with other nations?

On ‘rule by’, Held raises some intriguing questions:

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<sup>32</sup> The attempt to define democracy led to scholars finding their own wordings and explanations. Such an approach has certainly enriched the literature, but also created controversy and made the concept of democracy a multi-disciplinary term. For example, Bobbio defines democracy as ‘government by the many or by most or by the majority or by the poor, where the poor have obtained the upper hand, this indicates that power belongs to *pleithos*, to the masses’ (1990). On the other hand, Carey states: ‘The Greek word *demokratia*, rule/power/control by/of the demos, is as abroad as the English term. The word *demos* is used with two meanings. It can refer to the population as a whole (English people) or it can refer to the majority (the masses) as distinct from a more privileged group. *Demokratia* is distinguished on the one hand from systems in which power is exercised by a single individual (*basileia* or *tyrannis*, that is, traditional or non-traditional monarchy) and those in which power is confined to an elite group (*aristokratia* or *oligarchia*)’ (2000, p. 1)

Does 'rule by' entail the obligation to obey?<sup>33</sup> Must the rules of the people be obeyed? What is the place of obligation and dissent? What roles are permitted for those who are avowedly and actively non-participants? Under what circumstances, if any are democracies entitled to resort to coercion against some of their own people or against those outside the sphere of legitimate rule? (2006, pp. 1-2).

Then there is the bewildering kaleidoscope offered up by the term 'people'. Held (2006, pp. 1-2) and Catt (1999) summarized all enquiries as follows:

1. Who are to be considered 'the people'? The literal meaning of people is 'a group of individuals'. Does this mean that democracy entitles the whole population to rule and participate? Does people rule mean the majority, minority, aristocrats, technocrats, a certain age group or gender? What is the people's level of participation? Are they elected or appointed by the masses?
2. To what extent do the people have power? Are they the source of sovereignty? What are the limits of their powers? Is their political power, economic power, social power or all of this? What is the level of their participation? Are they elected or appointed? And perhaps above all, what kind of participation is designed for the people? Is it direct, representative or participatory democracy?
3. Scholars have also agreed to disagree on what constitutes successful 'rule by the people'. Chronology, education, social class, wealth and gender have all been pre-requisites entitling 'the people' to rule. Yet can democracy endure national crisis and war?

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<sup>33</sup> Held's question, 'does rule by entail the obligation to obey?', calls to mind a very controversial issue in the Muslim and Arab world, that of obeying the ruler / *6a3at Wali Alamer*. Is it obligatory or not? Views are divided on this. For some, Muslims have the right not to abide to or concede the ruler's policies, if the latter does not apply and follow the rules of Islamic Sharia. When the ruler does not abide by the rule of God, it gives people the right to revolt. In general, Islamic scholars and governments use the following Quranic verse as a base and shield to convince people that obeying the ruler is unquestionable: 'O you who believe obey god and obey the messenger and those in authority among you' (An-nisa: 59).



The second conceptual problem derives from the debate on whether democratic values are universal or Eurocentric. Can democracy be implemented or adopted in other cultures and civilizations: most notably, the Arab world? For Amartya Kumar Sen, democracy as a ‘universal commitment’ is a rather novel idea which emerged in the twentieth century. Indeed, during the nineteenth century, commentators would pick and choose a country and discuss whether it ‘fits democracy’. Sen criticized this approach, arguing that ‘a country does not have to be deemed fit for democracy; rather it has to become fit through democracy’ (1999)<sup>34</sup>.

Sen, winner of the Nobel Prize for Economics in 1998, also considers that democracy should not be defined in terms of ‘majority rule’, as it is not limited to voting and elections. He believes that democracy is based on the protection of freedoms, respect for the rule of law, and freedom of expression, without any restrictions on the spread of information and news through all channels and means. Moreover, he demonstrates how the values of democracy bring prosperity and progress to various societies by dividing them into three categories: intrinsic, instrumental and constructive.

Of these, *intrinsic* value relates to political freedoms, bound up with human rights. Exercising those rights helps develop society through its citizens. *Instrumental* value relates to how responsive democracy can be when practiced justly. Democracy can respond to citizens’ rights and needs, whether political, social or economic. Moreover, it also provides citizens with all channels necessary to express their views and claim their rights through political institutions. *Constructive* value relates to the opportunities which citizens enjoy under the umbrella of democracy. In such cases, citizens exchange experiences, set priorities, address problems and identify their needs and future aspirations (Sen, 1999, pp. 3-17).

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<sup>34</sup> Sen’s essay was based on a keynote address which he delivered at a February 1999 conference in New Delhi, entitled ‘Building a Worldwide Moment for Democracy’.

In the same context, Larry Diamond asserts that ‘freedoms and democracy are universal values sought by people worldwide (cited by Chesley, 2012). Diamond notes that as recently as the mid-1970s, democracy had far less reach worldwide – but now, 60% of the globe has adopted it as its system of government.

In survey after survey, in Latin America, post-communist Europe, East and South Asia, even the poorest states of Africa and now the Arab World, popular majorities support democracy as the best form of government. People around the world want the right to choose and replace their leaders and today democracy is the only form of government with broad international legitimacy (Chesley, 2012).

Moreover, Diamond demonstrates that the need and desire to be treated with respect and dignity is part of innate human nature. This leads people literally to strive for democracy. In this context, Diamond gives a recent example from Tunisia to prove that democratic values are fundamental. The humiliation and disrespect felt by Mohammed Bouazizi, a 26-year-old Tunisian fruit vendor, when his fruit cart was confiscated, led him to set himself on fire by way of protest (Ryan, 2011). The death of Bouazizi ignited the Tunisian masses to fight for their freedom and led to uprisings in other parts of the Arab world.

There is, though, a broader question, which given our focus on Kuwait, is highly pertinent to this thesis. Do democratic values rest on a particular view of human nature confined to Western societies? Can contemporary democracy, based on liberalism, secularism, autonomy and equality exist or even co-exist in the Arab/Muslim world? Can the ideals of democracy transcend apparent limits of individual cultures? (Hadar, 2013)

To this end, Sen argues not only that democracy is of universal value in human life; but that it plays a universal role in preventing abuse of power, and helping people formulate and understand their own needs, rights and duties (1999).

The third conceptual problem is that of confusion between classical and modern democracy. Scholars such as Birch (2002) or Sartori (1962) argue that the disparity between classical and modern democracy is radical and infinite; and that we effectively use the same term, 'democracy', for two different connotations. According to Birch, 'the Greeks gave us the word, but did not provide us with a model' (2002, p. 45). Sartori raises the intriguing question: 'How can we possibly think that when we advocate democracy today, we are pursuing the same aims and ideals as the Greeks?' (1962, p. 251)

What, then, is the difference between classical and modern democracy? Before we consider this, we must first acknowledge that in the literature, terms such as 'direct', 'participatory' and 'old' invariably stand for classical or Greek democracy. Conversely, 'indirect', 'representative' and 'new' tend to describe modern democracy.

In Greece, of course, *demokratia* emerged and was practiced on a limited scale of freedoms. The reason behind calling classical democracy 'direct' refers to Greeks' direct participation in making personal decisions related to the *polis*/city state: casting a vote directly without any form of representation.

Sartori (1962) argues that direct democracy is impossible and ineffective in contemporary politics, as the concept of self-governance requires complete devotion to state affairs from each citizen. He does, however, find that 'old democracy' is closest to the literal meaning of democracy, 'rule by people'. Sartori (1962) describes the Greek *polis*/city states as stateless. His distinction between old and modern democracy is worthy of consideration:

In direct democracy, there is continuous participation of the people in the direct exercise of power, whereas indirect democracy amounts to a system of limitation and control of power. In our democracies, there are those who govern and those who are governed; there is the state, on one side, and the citizens, on the other (Sartori, 1962, pp. 252-3).

Birch (1993) underscores how the assumptions and practices of the ancient Greeks were very different from those of modern democrats. The Greeks had little or no idea of the rights of the individual, an idea embedded in modern concepts of democracy. Greek practice granted the right of political participation to only a small minority of the adult inhabitants of the city. Direct voting was exclusive to particular social classes; women and slaves were deprived of the vote. When those granted this right took political decisions, they did so by a direct vote on issues, very different from the system of representative government which developed in the West over the past two centuries (Birch, 1993, p. 45).

The final conceptual problem owes to usage of the term 'democracy' in different contexts and settings. According to Holden (1974), 'there is a genuine difficulty in defining any word used in widely varying circumstances and often with little thought for the way in which it is being used'. As Birch (1993) notes, the term has been used not only to describe a system of government, but also to describe other social relationships. Thus, Americans consider that their country not only has a democratic set of political institutions; but has or is a democratic society. Many socialists identify themselves as believers in social democracy. Some socialists have advocated industrial democracy. Communists have described the Cold War states of Eastern Europe as 'people's democracies' (Holden, 1974, p. 1).

In 1936, the Communist Party of the Soviet Union changed its official line about democracy. Until then, it had been portrayed as a sham, devised by the ruling class in capitalist societies to give workers the illusion that they could improve their position substantially without a revolution if they exerted pressure through the electoral system. The Soviet system was described as one of proletarian dictatorship, as Marx, Engels and Lenin had all advocated for. However, by the middle of the 1930s, communist parties in the West, acting on instructions from Moscow, were

attempting to promote a 'popular front' of liberal and socialist parties against fascism. To assist this effort, the new Soviet Constitution of 1936 described itself as 'democratic'. It can be regarded as an extension of this new party line that, from 1948 onwards, the Soviet-dominated regimes of Eastern Europe claimed to be democratic too.

This kind of terminology should not pose serious problems if language is used with precision. No serious person has ever been deceived into thinking that the Soviet satellite states were democratically governed in the accepted sense of the term. Clearly, the citizenry of the states themselves were under no such illusion. A democratic society, in the American sense, is one without hereditary class distinctions, in which there is something approaching equality of opportunity for all citizens. The term 'democratic' is used to indicate a degree of social equality, not a form of government. Social democracy is a political ideology which advocates socialist economic and social policies to be carried out within a society which has democratic political institutions and processes. Industrial democracy, as coined by Sidney and Beatrice Webb in the early years of the twentieth century, means a form of workers' control within industrial plants (cited in Birch, 1993, p. 46).

There are significant problems though. Birch (1993) argues that, depending on 'the dictionary definition', we immediately run into the issue of how, in practical terms, to define 'the people' and how to define the meaning of 'rule'. Does 'the people' mean the whole adult population, or only those who possess enough property to give them what nineteenth century politicians called a stake in the country? Does it matter if women are excluded from the franchise, as they were until after the Second World War in several European countries universally recognized as democratic, including France and Switzerland? Can one say that a system is partially democratic

if the right to participate in politics is confined to one section of the population? (Birch, 1993, p. 47)

Sartori (1962, p. 4) considers that: ‘Although democracy has a precise meaning this does not really help us to understand what an actual democracy is’. ‘Democracy means different things to different people’, comments Sisk (2000, p. 8) wryly. And in *Democracy and Democratization*, Sorensen (1998, p. 3) contends that:

The definition ‘rule by people’ may sound innocently straightforward, but it immediately raises a number of complex issues like who are to be considered the people?... In order to understand democracy and its present position in the world, one must have an awareness of the most important debates about the meaning of democracy; a notion of the core features of democracy relevant for today’s world; and an understanding of how economic, social, and cultural conditions affect the quality of democracy.

### **3.4 Democracy and Islam**

Thus far, this chapter has considered democracy in terms of its Western origins. We now turn to a discussion of the concept from Islamic and Arab perspectives. It is impossible to address democracy in Kuwait without referring to how Arabs and Muslims define it.

The Constitution of Kuwait promulgates that it is an Arab-Muslim and democratic nation through three explicit Articles. On Arab identity, Article 1 states that: ‘Kuwait is an independent sovereign Arab State. Neither its sovereignty nor any part of its territory may be relinquished. The people of Kuwait are part of the Arab nation’. On Islam and Sharia/Islamic law, Article 2 states: ‘The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation’. On democracy, Article 6 states, ‘the system of government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers’ (see Appendix).

The aim of this section is to set out the definitions of democracy from the perspectives of Sharia scholars. To achieve that, we should first note that their theoretical approach differs entirely from

those of their Western counterparts. Sharia scholars have sought not to define democracy from its roots and origins, but to examine whether Islam is compatible with democracy. Views on this are divided between supporters and opponents of democracy; supporters use ‘the term Shura to translate the concept of modern democracy, which in modern Arabic is an adopted term from the European political tradition’ (Malinova, 2012). Opponents, however, are radically against democracy, which they regard as a Western cultural export and violation of the divine law. The focus of this section is, therefore, to shed light on these contradictory viewpoints and answer the following: (1) What is the definition of democracy according to Islamic perspectives? (2) Where do scholars of Islamic Sharia stand on the question of democracy in Islam?

Hassan al-Banna, Mohammad Dia’aldeen al-Rayes, Yusuf al-Qaradawi and Mohammed al-Ghazali argue that Islam is compatible with democracy, as there are common characteristics between both. According to al-Banna, the founder of the Muslim Brotherhood: ‘The pillars of the Western parliamentary system do not contradict with the pillars of the governing system in Islam’<sup>35</sup> (Huwaidi, 1993, p. 124).

Al-Rayes concurs regarding common characteristics between Islam and democracy when it comes to the will of the people, social and political rights, separation of powers and ‘*Ijmā’*’/ consensus. However, al-Rayes also believes that the disparities between democracy and Islam number considerably more. In his view, in Western democracy, the people (‘*Ummah*’) are limited to those who live within specific geographic boundaries because of common traditions, language and blood ties. From this point of view, democracy is more inclined towards ideas of nationalism or racism, which lead to extremism; whereas in Islam, place, blood or language ties are considered secondary. The major nexus between Islam and the people is its sole ideology. Thus,

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<sup>35</sup> Al-Banna’s public lecture, ‘Islamic Democracy’, delivered in Cairo in 1948 at the Youth Society headquarters (Huwaidi, 1993, p. 124).

every individual who adopts Islam as a religion, regardless of his gender, colour or country, is considered a member of the Islamic state (al-Rayes, 1952, pp. 378-86).

Further differences between Islam and democracy can be identified in the objectives of the latter. While al-Rayes finds democracy secular and materialistic, he argues that Islam thrives for both *Dunyā wa Dīn* (life and beyond). He describes it as a spiritual religion in which Muslims aim towards Judgement Day. Conversely, he finds democracy more limited in terms of fulfilling people's demands during their lifetimes.

Then there is the question of people's power / *Sulṭat al-'Ummah*. Al-Rayes contends that while *al-'Ummah's* authority is absolute in Western democracy, it is restricted in Islam to Sharia/Islamic law. Although in Islam, *'Ummah's* power is acknowledged as one of the sources of legislation, this does not entitle *al-'Ummah* to exceed the law of God. In Islam, the will of the people and their powers are derived from the *Quran* and *Sunnah*: the core of Sharia/Islamic law.

This is not to say, though, that al-Rayes is necessarily right. For example, contrary to his definition of 'people' in Western democracy, the literature rather proves the opposite. As we have seen, the reason why scholars of democracy shifted the debate from agreeing a definition to arguing over hugely controversial terminology owes to the seemingly unlimited questions about the word 'people'; and every single word mentioned in the literal meaning of democracy, 'rule by the people'.

Moreover, drawing a comparison between Islam as a religion and democracy as a government system renders al-Rayes' argument superficially appealing; but flawed. In theory, democracy is based on the separation between church and state; yet al-Rayes and others attempt to find justifications for Islam within a secular system. This makes little sense. It results in them treating



the freedoms and rights which plainly come hand in hand with democracy as ‘blessings from Allah not rights’ (Huwaidy, 1993, pp. 23-133). In other words, this seems like a case of al-Rayes putting the cart before the horse, so to speak.

Indeed, he may even be wrong when setting out the things he considers Islam and democracy to have in common. ‘Islam is not autocracy, theocracy, nomocracy<sup>36</sup> or democracy, but sovereignty in the Islamic State combines both the *’Ummah* and the Islamic law (Ibid., 1993).

There are, though, many Islamic theorists who have reached a wholly different conclusion. For example, Yusuf al-Qaradawi, Chairman of the International Union of Muslim Scholars (IUMS), critiques all those who claim democracy to be a sign of *Kufr*/blasphemy or against Sharia/Islamic law. Al-Qaradawi considers that the history of democracy provides a perfect example of how to defeat autocracy and tyrants, support human rights and achieve justice. He describes the process of elections; public referendums; the principle of majority rule; formation of political parties; protection of the rights of minorities; judicial independence; and freedom of the press as the core foundations of democracy, none of which should be voided. In addition, he asserts that no verse in the *Quran* or *Hukm*/rule contradicts the norms of democracy. He defines democracy as follows:

Democracy is the freedom to choose the ruler without any pressure or force. People are entitled to interrogate the ruler in case of any deficiency and in worse cases, they have the right to discharge him. It is also not accepted to guide people against their will when it comes to the enactment of cultural, economic, political and social policies<sup>37</sup> (Huwaidi, 1993, p. 136; see also al-Qaradawi, 2000, p. 636).

By contrast, since publishing *al-’Islām wa al-’Istibdād as-Siyāsī (Islam and Political Tyranny)* in

1949, Mohammed al-Ghazali has been an advocate and defender of democracy in Islam. He

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<sup>36</sup> From the Greek word *nomos* (laws) and *kratos* (power or rule) comes the term ‘nomocracy’. It means government based on the rule of law.

<sup>37</sup> For more on al-Qaradawi’s school of thought, the following website includes all collections of his fatwas, books and views: <https://www.al-qaradawi.net/>

repeatedly states that, ‘democracy is not a religion which can be compared to Islam; but a system which organizes the relationship between rulers and ruled’ (al-Ghazali, 1997, p. 211).

Another advocate for democracy in Islam is Fahmy Huwaidi, who justifies his position based on the following arguments. First, he believes that ‘it is an injustice and a mistake to draw a comparison between democracy and Islam and to claim that democracy is against Islam’. On the contrary: Islam has a mission, including principles, to organize people’s ethics, practises and acts of worship. Huwaidi describes democracy as a governmental system with a mechanism for political participation, and upholding universal values such as freedoms, equality and justice (1993, p. 97).

Second, he is more of a realist when addressing how Muslim Arabs view democracy; and the historical resentment which Arabs hold against anything Western:

For some, democracy is not a government system that is based on freedoms, pluralism and political participation, but it is a symbol for a Western project which exercises oppression and humiliation against Arabs and Muslims. This passive reaction is a result of the prolonged clash caused by Western colonization. In principle, Arabs and Muslims do not have any grudges against democracy, but the complexity resides in the origins and sources of the idea of democracy. Therefore, many Muslim groups do not only refuse democracy, but they count it as a violation of the Islamic law. In other words, rejecting democracy is a strike against any form of Western dependency due to the remanences of Western Colonization (Huwaidi, 1993, p.98; see also Esposito and Piscatori, 1991, pp. 427-40).

To confuse matters still further, other voices – such as Abul A’la al-Maududi<sup>38</sup>, the founder of *al-Jamā‘ah al-’Islāmiyyah* (The Islamic Group) in Pakistan in 1941 - take a much dimmer view of any compatibility between democracy and Islam than even al-Rayes. Al-Maududi considers that nothing in democracy coincides with Islam; and hence, the Islamic state cannot be regarded as a democracy, but a theocracy.

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<sup>38</sup> Abul A’la Maududi (1903-1979) is founder of a pioneering Islamic organization in Asia. One of its major objectives is the application of Sharia and establishment of an Islamic State. Al-Maududi is known as an Islamist philosopher, jurist and writer. The impact of Ibn Taymiyyah and Mohammad Iqbal on his work and thinking was very considerable. Al-Maududi also influenced other prominent figures in the Egyptian Muslim Brotherhood Movement, such as Hassan Al-Bana and Sayyid Qutb.

*Al-Jamā'ah al-'Islāmiyyah*, meanwhile, posits that the notion of popular sovereignty contradicts the sovereignty of God. Thus, it is argued, to consider the people as the source of all powers is a sign of *Jāhiliyyah*<sup>39</sup> ignorance: as God is the one and only legislator. Absolute freedom is not permitted, as it leads to corruption; while political parties are entirely opposed, with the argument being that only two parties exist: *Hizbu Allah* (the party of Allah) and *Hizb ash-Shayṭān* (the party of Satan). *Al-Jamā'ah* also does not believe that people are equal, as believers are distinct from non-believers or infidels (cited in Huwaidi, 1993, pp. 129-33).

Another opposing view is held by Abdullah Bin Abdulaziz al-Angarie, who argues that all attempts to compare democracy and Shura are void and illogical. In 2003, he published *Shura and Democracy: Facts and Disparities*, stating the differences between Shura as a religious system and democracy as a secular ideology. Unlike other scholars, al-Angarie's objective is to highlight the differences between Shura and democracy. He is critical of all those who had sought to assimilate the two: 'By this approach we are trying to exclude our religion from our lives and create an indifferent citizen who is detached from his faith'. Moreover, al-Angarie denounces attaching the word 'Islam' to Western terminologies such as 'liberal Islam' or 'Islamic democracy', claiming this approach to be entirely counterfeit (2003, pp. 425-7).

To define democracy and Shura, al-Angarie focuses mainly on the origins of each system. For him, Shura is derived from Islam; therefore, its application is obligatory, and considered a form of *Hukm Sharī* (religious rule). The equivalent of Shura is 'consultations', so rulers are expected to consult with 'Ahl al-Ḥall wa al-'Aqd.<sup>40</sup> Relying on the Quranic verse: 'It is by of grace from

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<sup>39</sup> *Jahiliyyah* is an Arabic term used to describe the pre-Islamic era, known as 'The Days of Ignorance', i.e. of divine guidance. It is used to describe a state of retardation, lack of knowledge and illiteracy.

<sup>40</sup> These could be wise experts and specialists in certain fields, in which their views are considered and respected. They could also be scientists and in many cases, the notables of each society.

God that you were gentle with them. Had you been harsh, hardhearted, they would have dispersed from around you. So pardon them, and ask forgiveness for them and consult them in the conduct of affairs. And when you make a decision, put your trust in God; God loves the trusting' (3:159). Al-Angari believes that Islam provided Muslims with a consultation system which is sacred, divine and exempts them from exposure to any secular systems. This, in this context, is democracy. He also believes that it is impossible to build a democratic system in a religious environment, as democracy is a product of secularism and Shura is religious rule.

Al-Angari describes democracy as a secular system based on the principle of separating religion from state, aiming at establishing a political system with a neutral stance towards the faith of the people. He regards Shura as a religious practice which cannot be applied outside Islamic Sharia. In Islam, all domains of life are subject to Sharia; but in democracy, there is complete exclusion of religion from life. Therefore, the political dimension of secular systems does not feature any religious foundations.

### **3.5 Democracy: Kuwaiti Perspectives**

This section focuses on Kuwaiti intellectuals' perspectives on democracy. How did they approach a definition of democracy? Were they trapped in a religious prism, like their counterparts in Islamic studies; or were/are they more engaged in addressing the conceptual problems in defining democracy, in accordance with Western scholars?

A review of the literature reveals that Kuwaiti intellectuals are trapped not by Islam but by Islamists; not by religion, but by tribalism. This left them not so much defining or understanding democracy, or even conceptualizing a model which could suit their Arab-Islamic culture; but diagnosing Kuwaiti democracy, and the challenges facing it.

Scholars and politicians such as Ahmad al-Khatib, Khaldoun al-Nakeeb, and Mohammad al-Rumaihi believe that democracy is not merely a governing system, but more of a culture and lifestyle. For al-Khatib, 'democracy is not free direct elections and the ballot box only, but it is more of an education, behaviour, and an ethical relationship with others' (2007, p. 56). As a political figure and one of the founders of the Arab Nationalist Movement, al-Khatib credited all attempts at political reform and democracy in the Arab world to active political movements, which paid a high price for believing in democracy, justice and equality. He focused especially on the long national struggle, whether in the Arab world in general or Kuwait specifically; one which neither the West nor Arab rulers had any hand in.

He referred to the supposed reforms in the Arab world as 'counterfeit', especially reforms sponsored by the US as part of its policy of democracy promotion in the Middle East. In his words:

Despite the active and committed political movements in the region, Arab rulers appear headed towards more centralization and suppression. Claims of progress and moves towards greater 'openness' should be taken by with a large pinch of salt: in practice, such endeavours amount to cosmetic changes to hide what cannot be hidden (al-Khatib, 2007, p. 15).

In his memoir, al-Khatib reminisced about the golden age of democracy in Kuwait with pride and sorrow. For him, Kuwaiti democracy had been a role model in the Gulf region and Arab world. As a democratic state, it respected the Constitution and rule of law. In the 1960s, Kuwait flourished in many fields: the arts, literature and sport. Moreover, its parliament was famous, because it provided a platform from which to speak freely with honesty, courage and integrity. These characteristics could not be found in any other parliament in the region. Kuwait was also an active, key actor in Arab politics. Its role in spreading education among the Gulf states and South Yemen provided evidence of its interest in adopting and defending the Arab national cause (Ibid., p. 15).

Another voice praising Kuwaiti democracy is that of Khaldoun al-Nakeeb, a sociologist who coined the term ‘political tribalism’, and discussed its impact and contradictions based on Kuwait. For him, it is the only Gulf state undergoing a real, serious democratic experience. However, he is perplexed by the overlap between the traditional, tribal nature of old Kuwait and what is new and democratic in the modern state - such as treating the Islamic Shura as the equivalent of democracy and describing the *Quran* as a constitution of the state. To understand these differences and their impact on Kuwaiti democracy, it is necessary to examine al-Nakeeb’s argument in more detail:

‘Democracy is not limited to elections, and devolution of power only, but it is based on constitutional legitimacy, protection of freedoms, judicial independence, law enforcement; but these principles are not implemented in the Third World countries, and neither in Eastern Europe, where the countries are in a transitional period’ (al-Nakeeb, 2002, p. 102).

Al-Nakeeb also asserts that ‘democracy in Kuwait is lame, but not paralyzed’ (Ibid., p. 103).

Like many Kuwaitis, he is proud of the country’s democratic practices and constitutional rights, but also has some reservations. He regards its democratic experiment as immature, and sees a pressing need for it to be sharpened, deepened and strengthened, in order to overcome: (1) The limited power of people (2) The absence of political parties (3) The prevalence of political tribalism (Ibid., pp. 103-5).

On participation and representation in the Kuwait Parliament, al-Nakeeb raises concerns over voting mechanisms and participation in the government. While people do vote and monitor the government’s performance through their 50 elected representatives, the problem lies in the mechanism of choosing MPs. He describes the electoral system as ‘floating’, with the right of the people to self-government clearly restricted (Ibid., pp. 103-4).

Moreover, the view that political parties are a tool which divide society into factions is also a misconception. Al-Nakeeb argues that their absence created a vacuum filled with tribal, sectarian

parties, who use their tribes, religious sects and families to obtain services and positions, regardless of their qualifications and efficiency. As he explains in Arabic, the word *7ezb* does not mean ‘division’; in fact, it means a group of people united by mutual aims, whether political or non-political.

In the former case, this is the very purpose of political parties. At international level, these parties and social movements play a pivotal role in the democratic process, raising public awareness of national issues; creating and embracing democratic traditions; and educating voters to choose the most efficient candidate to run a country’s affairs. In other words, political parties act in support of the public welfare, and follow systematic methods (al-Nakeeb, 2002, p. 104).

Al-Nakeeb highlights the problem of informal political parties, whether sectarian or tribal; which, one way or another, have distorted the whole concept of political parties’ altogether. In the modern world, many social, political parties are democratic in their formation, popular in their organization and liberal in their ideology:

This is what we need in Kuwait... Democracy depends mainly on rationality and the citizen bears the responsibility to choose freely without fear, and freedom of choice is an acquired right for all citizens. Any attempt by members of parliament or government to confiscate this right is a violation for the spirit of democracy and constitution (Ibid, p. 104).

The informal parties referred to above have sought tribal and sectarian allegiances; but what does al-Nakeeb mean in terms of the difference between tribalism and political tribalism? ‘Tribalism is a social organization, not a state of chaos as some claim. Our understanding of the concept of the tribe is simple and naïve. Thus, we have to develop the concept and look at it with a deeper eye’ (al-Nakeeb, 2002, pp. 107-11). If we refer to someone as ‘tribal’, this means that they belong to a certain tribe, based on kinship and blood ties; but the problem arises when such a tribe replaces state institutions and becomes more powerful than state laws. The crisis, in other

words, is when the tribe, religious sect or family becomes the key player in state politics and marginalizes any attempts at law enforcement.

Al-Nakeeb coined the term 'political tribalism' to diagnose one of the major problems afflicting Kuwaiti society: namely, using a tribe as a channel to achieve personal interests, regardless of the Constitution, state laws and public welfare. He regards political tribalism as irrelevant as far as traditional tribalism is concerned. The former distorts the importance of the latter for reasons of narrow, naked personal and sectarian gain.

For al-Nakeeb, political tribalism is based on unconstitutional foundations, and contradicts all institutional and political channels in any modern state. This not only threatens national unity, but creates a sense of injustice, inequality and discrimination among the citizenry. The absence and weakness of civil society institutions and non-governmental organizations has encouraged the growth of political tribalism. Tribal societies feature complex networks of sectarian groups paying allegiance to the tribe or religious sect, not the state, whose institutions are fragile and untrustworthy. This helps political tribalism become ever more influential and even dominant, with leading positions in the government, parliament and elected councils distributed and secured for its members or beneficiaries.<sup>41</sup>

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<sup>41</sup> A further definition of and approach to tribalism is provided by Abdullah al-Nafisi, political scientist, who drew a distinction between states and tribes. For him, the state is: 'A stage of development taking place in the humanitarian community towards more mature relationships, concepts, systems and values. It is an expression of the maturity stage of the humanitarian group and has overcome all forms of prevailing standards during the pre-state period. It is also a codification stage of the relationship between the power and the public and between the government and the citizen. It is the stage of the abidance of the power before the public and the government, before the citizen by the law and its rule and resolution, not the opposite. It is a stage distinguished by achieving control over power and government, not public and citizen... there are prevailing values which may not be consistent with the entity and structures of the state. The values of clannishness, full support, forbiddance, pride, satire, obedience, victory, protection... and other values of the tribe which cannot bear the idea of a modern state presence... Kuwait is still in the process of transition from being tribal to the form of a modern state. So far, Kuwait has not achieved a full transition from the tribe to the state ... general matters are managed in a tribal spirit. Yes, there are laws, regulations, systems methods, stops, stations, borders, police, police stations, an army, and everything related to a modern state;



Mohammed Abdulqader al-Jasim supplies another perspective, describing the governing system of Kuwait as a ‘special democracy’, and explaining that the Constitution did not adopt ‘a complete democratic system’, meaning that Kuwait is only partially democratic (al-Jasim, 1992, p. 296). Al-Jasim agrees that Kuwaiti society is still tribal, with electors voting based on their tribe or religious sect. Like al-Nakeeb, he is critical of the limited nature of the electoral base, which restricts political participation only to a certain class of people (Ibid., p. 264).

Al-Jasim divides Kuwaiti history into three epochs. (1) Between 1756 and 1896, its rule was based on Shura traditions and Islamic Sharia. These traditions were not written but based on trust between the ruler and ruled; with the Emirate’s affairs effectively run by consultation. Older Kuwaitis did not adopt or acknowledge the Shura system within its Islamic framework; but it was a tradition that the ruler would consult with his people, without any obligation to abide with the consensus which resulted. (2) Between 1896 and 1921, Kuwait was under authoritarian rule, led by Mubarak the Great, the founder of modern Kuwait. (3) The renaissance era (1950-1965) was known as the Golden Era. This occurred under Abdullah al-Salem al-Sabah, instrumental in both the attainment of independence in 1961, and ratification of the Constitution in 1962. ‘The vision and unique personality of Sheikh Abdullah was behind democracy and the Constitution’ (Ibid., pp. 118-9).

Pointing his finger firmly at the Kuwaiti ruling family, al-Jasim maintains that democracy in the Emirate is now in crisis, thanks to its rulers not believing in democracy – quite unlike the Father of the Constitution. Indeed, an honorary title was given to Sheikh Abdullah al-Salem al-Sabah for his prominent role in promoting democracy in Kuwait (Ibid., pp. 263-4).

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yet the spirit which manages all of these institutions is a tribal spirit and still lives in the values of the tribe’ (al-Nafisi, 2012, p. 20).

Mohammad al-Rumaihi, however, notes that democracy has no deep roots in Arab culture. Successful democracies are based on diversity, which will normally generate differences and disagreements; as well as the collective acceptance of managing these peacefully, in a civilized manner. By contrast, Arab attempts at democracy have invariably constituted an effort by one group to marginalize another. Arguments are not accepted, and instead turn into bitter disputes; political disagreement turns into personal problems. 'It is easy in Arabic culture to take things personally. Whereas, it is difficult to build state institutions' (al-Rumaihi, 2012). In the case of Kuwait, indeed, its democratic experience is akin to a 'bird flying in a cage'. Al-Rumaihi (2012) sets out three reasons for this:

1. The Constitution, which has applied unchanged for over five decades. For al-Rumaihi, a constitution is a 'social contract' drafted by individuals; such social contracts evolve in parallel with society. In terms of population, progress and values, Kuwaiti society is very far from the same now as when the Constitution was drafted in 1962. 'Evolution is the essence of everything. Everything has changed except the articles of the Constitution of Kuwait' (Ibid.). So much so that reformers and nationalists have proven historically strong opponents to amending the Constitution, simply because all such calls were usually intended to restrict freedoms.

2. The electoral system. Al-Rumaihi criticizes this as 'primitive.' It is quite similar to the First Past the Post system used for the UK House of Commons; but with no political parties allowed in Kuwait, the majority cannot form a government. Al-Rumaihi believes that this approach enshrines sectarianism and discrimination. It also forces Members of Parliament to abide by the agenda and demands of their supporters, and not act as representatives of the whole nation (Ibid).

3. Political Parties. If these, an integral component of representative democracy, do not formally exist, society will simply create its own factions and blocs; as is the case, as we have seen, in Kuwait. Lack of formal parties also mean lack of a formal opposition: anathema to any recognisable form of parliamentary or representative democracy.

Moreover, as al-Rumaihi elaborates upon, democracy is not merely about the ballot box, vote counting and electoral campaigns, but much more, a culture. Al-Rumaihi views democracy as a method through which to solve society's problems; it paves the way for social peace and progress within a stable environment. He believes that the essence of life is change; but any such change has been blocked by the failure to amend the Constitution ever since 1962. Lack of institution building and lack of confidence in the democratic process only further support al-Rumaihi's view. Kuwait is more of a cosmetic hybrid democracy than a genuinely deep rooted, serious one (Ibid.).

### **3.6 Conclusion**

What is democracy? This chapter has sought to understand this concept through two lenses: The West, where the word *demokratia* emerged and flourished in ancient Greece; and the East, where Kuwait constitutionally identifies democracy as its governing system - albeit with many ambiguities and caveats.

How, then, do scholars of West and East define democracy? There is clear consensus among all scholars on the literal meaning of democracy: 'Rule by the people'. It follows from this that democracy embraces the idea of and entitles people to rule and be the source of all powers; unlike other forms of government, whether monarchical, aristocratic or theocratic. Common

features characterize all democratic systems, and revolve around the extent of freedom, participation, equality and justice.

Western scholars developed the concept of democracy, but failed to identify: (1) Who is eligible to rule? (2) Who are to be considered ‘the people’? (3) Are democratic values Eurocentric and/or exclusive to Western culture, or universal? (4) Is classical democracy relevant to modern democracy? These debates resulted in definitions and interpretations which have proven controversial, vague and misleading.

Viewing democracy through an Islamic lens has revealed huge differences between Eastern and Western scholars’ approaches; not to mention profound levels of division among Islamic thinkers over whether democracy is a secular, Western system. Notably, Islamic academics have not sought to create any definition of democracy beyond the standard, literal ‘rule by people’; instead, their aim was to assess whether Islam is compatible with democracy, or otherwise.

Supporters of democracy believe that Islam can adopt and import any Western system, so long as it is adapted and tailored to Muslim society and does not contradict Sharia/the law of God. A separate school believe that Islam has its own version of democracy: namely, the principle of Shura (consultations). In such regard, it is advisable and recommended that rulers or decision-makers consult with the notables: wise and qualified scientists. Yet that there is no consensus over whether this is obligatory in Islam. Thus, this thesis considers that there is no such thing as ‘Islamic democracy’; especially given that democracy is an evolving system of government which takes on different forms and models. Supporters of democracy within Islamic thought have simply failed to explain and develop their own concepts; and in the process, rather shirked the most important issues here.

Opponents, however, reject democratic values and governments, arguing that these are part of a secular, liberal system, which encourages separation between the state and religion; with the impact of Western colonization also having left large numbers of Arabs and Muslims rejecting anything from the West, certainly including democracy. This school of thought holds that Islam is valid in all places, at all times; and that the *Quran* and *Sunnah* provide all necessary guidance to protect Muslims from depending on a man-made system, which separates creator from creatures. Interestingly, this means that both Islamic supporters and opponents alike accepted the literal meaning of democracy; but have neither developed nor refined it.

Finally, the chapter assessed how Kuwaiti scholars have defined and perceived democracy. It is apparent that Kuwait has also failed to define the concept; but its approach has differed significantly from both Western and Islamic perspectives. Kuwaiti intellectuals are proud of their democracy, but heavily critical of the model in place. For them, Kuwait has not adopted a complete system of democracy, and reforms are needed at all levels: political, constitutional and electoral (see Chapters 5 and 6).

Correctly, these academics believe that democracy is not only about elections and political participation, but much more about culture and ethical attitudes towards one another. All scholars criticized the hybrid system in place, which features a lack of political parties, flaws in electoral law, and an increasingly obsolete Constitution. Others raised the pressing issue of ‘political tribalism’, highlighting how tribal and sectarian arrangements are replacing civil society organizations (see Chapter 5).

In the light of the three perspectives covered by this chapter, we might conclude that for Western scholars, democracy means rule by the people; for their Islamic counterparts, it means rule by

God; while Kuwaiti intellectuals are all too painfully aware that in their case, it has come to mean rule by the tribe.

Finally, despite the different perspectives from the two worlds on the concepts of democracy, the outcomes of the mechanisms of adopting democracy are the same. Adopting or implementing democracy is complicated; therefore, it is the State's choice to decide on the aspects of democracy and structures which are more acceptable to its nature and culture. This leads us to one of the crucial arguments in this study: democracy needs to be set within the context of the wider concerns of any constitutional arrangements.

In the aim of obtaining a deeper understanding of the literature on democratic theory, the next chapter focuses on the classical models of democracy developed by David Held.

## Chapter 4: Classical Models of Democracy

### 4.1 Introduction

This chapter examines three classical models of democracy, developed by David Held (2006).

From classical democracy in Athens, to republicanism in Rome, to the rise of liberal democracy during the Renaissance, the chapter aims to demonstrate the main characteristics of each model by shedding light on their political ideals, institutional and constitutional features; as well as the thoughts and arguments of prominent political theorists, who inspired and influenced democratic thought particularly, and Western political thought in general.

There were three main reasons behind examining the classical models of democracy.

First, this is a study about the idea and concept of democracy in Kuwait. Thus, in exploring the concept, we cannot not ignore the historical reality that democracy is a Western concept. Article 6 of the Kuwaiti Constitution promulgates democracy as its government system, but how can we understand democracy in Kuwait, if we do not examine it in terms of Western theory and practice? How, for that matter, can I answer the main research question, ‘Is Kuwait a democracy?’ without looking at it from a Western perspective? <sup>42</sup>

Second, in Chapter 3: *Concepts and Definitions of Democracy*, the study surveyed the concept of democracy and its explanations from Western and Islamic perspectives. The Western side symbolizes the cradle of democracy, its roots and where it primarily originated. By contrast, the

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<sup>42</sup> The Constitution of Kuwait identifies the system of government as democratic. According to Article 6: ‘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’ (see Appendix).

Islamic side represents Kuwait: which identifies Islam as the state religion and Islamic Sharia as a main source of legislation.<sup>43</sup>

One of the main findings of Chapter 3 was that despite significant discrepancies in the approach towards democracy and its meaning, scholars from both worlds agreed that defining ‘democracy’ is itself often a controversial task, with the result (if any) frequently misleading. While setting out the literature, debates and controversy over the concept, Chapter 3 could not provide any further detail beyond the literal meaning of democracy: ‘Rule by people’. This gap can be filled by adopting Held’s classical models - its prime pillars, institutional features and constitutional characteristics - and applying these to Kuwait.

Moreover, this study was itself inspired by the theoretical trajectory adopted by Held in *Models of Democracy* (2006). For him, this would pave the way to understand democracy not merely in theory, but in practice:

In examining past, present and possible future models of democracy, it is important to inquire into their key features, their recommendations, their assumptions about the nature of the society in which democracy is or might be embedded, their fundamental conceptions of the political capabilities of human beings, and how they justify their views and preferences. And in accessing these models we must attend to the nature and coherence of theoretical claims, to the adequacy of empirical statements and to the practicality of prescriptions (Held, 2006, p. 7).

Third, a central argument of this study is that Kuwaiti democracy is as controversial as classical democracy. Neither is considered as ‘democracy’ in modern terms; both have and had restricted positions on citizenship, liberty and civic government. General characteristics, such as the size and location of the city state or city republic and Kuwait before independence, led to flourishing economic success, which paved the way for the establishment of independent political entities

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<sup>43</sup> **Article 2:** ‘The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation’ (see Appendix).



separate from Empire. Yet this has not provided for stability in either internal or regional conflicts, as will be discussed in detail at the end of this chapter.

The chapter is divided into three sections. Model I: Classical Athens sets out the main constitutional and institutional features of classical democracy. Model II: Republicanism is mainly devoted to the Italian city republics, and how these created their own concepts of self-governance, liberty and civic citizenship. This second model depicts the republican Renaissance republican tradition, and its two strands of protective republicanism and developmental republicanism. Both traditions were encapsulated through the works and political thoughts of two pre-eminent political theorists: Marsilius of Padua and Niccolo Machiavelli. Model III, meanwhile, charts the rise of liberal democracy and is elaborated through two variants: protective democracy and developmental democracy.

#### **4.2 Model I: Classical Athens**

In the fifth century BC, the hallmark of Athens was the constitutional and institutional characteristics of its democracy. Not only was Athens ‘the most innovative and sophisticated *polis* or city-state among many rival Greek communities’, but ‘the development of democracy in Athens has been a central source of inspiration for modern political thought. Its political ideals – equality among citizens, liberty, respect for the law and justice have influenced political thinking in the West’ (Held, 2006, pp. 11, 13).

The task of this section is, then, to demonstrate the constitutional and institutional characteristics practised in classical Athens through three main components of Athenian *polis*: (1) The democratic constitution; (2) Civic virtue, encapsulated by the concept of active citizenship; (3) The Assembly (*Ecclesia*), the supreme sovereign body in Athens.

Liberty and equality supposedly formed the core of the Athenian Constitution - but how so, when citizenship was restricted to those of a certain class and gender? To solve this conundrum, it is vital to shed light on the Athenian system, institutional structure and other civic principles.

#### **4.2.1 The Constitution**

Democracy is one of three forms of government. Tyranny involves the rule of one man.

Oligarchy entails rule of the few. Democracy, however, is the rule of people. In his masterpiece,

*The Politics*, Aristotle defines the Constitution as:

The organization of the offices and in particular of the one that is sovereign over all the others. Now in every case, the citizen body of a state is sovereign; the citizen body is the constitution. Thus, in democracies the people are sovereign, in oligarchies the few. That, we say, is what makes the one constitution differ from the other; and the same criterion can be applied to the others (quoted in Saunders, 1992, p. 187).

Democracy in Athens, then, was implemented via the Constitution, through a system which managed the affairs of the *polis* under the rule of people, based on established laws. Athenians were very proud of their invention. At a time where tyranny and oligarchy ruled major city states, democracy emerged as ‘the successful antipode’, in which the rulers were the ruled, and vice versa.

One of the best accounts on honouring and extoling Athenian democracy was by Pericles: a Greek statesman, orator and General of Athens during the mid-fifth century BC. During his rule, Athens enjoyed major political, economic and cultural prosperity and growth; this period was known as the ‘Golden Age of Athens’ and subsequently, ‘The Age of Pericles’. The following passage was part of a funeral oration attributed to Pericles by Thucydides, who recomposed the speech nearly 30 years after its delivery.

Let me say that our system of government does not copy the institutions of our neighbours. It is more the case of our being a model to others, than of our imitating anyone else. Our constitution is called democracy because power is in the hands not of a minority but of the whole people. When it is a question of putting one person before another in positions of public responsibility, what counts is not membership of a

particular class, but the actual ability, which the man possesses. No one, so long as he has it in him to be of service to the state, is kept in political obscurity because of poverty. And, just as our political life is free and open, so is our day to day life in our relations with each other. We do not get into a state with our next-door neighbour if he enjoys himself in his own way, nor do we give him the kind of black looks, which, though they do no real harm, still do hurt people's feelings. We are free and tolerant in our private lives; but in public affairs, we keep to the law. This is because it commands our deep respect (Held, 2006, pp. 13-14).

In his speech, Pericles acknowledged the peculiarity of Athenian democracy. No other *polis* had anything comparable, so the Athenian experience could provide a role model for others. Pericles explained that in *demokratia*, power is in the hands of a majority of people, not a minority. To be in charge of public affairs is to have responsibility; merit was more important than any kind of social class. Pericles also praised the balance between public and private life in Athens. He considered Athenians to be free, open and tolerant; with huge respect for both law enforcement and people's personal affairs.

This naturally brings us back to the question of: who were 'the people' in Athenian democracy? Who was eligible for citizenship in Athens? Under what umbrella did people rule? Was there an institution or council comparable with parliaments in modern democracies? If *demokratia* means rule by people, this means that people are equal before the law - so who were the ruler and the ruled? What was the mechanism of ruling?

#### **4.2.2 Citizenship**

Athenian citizenship was acquired from birth only when someone was born to Athenian parents.

Without the Assembly's consent, citizenship was void (Finley, 1991, p. 71). Laws covering citizenship in Athens had been subject to change: for example, at a certain point in 451/450 BC, it was granted to a male with an Athenian father and mother of free birth. However, Pericles implemented greater restrictions (Carey, 2000, p. 36).

We should also note that the concept of citizenship in classical Athens varied substantially from the current understanding of modern citizenship. In today's world, citizenship is more of a status

or form of identity granted to citizens, with a bundle of privileges, rights and duties. Conversely, in classical Athens, to be a citizen meant to be responsible, active and involved in the welfare of the *polis*. This is what exactly direct participation entails.

We give our obedience to those whom we put in positions of authority, and we obey the laws themselves, especially those, which are for the protection of the oppressed, and those unwritten laws which it is an acknowledged shame to break. Here each individual is interested not only in his own affairs but in the affairs of the state as well: Even those who are mostly occupied with their own business are extremely well-informed on general politics – this is a peculiarity of ours: we do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all. We Athenians, in our own persons, take our decisions on policy to submit them to proper discussions: for we do not think that there is an incompatibility between words and deeds; the worst thing is to rush into action before the consequences have been properly debated (Pericles' Funeral Oration, in Thucydides, 1972, pp. 145, 147).

In his speech, Pericles demonstrated the main features of Athenian democracy: (1) Respect for the law was above all else. (2) The relationship between the ruler and ruled was based on allegiance and trust. (3) Involvement in public affairs was mandatory: to be a citizen meant to 'hold sovereign power; that is, supreme authority to engage in legislative and judicial functions' (Held, 2006, p. 14). (4) Direct participation in the *polis* came through a process of self-government, which required thorough commitment from the people, regardless of their personal or business status. (5) Private life was respected and protected, but the welfare of Athens was always a priority.

Yet as we have noted, there were significant conditions and restrictions when it came to acquiring citizenship. Ancient Greece was a male-dominated culture: women and slaves were entirely excluded from any political activity. Political participation was limited by class and gender. In the middle of the fourth century BC, the procedures at the Athenian Assembly to apply for citizenship were as follows:

Two meetings of the assembly were required. At the first, a citizen put forward a decree proposing citizenship. If there was a majority vote in favour, it had to be confirmed at a subsequent assembly meeting, at which a quorum of 6000 was required and the vote was taken by secret ballot to prevent intimidation or

corruption. Even after this vote, the grant could be challenged, since the proposer could be prosecuted under the action available against illegal proposals either on procedural grounds or because the individual honoured did not deserve the award, and if the prosecution succeeded the award was rescinded (Carey, 2000, p. 38).

### **4.2.3 Assembly**

Known as *ekklesia*, this was the main sovereign body in Athens. Male citizens aged 20 (the legal age necessary for citizenship) and above had the right to attend to vote, discuss, propose or sometimes amend proposals openly and freely before their fellow citizens. The Assembly convened for 40 sessions per year; a quorum of 6000 citizens was required to proceed with any decision. ‘All major issues, such as the legal framework for the maintenance of public order, finance and direct taxation, ostracism and foreign affairs came before the assembled citizens for deliberation and decision. The assembly decided the political commitments of the Athenian state’ (Held, 2006, p. 17).

Two councils functioned under the Assembly’s umbrella: The Council of Areopagus, which was largely symbolic, and included ex-archons or chief magistrates, granting them membership for life; and the Council of 500, which appointed citizens over the age of 30 by lot, and had the executive powers to initiate public decisions. The duration of the post was one year only; each citizen could serve twice (Finley, 1991, pp. 71-2; Carey, 2000, pp. 47-54; Held, 2006, pp. 17-9).

Aristotle’s account on the principles and practises of democracy in the Assembly is worth highlighting here:

- (1) Elections to office by all from among all. (2) Rule of all over each and of each by turns over all. (3) Offices filled by lot, either all or at any rate those not calling for experience or skill. (4) No tenure of office dependent on the possession of a property qualification, or only on the lowest possible. (5) The same man not to hold the same office twice, or only rarely, or only a few apart from those connected with warfare. (6) Short terms for all offices or for as many as possible. (7) All to sit on juries, chosen from all and adjudicating on all or most matters, i.e. the most important and supreme, such as those affecting the constitution, scrutinies, and contracts between individuals. (8) The assembly as the sovereign authority in everything, or at least the most important matters, officials having no sovereign power over any, or over as few as possible. (The council is of all offices the most democratic as long as all members do not receive lavish pay; for lavish pay all round has the effect of robbing this office too of its power; for the people, when well-paid, takes all decisions into its own hands, as has been

mentioned in the inquiry preceding this.) Next, (9) payment for services, in the assembly, in the law-courts, and in the offices, is regular for all (or at any rate the offices, the law-courts, council, and the sovereign meetings of the assembly, or in the offices where it is obligatory to have meals together). Again, (10), as birth, wealth, and education are the defining marks of oligarchy, so their opposites, low birth, low incomes, and mechanical occupations, are regarded as typical of democracy. (11) No official has perpetual tenure, and if any such office remains in being after an early change, it is shorn of its power and its holders selected by lot from among picked candidates (Saunders, 1992, pp. 363-4).

All these features and characteristics were based on the two primary pillars of democracy: namely, liberty and equality. What is the relationship between both principles? And when liberty and equality meet, what is their impact on democracy? The idea of ‘ruling and being ruled’ means that to rule requires the acceptance to be ruled at a certain point. In other words, the process of ruling is by rotation. Hence the need for equality: ‘All should have an equal share of the privilege of ruling; and it also ensures this sharing in practice, by allowing the populace to enforce it by its majority of equal votes’ (Ibid., pp. 361-2).

Yet was there genuine equality within the Greek *polis* when political participation and citizenship was exclusive to those of a certain gender and social class? Aristotle does not overlook this, and explains that he means ‘numerical equality, not equality based on merit’. This means that the people who rule have the same and equal opportunity to be ruled, and vice versa. Aristotle also holds that securing liberty and equality in democracy leads to the idea that people - ‘the multitude’ - are sovereign, and ‘whatever the majority decides is final and constitutes justice’ (Ibid., p. 363).

The second defining pillar of democracy and a major element of liberty is ‘living as one pleases’. Aristotle believed that when people live as they wish, they are free. Yet he went further still, arguing that people cannot be ruled ‘by anyone at all if possible, or at least only in alteration’ (Ibid., pp. 362-3).

### 4.3 Model II: Republicanism

Liberty, self-governance and active citizenship were the main characteristics of the Renaissance Italian city republics. The hallmark of Italian republicanism was not as innovative as classical Athens, where democracy originated and flourished. However, Italian city republics were credited with withstanding the traditional ruling norms of the 'Christian Monarchy' and creating their own ideals of self-governing and civic glory.

This section focuses on the 'Renaissance republican tradition', which David Held divides into developmental republicanism and protective republicanism. For theoretical purposes, the two strands essentially amounted to a scale, measuring the level of political participation and freedom in the Italian republics, as demonstrated by the prominent theorists of the Renaissance.

Developmental and protective traditions were also measured based on whether theorists were more influenced by the ancient Greek *polis* or Roman traditions, which were dominant during the early Renaissance period. Held articulates the differences between the two strands as follows:

The developmental theorists stress the intrinsic value of political participation for the development of citizens as human beings... the developmental republican theory builds on elements of the classical democratic heritage and on themes found among the philosophers of the Greek polis, notably their exploration of the inherent value of political participation and of the polis as a means to self-fulfilment. In this account, political participation is a necessary aspect of the good life. By contrast, protective republican theory, which can be traced to the influence of republican Rome and its historians, emphasizes the highly fragile nature of civic virtue and its vulnerability to corruption if dependent solely upon the political involvement of any one major grouping, whether it be the people, the aristocracy or the monarchy. Accordingly, protective republican theorists stress the overriding importance of civic involvement in collective decision making for all citizens if their personal liberty is to be safeguarded (Held, 2006, p. 35).

Before explaining political theorists' stances on political participation, citizenship and liberty in the Italian city republics, the following sheds some light on the causes which led a number of city republics to rise up against traditional ruling norms - with reference to the institutional structure of their governing system.

Towards the end of the eleventh century, medieval Europe oversaw the rise of a group of urban cities, whose economies flourished as a result of burgeoning agriculture, trade and

manufacturing. These rising communities managed to establish their own political and social structures, which led in turn to the birth of the political ideals of Italian republicanism. Florence, Venice and Siena were among the best examples of the emerging Italian republics. They took their first steps to self-government by establishing ‘consuls’ or ‘administrators’ to conduct their judicial matters, in an effort to remain autonomous from ecclesiastical and monarchical predominance (Skinner, 1992, pp. 57-66).

By the end of the twelfth century, the ‘consuls’ in Florence, Padua, Pisa, Milan and Siena had become politically independent entities. They managed to establish their own system of government, consisting of different councils and headed by officials known as *podesta*. Held and Skinner demonstrated the institutional structure of these governments represented in the following hierarchy. First, the citizenry consisted of ‘electoral districts or *contrada*, where eligible citizens ought to be male householders with taxable property, born or continuously resident in their city’. Second, ‘the Grand Ruling system was the key sovereign authority with up to 600 members. Citizens eligible to vote commonly drew lots to determine who should serve as electors on the Council’. Third, the ‘Head of the Grand Council was made of the *podesta* or the officials, who held supreme powers in executive and judicial affairs. They were appointed officials and were responsible before the Grand Ruling Council’<sup>44</sup> (Skinner, 1992; Held, 2006, pp. 32-3).

From the start, the essence of Italian republicanism rested on political ideals which included: (1)

The political community is free and has supreme power above all. (2) Liberty is the core of self-

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<sup>44</sup> Held provided more details about the councils and tenure of *podesta*: ‘Councils frequently drew lots to establish a selection committee (numbering between 9 and 20) to consider suitable people to head the Council; names of three possible candidates would be put to the Council, which would have the final say. The elected officer, who would receive a salary from the city, was appointed for a period of up to one year, and could not directly serve the Council thereafter for a minimum of three years’ (Held, 2006, p. 33).



governing. (3) Freedom of citizens must be guaranteed, as this nurtures the process of self-governing and stimulates more political participation within an institutional and constitutional framework. (4) Rulers or ‘chief magistrates’ are appointed officials. ‘They are not rulers in a traditional sense, but agents or administrators of justice’. They are held accountable before their communities and law enactments is their sole responsibility (Held, 2006, p. 34).

Here, it is interesting to consider whether democracy in ancient Greece was an inspiration to Italian city republics. Given that liberty and active citizenship were prevailing political ideals in ancient Athens, was there any impact of Greek democracy on the newly emerging city republics? According to Held, city republicans were not familiar with the concept of democracy until the middle of the thirteenth century, when *The Politics* were translated from Arabic to Roman. The ancient Romans were reserved about Greek democracy, and did not consider it their role model to follow:

For Roman republics, democracies of ancient Greece, which in their view, were prone to instability, civil strife and internal weakness, Rome set out a model of governance which linked liberty not only with virtue but also with civic glory and military power. Rome offered a conception of politics which connected political participation, honour and conquest, and which, accordingly could defeat the claims made in monarchical polities that only a king, enjoying personal authority over his subjects, could guarantee law, security and the effective projection of power (Held, 2006, p. 34).

In other words, the city republics sought to build their own political identity by redefining major political ideals, such as freedom and civic virtue. For republicans, ‘freedom’ involves the defeat of tyrants and embrace of more political participation. ‘Virtue’ involves putting public welfare above personal interests; which according to republican tradition, was what ‘patriotism and public spirit’ should look like (Canovan, 1987, p. 434).

To obtain a better understanding of the republican Renaissance tradition, the works of Marsilius of Padua and Niccolo Machiavelli are highly worthwhile to explore. Each theorist enriched democratic thought by developing the notions of liberty, self-governance and civic citizenship.

#### **4.3.1 Marsilius of Padua (1275/80-1342)**

The work of Marsilius of Padua (1275/80-1342) contributed hugely to the republican Renaissance tradition. He was a medieval philosopher and prominent political figure of the fourteenth century. His writing - particularly his treatise *Defensor pacis* (The Defender of Peace), issued in 1324 - was considered highly provocative, even revolutionary, against the Church and monarchy. In *Defensor pacis*, Marsilius argued that the authority of priesthood should be curtailed; and that the Church should not be political but replaced by a secular power. He believed that making laws was the responsibility of people or 'its weightier part' through a general assembly, where political roles would be divided up and a government elected in reflection of the will of the people (Brett, 2005, pp. 29-49).

According to Held, Marsilius' work was an example of developmental republicanism, which relied mainly on 'classical democratic heritage and on themes found among the philosophers of the Greek polis' (Held, 2006, pp. 36-40). Marsilius was himself a disciple of Aristotle, with his work greatly influenced and inspired by Aristotelian philosophy. He believed, for example, that protecting the common good was the responsibility of the city republic, so that citizens could thrive. Thus, he believed that authority must exist, but only if it was fair and just. This could not be achieved without allowing the people to participate in enacting laws and actively in politics in general.

Marsilius' views on civil communities, government and citizenship are especially worthy of further exploration. He viewed the creation of civil communities as a 'product of reason': an inevitable result of a dedicated government, keen to deliver a 'sufficient life' for its citizens. The pursuit of a 'good life' is a natural desire of the individual; but governments must recognize that providing both this and peace for its citizens would requires them to prioritize the common good

over the interests of certain groups or factions. In this case, the government would be merely a means, but the civil community would be integral to the pursuit of a good life.

The work and mission of the government is intrinsic and does not end. For Marsilius, struggle and strife are part of human nature. Difficulties and conflicts are expected to occur. The challenge facing the government is to maintain peace and help civil community to flourish. To achieve this, a good government would employ a ‘unitary coercive power’ to protect political associations from deterioration and help the survival of active civil communities. In referring to the ‘unitary coercive authority’, Marsilius meant a united government, whose judicial and executive branches would help the enforcement of law and order. For him, ‘a good government emerges less from a community dedicated to virtue than from rulers governing in the public interest, backed by coercive power’ (Held, 2006, pp. 36-7).

He also believed that people have the supreme power to legislate and execute laws and orders in their civil communities. The consent of people is the basis of legitimizing the coercive authority. Marsilius believed that a government approved by ‘the many’ would be more sustainable and enduring than a government formed by one ‘kingship’ or ‘lordship’, or the few (‘aristocracy’).

On the importance of the power of people, he stated:

The authority to make laws ...cannot belong to one man alone ... for through ignorance or malice or both, this one man could make a bad law, looking more to his private benefit than to that of the community, so that the law would be tyrannical. For the same reason, the authority to make laws cannot belong to a few; for they too could sin, as above, in making the law for the benefit of a certain few and not for the common benefit, as can be seen in oligarchies. The authority to make the laws belongs, therefore, to the whole body of citizens or to the weightier part thereof, for precisely the opposite reason. For since all the citizens must be measured by the law according to due proportion, and no one knowingly harms or wishes injustice to himself, it follows that all or most wish a law conducing to the common benefit of the citizens (Brett, 2005, 46-7, 48-9; Held, 2006, p. 38).

Marsilius continued to explain why ‘laws made by the many’ or the people are more legitimate.

Entrusting citizens to make their own laws for their own common good would generate a sense of responsibility among citizens and help them become more involved in their communities. In

turn, this would reduce confrontation and conflict, and result in peace and stability. ‘Laws are better observed by every citizen, if each one is involved in imposing it upon himself’ (Brett, 2005, p. 47).

In this context, Marsilius advocated for a government which fortified popular sovereignty, established self-governing councils and urged citizens to elect their officials and administrators for the sake of the community’s common good (Ibid., pp. 22-33). Held found that Marsilius’ views on citizenship and political participation in the city republics could only exist or be adapted to small size communities, just as in the case of the Greek city states. This is entirely valid when discussing size and relationship to self-government; but it is important to remember that Marsilius was suggesting a kind of political participation which did not exist at that time.

It is certainly true, though, that Marsilius was one of the theorists of developmental republicanism: influenced heavily, as we have noted, by Aristotle. For him, a citizen is ‘one who participates in the civil community, either in the government or in the deliberative or judicial function of the polity’ (Ibid., p. 49; Held, 2006, p. 39). This meant he held many reservations over exactly who was eligible to become a citizen: excluding children, slaves and women. The only exception he made related to ‘the sons of citizens are citizens in proximate potentiality, lacking only in years (Brett, 2005, p. 46; Held, p. 39). For Marsilius, citizenship would extend only to the ranks of men with taxable property, born or resident for a long period in their city, but exclude all others.

Yet his innovations lay in considering rulers or administrators as delegates. He paved the way for an indirect form of political participation by supporting the election of council rulers. In this regard, those elected were not and could not be the legislator in the absolute sense, but only in a relative sense and for a particular time, in accordance with the authority of the primary legislator,

‘the whole body of the citizens’ (Brett, 2005, p. 45; Held, 2006, pp. 38-9). Executive and judicial officers would hold their position thanks to the authority bestowed by the people; and could be removed from power if they failed to pursue common interests.

#### **4.3.2 Niccolo Machiavelli**

The political culture of Florence, home town of Niccolo Machiavelli (1469-1527), was what inspired and influenced his work: especially *The Prince* (1513), and *Discourses on Livy* (1531).

This section focuses mainly on Machiavelli’s account on mixed government, liberty and citizenship, as explained in *Discourses on Livy*.

Machiavelli is known as ‘the first theorist of modern state politics’ in respect to his contribution to political thought, which played a major role in shaping the theory of ‘protective republicanism’. The following will shed light on Machiavelli’s major themes regarding the instability of all forms of government, the indolence of human nature, and the consequences of this for political participation and personal liberty.

1. Machiavelli believed that all forms of government would fail and decay. Whether they take the form of monarchy, aristocracy or democracy, all systems go through a cycle of achievements and setbacks, with the latter leading to corruption and instability. Failure of monarchy leads to tyranny, aristocracy to oligarchy, and democracy could also turn into anarchy: which then tends to be overturned in favour of monarchy again (Held, 2006, p. 40; Machiavelli, 1983, pp. 104-11).

For Machiavelli, the best solution was therefore to constitute a government including all elements of monarchy, aristocracy and democracy. He found an example to follow in Rome’s mixed government, ‘with its system of consuls, senate and tribunes of the people’ (elected officials or representatives). He argued that a system of mixed

government aims to: (1) Avoid all the shortcomings which come with any individual system of government; (2) Limit the rivalry between different social classes, particularly rich and poor, by adjusting their interests to the common good; (3) Develop a system which can accommodate the needs and interests of all factions of the community, while enforcing laws which do not contradict their interests (Held, 2006, p. 41).

2. To Machiavelli, the political world ‘was always one of flux and potential chaos’. His scepticism was held for various reasons. He believed that political order is a man-made invention. Thus, the instability of political life stemmed from human nature, which he viewed as self-centred and clueless unless interests were at risk. Moreover, ‘there was no natural or God-given framework with which to order political life. Rather, the task of politics was to create order in the world’ (Held, 2006, p. 41; Machiavelli, 1983, pp. 200-1). This would suggest that either there is no sense of direction or basis which constitutes political order; or that God would leave the management of political life to humans. Either way, both interpretations thoroughly contradicted the teachings of the Church.

The failure of democracy and political order in ancient Greece particularly shaped Machiavelli’s pessimistic views on politics. He attributed this to ‘the arrogance of the upper class and the licentiousness of the general public’ (Machiavelli, 1983, p. 110; Held, p. 41). He was critical of both Athenian democracy and its people for failing to protect and preserve Greek stability.

3. Like his views on the political world, Machiavelli’s position on human nature was also pessimistic. He viewed people as ‘self-seeking, lazy, suspicious and incapable of

doing anything good, unless constrained by necessity' (Held, 2006, p. 41; Machiavelli, 1983, pp. 200-1, 256-7). From his perspective, this was the innate nature of people; he was not questioning human nature at all. However, how to attract people to civic virtue? What were the best conditions in which people could be more involved and responsible towards their communities? His solution involved enforcing laws and protecting freedoms, particularly freedom of faith.

It is important to note here that Machiavelli effectively used liberty as a shield for his proposed solution. Liberty provided the basis for encouraging political participation and self-governance. The rule of law would make people responsible and devoted to their communities by endorsing the common good over their personal interests. To achieve this, the government should secure and protect freedom of religion, expression and association. This equation between the rule of law and protection of freedoms formed the core of protective republicanism.

4. What, though, were Machiavelli's criteria for citizenship, and who was eligible for it in the Italian city republics? Unlike Marsilius, he was one of the first republican theorists to believe that political participation should not be limited to the wealthy aristocrats or nobles, but that it should include 'men of unambiguously local descent who had a stake in the country'. This meant mainly 'artisans and small traders' (Held, 2006, p. 43).

Despite this quantum leap, which incorporated all local small workers who contributed to the republics, his position towards 'foreigners, labourers, servants ...

women and children' remained the same as those of his predecessors - meaning they were excluded from Roman citizenship (Held, 2006, p. 43; Pitkin, 1984).<sup>45</sup>

5. Machiavelli's embrace of freedom of expression involved giving consideration to opponents' voices, disagreements and conflict, in both social groups and as individuals. This liberty would help contribute to the success of the city republics. As well as offering self-government and political participation to a broader scale of social classes, Machiavelli argued that disagreement and dissension were also an important basis of liberty. Through conflicted ideas and opposition, citizens could express their needs and protect their personal interests. Ultimately, 'if a community can enjoy liberty, it will flourish' (Machiavelli, 1983, p. 275).<sup>46</sup>

#### **4.4 Model III: Liberal Democracy**

What does the term 'liberal democracy' truly mean? Is liberal democracy the enhanced or modern version of democracy? To define and understand it, it is necessary to establish how the liberal tradition emerged and developed in eighteenth century Europe; and how it tackled issues related to sovereignty and state power, individual rights and the shift from direct to indirect democracy. So as not to deviate from the crux of the study, this model will focus only on the early foundations of liberal democracy, developed by the fathers of political theory: Thomas Hobbes and John Locke.

As a government system, liberal democracy has two tasks: (1) To secure and protect individuals' freedoms and rights; (2) To restrict and monitor the power of governments. To understand the concept further, though, we will again adopt what Held refers to as protective and development democracy.

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<sup>45</sup> To read more on gender and women in Machiavellian thought, see Pitkin (1984), *Fortune is a Woman*.

<sup>46</sup> For more on Machiavelli, see Skinner (1981), *Machiavelli*.



Two challenges faced the emergence of liberal democratic thought between the fifteenth and eighteenth centuries: The Church and clerical power on the one hand, absolute monarchies on the other. The following sections set both out in turn.

#### **4.4.1 Hobbes: Power and Sovereignty**

The need for a sovereign power arises from the vulnerability of human nature, which is more inclined towards war and personal interests. This was the main theme behind Thomas Hobbes (1588-1679)' argument: to entrust or authorize one power or 'singular authority' is a guarantee of political and social order. Hobbes' position on power and sovereignty underpinned the foundations of liberal democracy. We will explain where the concept of sovereignty came from by focusing on Hobbes' equation between the two powers of conflicted human nature ('man powers') and sovereign power.

What is the difference between man powers and sovereign power? In *Leviathan* (1651), Hobbes explained that 'the power of a man is his present means to obtain some future apparent good'. For him, there were two kinds of man powers: 'The natural power is the eminence of the faculties of body, or mind [such as] extraordinary strength, form, prudence, arts, eloquence, liberality, nobility. Instrumental [powers] are those acquired by fortune, are means and instruments to acquire more [such] as wealth, reputation, friends, and the secret working of God, which men call good luck'.

Either way, Hobbes finds human nature inclined to embrace power, whether natural or instrumental; it would always seek fame and glory. He described human nature as 'self-interested and always seeking more intense delight and strong position'. This leaves human beings in constant conflict, with each seeking the advancement of their own interests. As conflicts of interest are therefore highly likely to occur, individuals would always feel insecure and in a state

of war. Hobbes continued to blame conflicted human nature, which is naturally inclined to competition, but leads to: (1) Violence ‘to make themselves [people in power] masters of other men, persons, wives, children and chattel’; (2) Diffidence ‘to defend them’; (3) Seeking glory ‘for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons, or by reflection in their kindred, their friends, their nation, their profession, or their name’ (Tuck, 2006, p. 88).

Hobbes argued that the consequences of this condition are not only limited to antagonism among individuals; but can contribute broadly to the laziness of society instead of progress and prosperity. His view was that ‘where there is no common power, there is no law’; with life based on ‘continuous fear, danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short’ (Tuck, 2006, p. 89).

Yet Hobbes fully supported collective power emanating from unity and consent among groups and factions. Collective power is:

The greatest of human powers, is that which is compounded of the powers of most men, united by consent, in one person, natural or civil, that has the use of all their powers depending on his will; such as is the power of common wealth: or depending on the wills of each particular; such as is the power of faction... Therefore, to have servants, is power; to have friends, is power: for they are strengths united (Ibid., p. 62).

This quote explains Hobbes’ proposition that the best power is that of unity; the consent to recruit ‘one authority’ to manage the fluctuations of human nature. ‘The desires, and other passions of man are in themselves no sin no more are the actions that proceed from those passions, till they know a law that forbids them, which till laws be made they cannot know, nor can any law be made, till they have agreed upon the person that shall make it’ (Ibid., p. 89).

Ultimately, though, Hobbes arrived at an impasse. Not only was he pessimistic about human nature, but he also believed that it would never recognize peace until the moment of demise.

‘The passions that incline men to peace are fear of death’ (Ibid., p. 90).

Who has sovereign power? In modern politics, people are the source of all powers; but when this idea first emerged, Hobbes proposed that one power should act on behalf of the multitude, based on their consent. Hobbes listed three means of attaining sovereign power - but did not support the first, whereby the sovereign uses his ‘natural power’ to subjugate his children and kin to his rule. Neither did he agree with obtaining power by war, whereby the sovereign subdues his enemies to his will by force, on pain of death (Ibid., p. 121). The third method, ‘the political commonwealth by acquisition’, requires further elaboration.

When assessing Hobbes’ perspectives on sovereign power and commonwealth, we can easily note the correlation between both concepts. To establish commonwealth means:

To confer all their [the multitude] power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, into one will... This is more than consent, or concord; it is a real unite of them all, in one and the same person, made by covenant of every man with every man, in such manner, as if every man should say to every man, I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up the right to him, and authorize all his actions in like manner. This done, the multitude so united in one person, is called a commonwealth, in Latin CIVITAS. This is the generation of the great LEVIATHAN, or rather (to speak more reverently) of that mortal god, to which we owe under the immortal god, our peace and defence (Ibid., p. 120).

Hobbes’ position was that individuals ought willingly to surrender their rights of self-government to a powerful single authority - thereafter authorized to act on their behalf - because if all individuals did this in the name of long term security and peace, a unique relationship of authority would be created, of sovereign to subject; and a unique political power established, sovereign power or sovereignty: the authorized, and hence rightful, use of state powers by the person or assembly established as sovereign. The sovereign’s subjects would have an obligation and duty to obey; for the office of ‘sovereign’ would be the product of their agreement, and

‘sovereignty’ is a quality of this agreed position rather than of the person who occupies it (Held, 2006, p. 61).

It is important to stress that, in Hobbes’ view, while the office of sovereign must be self-perpetuating, undivided and ultimately absolute, it is established by the authority conferred by the people. The state’s right of command and the subjects’ duty of obedience are the result of ‘consent’, which individuals would have agreed to had there actually been a social contract.

Held (2006) argues that Hobbes’ contribution to liberal thought was unquestionable - yet included both liberal and illiberal elements. The former resides in Hobbes’ emphasis on an individual’s right to be ‘free and equal’, and the need for consent and agreement from the multitude; not only for the sake of security and peace, but also to legitimize the power of the sovereign. Yet with regard to the latter, Held notes that whereas the subjects/people are in desperate need to regulate their lives through security and peace, the sovereign is keen to dominate in all powers, and the multitude are obliged to obey the sovereign and abide by his will:

Hobbes was not actually asking his fellow countrymen to make a contract; he was asking them to acknowledge the reasonable nature of the obligations that follow if one were to presume that such a contract had been made. His conception of these obligations drastically tipped the balance between the claims of the individual on the one hand, and the power of the state on the other, in favour of the latter (Held, 2006, pp. 61-2).

The sovereign power of the modern state was established, but the capacity of citizens - albeit, male citizens with ‘high standing’ and substantial property - for individual action was compromised radically. Hobbes sought to defend a sphere free from state interference in which trade, commerce and the patriarchal family could flourish; civil society. But his work ultimately failed to articulate either the concepts or the institutions necessary to delimit state action satisfactorily (Ibid.).

However important Hobbes was to the foundations of liberalism, for liberal democracy to gradually emerge in Europe, notions of sovereignty, active citizenship and direct participation in the city state or republic needed to shift entirely. According to Held:

The historical changes that contributed to the emergence of modern liberal and liberal democratic thought were immensely complicated. Struggles between monarchs and estates over the domain of rightful authority; peasant rebellions against the weight of excessive taxation and social obligation; the spread of trade, commerce and market relations; changes in technology, particularly military technology; the consolidation of national monarchies (notably in England, France and Spain); the growing influence of Renaissance culture; religious strife and the challenge to the universal claims of Catholicism; the struggle between church and state – all played a part (Held, 2006, p. 56).

#### **4.4.2 Locke: Citizenship and the Constitutional State**

This section discusses the ideas of John Locke, which ran counter to Hobbes on both human nature and sovereign power. Locke was entirely against the idea of investing the rights and powers of people in one supreme power. His thoughts on civil society, government by consent and the constitutional state played a major part in shaping the foundations of liberalism, paving the way for the tradition of representative government and initiating the concept of the separation of powers. Here, we focus on Locke's views on citizenship and constitutional state, as explained in his *Two Treatises of Government*; particularly, *The Second Treatise of Government: An Essay Concerning True Origin, Extent and End of Civil Government*, first published in 1690.

Unlike Hobbes, Locke's view of the state of nature was optimistic. He did not believe that the state of nature is one of war; but a 'state of liberty'. Locke believed that individuals are born free and equal; and that the 'state of perfect freedom' is the original state of human nature.

Locke's positive view clearly influenced his perceptions of the concept of sovereign power and individual rights: he believed that all individuals are born free, equal and independent. 'No one can be put out of this estate and subjected to the political power of another without his consent' (Laslett, 1988, p. 330). Locke also identifies a correlation between the law and state of nature: God is the master of the law of nature and He is the one and only supreme power: 'The law can

be grasped by human reason, but it is the creation of God, the infinitely wise maker' (Held, 2006, p. 63). From this, we can infer that Locke's objection to Hobbes' idea of a sovereign power ruling the multitude was derived from his utmost faith and devotion to God's supremacy. His adherence to God appeared in different chapters of *The Second Treatise*:

When men think of themselves as organized with each other, they must remember who they are. They do not make themselves, they do not own themselves, they do not dispose of themselves, they are the workmanship of God. They are his servants, sent into the world on his business, they are even his property.... [this means] we are all free and we are all equal; free of each other, that is to say, and equal to each other, for we are not free of God's superiority and not equal to him (Laslett, 1988, p. 93).

Moreover, 'the state of nature... is a state of liberty but not a state of license. Individuals are bound by duty to God and governed by the law of nature' (Held, 2006, p. 63). In other words, men are free to live their lives as they please, but are not allowed to harm themselves and others, as this constitutes an infringement of someone else's property. For Locke, property equals life, liberty and estate. He also emphasized that individuals are responsible for protecting each other and never risking their lives.

Moreover, Locke highlights the clear contradiction in Hobbes' argument. The latter expects individuals to trust and subdue all their rights to one 'indivisible authority', while simultaneously holding that human nature is brutal, self-interested; and that therefore, individuals could not trust each other (Held, 2006, p. 62).

Yet Locke was no mere romantic or idealist. On the contrary: he noted the discrepancies between the state of nature created by God, and the state of individuals in real life, which was still chaotic and unfamiliar with any form of political organization. For him, the state of nature provided individuals with freedom, equality and independence; but reality had shown the opposite, especially when some individuals do not respect others' rights. This leads to conflicted interpretations of the law and means that individuals are insecure and in a state of continuous

conflict and war. In other words, Locke's argument was that people were unable to enjoy the qualities of their nature; and had instead been left fighting to protect their rights to live and survive.

What, then, was Locke's solution for such inconveniences and contradictions between natural rights and real life? What was his mechanism to achieve peace, freedom and security in the commonwealth?<sup>47</sup> The answer lay in the creation of two powers, civil society and political power/government. Locke believed that protecting individuals is the responsibility of political power; thus, individuals should surrender their natural power to the political community, which would enact laws to protect their property.

Government, though, was a means, not an end. For Locke, 'the institution of "government" can and should be conceived as an "instrument" for the defence of the life, liberty and estate of its citizens; that is, government's *raison d'etre* is the protection of individuals' rights as laid down by God's will and enshrined in law' (Held, 2006, p. 62; Dunne, 1969).

The institution of government does not mean that all powers reside in one absolute authority. Instead, a constitutional government is based on two separated, divided powers: (1) A legislative assembly represented by a parliament, in charge of legislating laws, which coincide with the law of nature. Members of this assembly are representatives of the people, without whose consent, government loses its legitimacy. (2) Executive power is represented by the monarchy and includes the judiciary. Thus, the executive power is responsible for executing the laws passed by the government and implementing the commonwealth's legal system.

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<sup>47</sup> Locke's idea of the 'commonwealth' is not a democracy or any form of government, but any independent community. The Latin word *civitas* is the best translation; it expresses such a society of men in a way that 'community' or 'city' does not. There may be subordinate communities in a government; and 'city' has a quite different meaning (Laslett, 1988, p. 355).

The aim behind this separation of powers was mainly to confine all forms of absolute authority, and prevent any self-interested attempt by the executive or legislative power to fulfil personal endeavours which are not part of public welfare:

It may be too great a temptation to human frailty apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government (Held, 2006, p. 64).

Creating civil society is another major component of Locke's constitutional state. Citizenship, consent and respect of law are the key prerequisites in establishing civil society:

Those who are united into one body, and have a common established law and judicature to appeal to with authority to decide controversies between them and punish offenders are in civil society one with another: but those who have no such common appeal, I mean on earth, are still in the state of nature, each being, where there is no other, judge for himself, and executioner; which is, as I have before showed it, the perfect state of nature.

Wherever therefore any number of men are so united into one society, as to quit everyone his executive power of the law of nature, and to resign it to the public, there and there only is a political or civil society. And this is done wherever any number of men, in the state of nature enter into society to make one people, one body politick under one supreme government, or else when any one joins himself to, and incorporates with any government already made. For hereby he authorizes the society, or which is all one, the legislative thereof to make laws for him as the public good of the society shall require; to the execution whereof, his own assistance (as to his own decrees) is due. And this outs men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries, that may happen to any member of the commonwealth; which judge is the legislative, or magistrates appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature (Laslett, 1988, pp. 324-5).

Locke's belief in freedom, then, led him to effectively lay the foundations of modern liberal government. Yet although his *Second Treatise* discussed many elements of the modern democratic state, for him, the formation of a governmental apparatus does not signal the transfer of all subjects' rights to the political realm. The rights of law making and enforcement (legislative and executive rights) are transferred, but the whole process is contingent on government adhering to its essential purpose; the preservation of life, liberty and estate. Sovereign power, i.e. the capacity to determine the proper use of political power, remains with the people.



Thus, the integrity and ultimate ends of society require a constitutional government in which 'public power' is legally circumscribed and divided. Locke believed in the desirability of a constitutional monarchy holding executive power and a parliamentary assembly holding the rights of legislation; although he did not think this was the only form which government might take. His views are compatible with various other conceptions of political institutions (Held, 2006, p. 64).

The government rules, and its legitimacy is sustained, through the 'consent' of individuals. 'Consent' is a vital and difficult notion in Locke's writings. We might imagine that only the continually active personal agreement of individuals would be sufficient to ensure a duty of obedience, i.e. a government's authority and legitimacy. However, Locke seems to have considered the active consent of individuals as crucial only in the inauguration of a legitimate civil government. Thereafter, consent ought to follow from majority decisions of the people's representatives; so long as they, the trustees of the governed, maintain the original contract and its covenants to guarantee 'life, liberty and estate'. If they do, there is a duty to obey the law. However, if those who govern flout the terms of the contract through a series of tyrannical political acts, rebellion to form a new government might not merely be unavoidable; but justified (Ibid.).

Political activity is instrumental because it secures the framework or conditions for freedom, so that the private ends of individuals may be met in civil society. The creation of a political community or government is the burden which individuals must bear to secure their ends. Membership of a political community, i.e. citizenship, bestows responsibilities and rights, duties and powers, constraints and liberties on the individual.

In relation to Hobbes' ideas, this was a most significant and even radical viewpoint, for it helped inaugurate one of the central tenets of modern European liberalism - that the government exists to safeguard the rights and liberties of citizens, who are ultimately the best judges of their own interests; and accordingly, government must be restricted in scope and constrained in practice, to ensure the maximum possible freedom of every citizen. In most respects, Locke's, rather than Hobbes', views helped lay the foundation for the development of liberalism and prepared the way for popular representative government. Locke's influence on the world of practical politics has been very considerable.

Taken together, Locke's writings highlight the importance of securing the rights of individuals, popular sovereignty, majority rule, a division of powers within the state, a constitutional monarch and a representative system of parliamentary government, all of which directly anticipates many elements of modern democratic government and the modern representative state. Yet that said, most of these ideas are only in rudimentary form, and it is certain that Locke did not foresee many other components of representative democratic government; such as competitive parties, party rule and the maintenance of political liberties regardless of class, sex, colour and creed. In his idea of consent or legitimacy, there is no mention of regular elections of a legislative assembly, let alone universal suffrage (though we can safely assume that he would not have dissented from a franchise based strictly on the property holdings of male adults).

Moreover, he did not develop a detailed account of what the limits to political interference in people's lives would involve; and under what conditions civil obedience could be justified. He thought that political power was held 'on trust' by and for the people; but failed to adequately specify who were to count as 'the people', and under what conditions 'trust' should be bestowed. While Locke was unquestionably one of the first great champions of liberalism, and although his

work clearly stimulated the development of liberal democratic government, he cannot, like so many of his predecessors, be considered a democrat without the most careful qualification.

## **4.5 Conclusion**

The main objective of this study is to demonstrate the concept of democracy in theory and practice and explain how the people and Constitution of Kuwait conceived their own model of democracy. Therefore, this chapter has applied the classical models of democracy developed by David Held: highlighting a number of analogies between models of ancient democracy and the democratic model of Kuwait, developed by Kuwaiti constitutional law scholars (see Chapter 6).

As we have noted, the hallmark of ancient Athens was the institutional and constitutional characteristics of its democracy. During the fifth century BC, when tyranny and oligarchy ruled major city states in ancient Greece, Athens instituted democracy to manage the affairs of the *polis* through the rule of people, based on established laws. Restrictions on citizenship and the number of citizens involved in the political process were antipathetic to what we consider as modern, representative democracy; ‘majority rule’ can hardly be said to have existed in ancient Athens.

Yet political ideals, not processes, were of most interest to this research when it came to drawing parallels. The principles of liberty and equality formed the basis of democracy in ancient Greece. This study therefore concurs with Finley (1983)’s argument that it matters rather less whether Athenian democracy represented ‘rule by the few’ or ‘rule by the many’ than how this model did so much to inspire latter day Western political thought (Ibid., p.9).

With regard to parallels between classical Athens and Kuwait, both are small in terms of size and population; with strategic, coastal locations encouraging manufacturing, trade and hence leading

to political autonomy. The relationship between city area/population and economic prosperity, political freedom and participation is important. 'Size, complexity and a degree of heterogeneity' are elements noted by Held (2006); indeed, Athenian city states, Italian city republics and Kuwait are all cases of small, heterogenous states which leant themselves to relative degrees of tolerance, openness, economic and political innovation.

Classical Athens and Kuwait were also controlled by 'local kingships' or 'tribal hierarchies'. Kuwait was dominated by Bani Khalid before the arrival of the al-Utub families - among which were the al-Sabahs, rulers of Kuwait since 1756. Despite the pre-eminence of the Ottoman Empire over Eastern Arabia, Kuwait survived as an independent entity, with Ottoman legal records describing it as 'The Land of Tribes' (see Chapter 2). A clear sense of communal society and responsibility was paramount in both ancient Athens and Kuwait, with precedence given to the common good.

The resemblance between the ruling traditions of classical Athens and Kuwait before independence is of great import here. Kuwait's ruling traditions followed the principles of Islamic Shura (consultations) and were based on the traditions of 'joint governing': namely, virtue, respect, trust and allegiance to the ruler, all of which were also major characteristics of Athenian democracy.

Despite the enormous chronological gap between ancient Athens and Kuwait and the flaws and limitations of both models of democracy, both were nonetheless innovative, in institutional and constitutional terms. Classical Athens adopted democracy through the world's first constitution enabling people to rule. The Constitution of Kuwait customized its own version of democracy, combining the characteristics of presidential and parliamentary systems (see Chapter 6).

Section 4.3 noted certain parallels between Marsilius of Padua, Machiavelli, and the case of Kuwait. Marsilius was critical of the Church, arguing that the authority of the priesthood should be curtailed, and replaced by a secular form of rule by the people. In later medieval Europe, conflict between Church and State was increasingly overt. Marsilius considered that people should have the final say in legislating and executing laws. He emphasized that a government approved by ‘the many’ is more effective than a government made by one (in this case, the monarch).

This links in neatly with the next chapter, which sheds light on Kuwait’s debates on the conceptual dilemma between democracy on the one hand, Islamic Sharia on the other. Whereas European democratic ideals ultimately ended ecclesiastical hegemony, in Kuwait, the conceptual dilemma between Islam and democracy continues to obtain, as Chapter 5 will set out in detail.

Both the Italian city republics and Kuwait adopted a system of ‘mixed government’ to ensure stability and suppress conflict. The former combined aspects of monarchy, aristocracy and democracy; the latter is a combination of democratic, hereditary, representative, parliamentary and presidential systems, infused with cultural Arab elements and Islamic teachings (see Chapter 6).

Section 4.4 covered the rise of liberal thought, juxtaposing this against the Kuwaiti Constitution’s enactment of the principles of a constitutional state (including sovereignty, rule of law, separation of powers, and the protection of freedoms). In addition to personal liberty, the Constitution guarantees freedoms of faith, expression, association and the press.

Perhaps most important, though, is this study’s finding that the evolution of Kuwaiti democracy underwent three phases, all of which clearly resonate with Held’s classical models. Kuwait’s

emergence bears clear parallels with that of classical Athens. The age of republicanism in medieval Rome has echoes of Kuwait's journey towards independence. Finally, the rise of liberal thought during the Renaissance is reminiscent of the 'Golden Age of Kuwait' / 'Renaissance of Kuwait', when the latter at last gained its independence and ratified a democratic constitution.

To conclude, the significance of David Held's approach to ancient democracy was of great relevance to the case of Kuwait. It proved that democratic frameworks have almost always been hybrid arrangements of one kind or another; with the Kuwaiti case a particular articulation of hybridity. This point will be discussed in further details in the subsequent chapters.

The next chapter focuses on the process of drafting the Constitution of Kuwait, the roles of the elected Constituent Council, government and Amir; as well as paying great heed to the attendant discussions over democracy and Islamic Sharia.

# **Chapter 5: The Constitutional Underpinnings of Kuwait's System of Government**

## **5.1 Introduction**

Following Kuwaiti independence on 19 June 1961, the election of 20 representatives to the new Constituent Council represented the vital first step to democracy: for this Council would have responsibility for drafting and ratifying Kuwait's first Constitution.

This chapter evaluates the primary debates on democracy which took place in the Constituent Council by considering the following questions: (1) Where did the members stand on the question of adopting democracy as a Western concept despite the backdrop of a conservative culture which believed in Islamic Sharia and the rule of God? (2) What were the reactions of Council members to democracy being enacted? (3) To what extent was the concept of democracy understood by Council members? (4) Who drafted the Constitution? (5) How did the Constitution of Kuwait maintain the balance between the state religion (Islam) and government system (Western democracy)?

The objectives in covering these debates are as follows: (1) To involve the reader in the debates on democracy vs. Sharia law (2) To understand the origins of democracy in Kuwait: were the drafters of the Constitution advocates of democracy and modernity; and was democracy a political trend in the region? (3) To assess the political and intellectual backgrounds of the members: were they knowledgeable and up to the task of drafting Kuwait's first ever Constitution?

This chapter is divided into three parts. Part 1 focuses on the mission, structure and functions of the Constituent Council, and role of the Egyptian jurists, responsible for drafting the Constitution

and discussing its articles from a legal and constitutional point of view. Part 2 sets out the debates on democracy and Islamic Sharia, based on the Minutes of Proceedings (MOPs) of both the Constituent Council and Constitution Committee. Part 3 examines the historical background in the Arab world regarding Islamic Sharia, arguing that the apparent conflict between it and democracy is not a threat to traditional and Islamic values, despite this often being claimed. Conversely, the struggle over the Sharia clause reflected the *fuqahā'* / Islamic jurists' desperate aspiration to harness any political or constitutional opportunity to implement Islamic Sharia as the one and only source of legislation, which stemmed from their dream to establish an Islamic Caliphate.

Finally, the chapter sheds light on the legal theory of Abd al-Razzaq al-Sanhuri, the legal theorist who drafted Egypt's civic code and adapted Sharia and Western laws under one system. His theory, adopted by many Arab constitutions (including Kuwait's), managed to curb conflict and establish a series of constitutional states.

This chapter could not have been written without accessing the Archives and Library of Kuwait's National Assembly, where the author spent three months examining the MOPs for both the Constituent Council and Constitution Committee. In Spring 2013, the Public Relations Department at Kuwait National Assembly gave the author permission to access 55 original sets of documents, made up of 32 Constituent Council and 23 Constitution Committee MOPs. All data collected from the MOPs have been translated by the researcher.



## 5.2 The Constituent Council and Constitution Committee

Two months after Kuwait's independence, the Amir issued Decree 12/1961, calling for elections to the Constituent Council. The Decree included an order to form a Consultative Committee<sup>48</sup> to assist the Higher Council<sup>49</sup> in drafting and issuing the Electoral Law of the Constituent Council, and the interim Constitution, known as The Basic System of Governance in the Transitional Period. The significance of Decree 12/1961 stems from its preface announcing that, for the first time, Kuwait's government system would be based on democratic principles; and that as a newly independent state, Kuwait would take all measures to draft and ratify the Constitution within one year:

We Abdullah al-Salim, Amir of the State of Kuwait, desiring to establish a government system based on definite foundations, and in preparation to issue the constitution of the State of Kuwait which derives its laws from the circumstances of Kuwait and based on democratic principles, aiming the prosperity and welfare of the people<sup>50</sup> (Dashti and Marafi, 2013, pp. 8-9).

The elections took place on 30 December 1961, and Kuwait was divided into 10 constituencies. Of 72 candidates, 20 won seats. On the same day as the elections were held, the Amir approved the interim Constitution, which was brief, general and basic. It included only 38 articles, divided into five sections addressing freedoms, legislative, executive and judicial authorities and public laws.<sup>51</sup> Article 1 of the Basic System of Governance in the Transitional Period (interim Constitution) enacts the mission of the Constitution:

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<sup>48</sup> The Consultative Committee consisted of 11 public figures: Hamad Saleh al-Humaidhi, Hamad Abdulmehsen al-Meshary, Humoud Zaid al-Khalid, Khalid Sulaiman al-Adsani, Abdulhameed Abdulaziz al-Sane, Abdulaziz Hamad al-Sager, Masha'an Abdulrahman al-Khudhair, Mohammed Yousif al-Nisf, Yusef Ibrahim al-Ghanim, and Yusef Abdulaziz al-Duaij.

<sup>49</sup> Decree 12/1961 enacted that the Higher Council would appoint 11 members from the ruling family. It required both the Higher Council and Consultative Council to form a Joint Council in order to draft a Bill: (1) To elect members of the Constituent Council; (2) To draft the interim Constitution between January 1962 and January 1963 (Dashi and Marafi, 2013, p.10).

<sup>50</sup> Dashti, pp. 8-9

<sup>51</sup> Articles 6, 7, 8, 11 and 13 relate to democratic values in terms of securing freedoms and personal liberties. For the full text of the interim Constitution, see the Appendix.

The Constituent Council is responsible to draft the Constitution and explain the government system, which is based on democratic principles and inspired by the reality and objectives of Kuwait. The Council should complete this mission within one year starting from the opening session. Per the Council consent, the Constitution should be presented for the Amir for ratification and issuing (Dashti and Marafi, 2013, p. 225).

The opening session of the Constituent Council took place on 20 January 1962. There was consensus among members that success would propel Kuwait's momentum towards a modern, independent and democratic state. The 20 elected members, intent on accomplishing their mission, were proud that Kuwait was about to adopt a liberal constitution. Most fully embraced this responsibility. In his memoirs, Ahmed al-Khatib, Deputy Speaker, attributed the Council's ultimate success to some especially devoted members who had been pioneers in calling for political reform in Kuwait. Their membership was motivated by patriotic reasons.<sup>52</sup> Al-Khatib describes them as 'loyal and moderate reformists and statesmen', and recounts that:

The first government in the history of Kuwait consisted of 11 Sheikhs and three elected members... Abdulaziz al-Saqer, Minister of Health, Humood Al-Zaid Al-Khalid, Minister of Justice and Muhammad al-Nisf, Minister of Public Works. Before holding the Ministerial positions, the three elected Ministers were prominent figures in Kuwait, as they were known for fighting corruption with an iron fist. For them, high rank position was not a priority, it was merely an instrument to support the reform movement and embrace the values of democracy. In one of the first meetings of the Council of Ministers, the Ministers were discussing a subject pertinent to the Municipality of Kuwait and its rejection to a request of property-ownership by one of the Sheikh Ministers. The rejection arose from the fact that the Sheikh did not own the land; therefore, he took the case to the Ministers Council to get the registration against the law. The three elected Ministers objected to the request, but their decision was voided as they were a minority and decisions at the council were taken by voting. During the session, minister al-Khalid deliberately asked for a coffee break to consult with his two allies, informing them "we are three elected Ministers and the majority are Sheikhs, if we agreed that voting is the tradition for making decisions, we will not make any difference. Thus, I suggest making decisions happen by consensus". Minister al-Khalid went further, and he addressed the issue personally with Jaber al-Ahmad al-Sabah, Minister of Finance and Economy, informing him that the three elected Ministers would resign, leave their Ministry cars, and walk back to their homes. Given their social status and their close connections with the Sheiks, the government accepted their proposal (al-Khatib, 2007, pp. 235-6).

Nevertheless, there are contradictions between al-Khatib's account and those of scholars such as Miriam Joyce or Mohammad al-Yousifi, who were critical of the poor representation and limited skills of some members. For example:

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<sup>52</sup> Al-Khatib refers to his colleagues as reformists. They included Yacoub Al-Humaidhi, Sulaiman Al-Hadad, and three ministers: Abdulaziz al-Saqer, Muhammad al-Nisf and Humoud al-Khaled. He also praised other independent members who were not within the movement: Yousef al-Mukhled, Khalifah al-Jerry and Ahmed al-Fouzan.

Neither the intellectual calibre nor the public spirit of the members was high. One observer noted that Bedouin members were so happy with their incomes and motor cars that they never questioned the wisdom of the government. Members from the merchant families focused only on their economic interests and the few nationalists in the assembly simply concentrated on providing opposition to whatever the government promoted. With the exception of the Nationalists, there was little cohesion between representatives<sup>53</sup> (Joyce, 1998, p. 135).

The above, though, were only observations; by implication, subjective in nature. In fact, both Joyce and al-Yousifi underestimated key points about the nature of the Council. First, elected members were thought of as elites by their tribal, merchant or nationalist communities; second, the number of members was small, with each likely to prioritize their own agenda over the Council's mission. Should this transpire, the members would not be able to complete the Constitution in the one year required. Third, social class was critical; and fourth, the mission and vision of the Council was determined from the early stages, contradicting the idea that 'the members lacked a clear vision before discussing the articles of the Constitution' (al-Yousifi, 2013, p. 25).

In fact, the written records (Minutes of Proceedings) of the Constituent Council and the Constitution Committee reveal the opposite. It was apparent that the members lacked knowledge and expertise in legal and constitutional affairs.<sup>54</sup> Therefore, from the early sessions onwards, they agreed to hire Muhsin Hafez as a legal expert and Othman Khalil Othman as a constitutional expert. They also delegated young legal and constitutional experts from the public sector to assist them further.<sup>55</sup> The Council divided up the work into eight committees<sup>56</sup>, with three members

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<sup>53</sup> The page number in the Arabic edition is p. 177.

<sup>54</sup> This chapter includes a translation of five example sessions and excerpts from the Minutes of Proceedings for sessions of both the Constituent Council and Constitution Committee.

<sup>55</sup> Hiring young Kuwaitis was a proposal from Council member, Mubarak al-Hassawi. He presented this at the second session, highlighting the massive amounts of work ahead and small number of Council members. He suggested hiring young Kuwaiti professionals to assist in the Committee's work, and work as consultants regarding legal issues. Other members, such as Humood al-Khalid, Mohammed al-Nisf and Abdullatif al-Ghanim, supported al-Hasawi's proposal. This was approved by the Council in its fourth session. For more details, see Session 2 (31.01.1962) and Session 4 (24.02.1962) of the Constituent Council.

elected to each (except the Constitution Committee). The Constitution was ready for ratification by the Amir on 15 January 1963. The Council also successfully drafted the Explanatory Memorandum, legislated 45 Bills, and resolved 15 petitions and complaints (Dashti and Marafy, 2013, p. 224).

The Constituent Council convened over 32 sessions and supervised the working process of the eight committees. It also convened to discuss major issues. If members did not reach a consensus pertinent to any constitutional provision, sessions were adjourned for further research to be conducted, or for the provision in question to be discussed further with the assembled experts. Voting on the Articles of the Constitution was always the final step. Among the eight committees formed within the Constituent Council, this chapter focuses mainly on the Constitution Committee, as it was the only committee in charge of drafting the Constitution and debating democracy.

The Constitution Committee convened over 23 sessions from 17 March 1962 to 27 October 1962, discussing, reviewing and amending the draft prepared by the constitutional experts. Although the committee completed its task in one year, consensus on certain constitutional articles proved almost impossible, especially those related to democracy and Sharia.

It was the only committee consisting of five members: Abdullatif Mohammad al-Ghanem, Speaker of the Council; Saad al-Abdullah al-Salem al-Sabah, Minister of Interior and a representative of the ruling family; Humood al-Zaid al-Khalid, Minister of Justice; Yacoub Yousef al-Humaidhi, member; and Saud al-Abdulaziz al-Abdulrazaq, member. In addition, Ali

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<sup>56</sup> The eight committees of the Constituent Council were: (1) The Constitution Committee (2) Committee of Internal Charter (3) Committee of Domestic Affairs and Defence (4) Committee of Economic Affairs (5) Committee of Legislative Affairs (6) Committee of Cultural and Social Affairs (7) Committee of Foreign Affairs and Information (8) Committee of Public Utilities.

Mohammad al-Radwan, Secretary of the Constituent Council, had the same position on the Constitution Committee.

The task of the Constituent Council and Constitution Committee was to draft, review, discuss and finally approve the constitutional provisions, with both adopting the same process in so doing. (1) The experts presented constitutional provisions to Committee members. (2) Both the legal and constitutional experts would start explaining the article in question. (3) The discussion was opened for analysis by all members. (4) After consensus was reached, the article was raised to the Constituent Council for final approval. The Council reprised the same procedures in preparation for the final draft to be ratified by the Amir (al-Yousifi, 2013, p. 26).

### **5.3 Constitutional Experts**

Playing a large part in the drafting process were three Egyptian jurists: Muhsin Hafez, Othman Khalil Othman, and Abd al-Razzaq al-Sanhuri. Each was a designated legal or constitutional specialist, except al-Sanhuri, mastermind of the Constitution and other laws in Kuwait. The renowned jurist was known for codifying the Sanhuri Code, a legal system which balances Islamic Sharia and Western laws. This twentieth century legal invention influenced many constitutions in the Arab world, very much including Kuwait's. This section focuses only on the roles of Hafez and Othman, official experts for the Constituent Council. The part played by al-Sanhuri is discussed later.

During the second session of the Constituent Council, on 31 January 1962, members approved a proposal by the Amir to designate Muhsin Hafez as legal expert on the Council. Appointing a foreigner raised concerns for member Ahmad al-Fawzan, who preferred a Kuwaiti national; but Abdullatif al-Ghanim, Speaker, described the legal expert's position as merely consultative.

Ahmad al-Khatib, the Deputy Speaker, supported Hafez; and suggested that a full time constitutional expert be hired.<sup>57</sup>

It is probable that al-Fawzan's concerns owed not to Hafez' nationality, but the latter's affiliation with the government. Opposition members<sup>58</sup> considered him more obstacle than asset (Dashti and Marafi, 2013, p. 20; al-Khatib, 2007, p. 221).

Hafez began attending Constituent Council sessions from 20 February 1962 and joined the Constitution Committee on day one. During the fourth session of the Council, on 24 February, the Deputy Speaker officially requested that Othman Khalil Othman was brought in from Egypt, as he had begun to have doubts over Hafez. According to al-Khatib:

In the Constitution Committee, it was obvious to us that Muhsin Hafez was aggravating the members and obstructing the work. He was an employee of the government and he was more interested in showing Saad al-Abdullah [Minister of Interior] his allegiance to the government than in supporting public welfare. Therefore, it was a must that the council has its own legal counsellor (2007, p. 221).

Othman became the Council's constitutional expert at its fifth session, on 21 April 1962. His appointment owed considerably to the recommendation of Ali al-Radwan, Secretary, who had a degree in law from Egypt. Othman was a renowned Egyptian jurist and erudite scholar in constitutional law. Before accepting his post in Kuwait, he was Dean of the Heliopolis University Law School in Cairo. In his memoirs, al-Khatib recounts the story of hiring Othman from Egypt as follows:

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<sup>57</sup> For a complete draft of the discussion, see the Minutes of Proceedings of the Constituent Council: Session 2, 31 January 1962.

<sup>58</sup> The opposition consisted of Arab nationalists, including Ahmad al-Khatib (Deputy Speaker), Yacoub al-Humaidhi, Sulaiman al-Hadad; Abdullatif al-Ghanim, Speaker of the House; and three ministers: Humood al-Zaid al-Khalid (Minister of Justice), Abdulaziz al-Sager (Minister of Health) and Muhammed Yousif al-Nisf (Minister of Social Affairs and Labour). All regularly met at Mohammad al-Nisf's residence in Shamiya to discuss matters, share views and agree one joint opinion on critical issues (al-Khatib, 2007, pp. 219-20).

Based on Abdullatif al-Ghanim [Speaker of the Council]'s instructions, Ali al-Radwan contacted Abdul-Aziz Hussein al-Terkait, Ambassador of Kuwait to Egypt: explaining the urgency of having Othman in Kuwait to take part in the Constitution Committee sessions which had already started. From his side, Ambassador al-Terkait contacted Othman and offered him the job. Othman who welcomed the proposal, asked for few months to terminate his tenure at the university. In response, Ambassador al-Terkait expressed some concerns that if he waited that long, the Constitution Committee would not benefit from his late arrival. The Kuwaiti Ambassador promised Othman that the embassy in Cairo would take care of all the arrangements with the Egyptian government. The next day, the Ambassador met with Jamal Abdel Nasser, President of Egypt and explained the urgency to have Othman right away in Kuwait. Nasser, who played a prominent role in denouncing the allegations of Abd al-Karim Qasim, President of Iraq against the independence of Kuwait in June 1961, did not have a second thought to order his office to expedite and facilitate the mission of Othman to arrive Kuwait as soon as possible (Al-Khatib, 2007, pp. 221-2).

Based on this account, the appointment of the jurists was not merely symbolic. In fact, they found themselves consulted on all issues. Habachy commends the efforts of al-Sanhuri and Othman to understand Kuwaiti society before drafting the Constitution:

Both scholars spent long periods of time in Kuwait, studying local conditions, requesting advice and opinion from Kuwaiti citizens in all stations of life. They acquainted themselves with the customs and traditions of the country before settling down to draft the constitution. Consequently, their work was not a mere academic exercise in constitutional law or a reception of foreign representative institutions. It was inspired by a comprehensive study of the Kuwaiti way of life and the actual needs of the country. They were able to reconcile what was best in Kuwait's Islamic tradition with what was most appropriate in Western constitutional law. Modern constitutions of other countries were put to contribution; but were not copied servilely. The texts they adopted were appropriately modified to suit Kuwaiti requirements (Habachy, 1964, p. 117).

The members trusted the jurists and considered their observations carefully. At Session 14 (23 June 1962), Humoud al-Zaid al-Khalid, Minister of Justice, linked the merits of the Constitution to the high calibre of its drafters:

I would like to draw your attention to a significant matter: For the people of Kuwait and all Arab countries, you are the drafters of the Constitution and your country is their role model. Therefore, they consider your people and the government you represent; the leading power of the Arab World. By the time, we ratify our Constitution, the Arab masses will not hold us accountable for any drawbacks. However, they will blame you and hold the United Arab Republic responsible. Through your current positions, you are dealing with a great deal of responsibility.<sup>59</sup>

Al-Khalid's comments denoted recognition that the Constitution followed and was inspired by the Egyptian model; and hence represented an achievement for the United Arab Republic and its people. However, Hafez and Othman preferred to adopt a neutral stance.

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<sup>59</sup> For the full transcript of the Constitution Committee, see Session 14, 23 June 1962, at the Archives and Library of Kuwait National Assembly.

They disclaimed involvement with the members' political decisions and described their contribution as limited to 'technical and legal' roles. Hafez noted that from a political point of view, there were issues on which the jurists did not agree with the members - whether constitutional clauses or articles - but the members decided to go against the jurists' advice. For example, appointing ministers from outside Parliament was a political decision; both Hafez and Othman were against it from a philosophical point of view.<sup>60</sup>

#### **5.4 Debates on Democracy and Islamic Sharia**

This section focuses on the major debates and discussions that took place in both the Constitution Committee and the Constituent Council, based on the original Minutes of Proceedings (MOPs) accessed by the researcher at the library and archives of Kuwait National Assembly in spring 2013.

The MOP records indicate that the Constituent Council convened over 32 sessions, while the Constitution Committee took place over 23 sessions. The following are translations of five MOPs, which tackled the debate over democracy and Islamic Sharia. Given their importance, Sessions 4, 5 and 6 are fully transcribed and translated. Sessions 7 and 19 were long and covered several subjects. I include two excerpts from these sessions too.

The MOPs are a literal record of every discussion on the Constituent Council in 1962. There are several reasons behind using them as primary sources in this research. One of the general objectives is to investigate the roots and origins of the debates relating to the notion of democracy; accessing the Council's records help us do this. Moreover, during fieldwork in Kuwait in 2013, the researcher discovered that although the MOPs were accessible at the Kuwait National Assembly library, no research had been performed on the debates. The work here,

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<sup>60</sup> Ibid.



therefore, represents the first systematic analysis of these records. The MOPs provide direct information on the intellectual background of all members of government and the Council, which in turn help explain their stances on democracy.

The original data provided by the MOPs also helps demonstrate the dilemma facing Council members over democracy and Sharia and contributes greatly to understanding the nature and schema of democracy in Kuwait. Translations of the five sessions covered by this thesis are set out below.

#### **5.4.1 Example 1: Session 4 of the Constitution Committee**

The Fourth Session of the Constitution Committee convened on 7 April 1962. Attendees included all five members of the Constitution Committee<sup>61</sup>, as well as Muhsin Hafez, the legal expert; and Ali Mohammad al-Radwan, Secretary. Council members began discussing the government system, based on a recommendation from Hafez.

Muhsin Hafez (legal expert): ‘We are at a crossroads now. We have to discuss the system of government and its form. Otherwise, we cannot draft any constitutional provision without consensus on the political foundations. These principles are the focal pursuit of the Constitution Committee’.

Without any introduction, member Yacoub al-Humaidhi responded: ‘For the sake of stability, I request the presidential system to be the government system’.

H.E. Humoud al-Zaid al-Khalid (Minister of Justice): ‘I prefer the presidential system, meaning that the head of state is the head of the government in order to ensure stability for the government’.

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<sup>61</sup> Abdullateef al-Ghanim, Speaker of the Council; Saad al-Abdullah al-Sabah, Minister of Interior; Humoud al-Zaid al-Khalid, Minister of Justice; Yacoub al-Humaidhi, member; Saud Abdul-Aziz Al-Abdul-Razaq, member.

Abdullateef al-Ghanim (Speaker of the Council): ‘I object to a presidential system and I call for the parliamentary system. We are laying the general foundations for the future and we do not want to hinder this future’.

H.E. Hummod al-Zaid Al-Khalid (Minister of Justice): ‘The available competencies are few. Therefore, we will eventually go with the wind’. Minister al-Khalid predicted that Kuwait would fail given the limited available qualifications among its citizens.

Saad al-Abdullah al-Sabah (Minister of the Interior) contributed by seeking the opinion of the legal expert regarding the most appropriate form of government based on the case of Kuwait: ‘We are willing to pledge maximum democracy, but it must be made clear that democracy is a huge responsibility and we also have to be up to this responsibility’.

Muhsin Hafez (legal expert) ended the session by suggesting the following: ‘I suggest that I present a memorandum including the advantages and disadvantages of each system [the presidential and parliamentary system] to scrutinize them and choose one’.

From these excerpts, we can surmise that this was a random discussion initiated by the legal expert. It is a matter of considerable concern that members’ views were clearly not based on solid theoretical or political positions. Instead, their arguments were simple and limited. Al-Humaidhi and al-Khalid both chose the presidential over the parliamentary system rather haphazardly. One of the main characteristics of the presidential system is an elected president; in the case of Kuwait, this is impossible, as it is a hereditary emirate.

This reflects the intellectual naivete of some members regarding the theoretical and political aspects of Kuwait’s government system; and led the legal expert to pledge full

theoretical explanations and a memorandum explaining the differences between the two systems at the next session.

#### **5.4.2 Example 2: Session 5 of the Constitution Committee**

The Fifth Session convened on 21 April 1962. Attendees included all five members of the committee; Muhsin Hafez, the legal expert; and Ali Mohammad al-Radwan, Secretary.

Muhsin Hafez (legal expert): ‘I have presented to the distinguished committee an objective comparison between the presidential and parliamentary system from a theoretical point of view and the opinion is yours to decide on what is best for Kuwait’<sup>62</sup>.

Humood al-Zaid al-Khalid (Minister of Justice): ‘I personally formed a clear idea [about the two political systems] after reading the report [memorandum]. The parliamentary system is the most appropriate system for Kuwait’.

Yocoub al-Humaidhi: ‘The parliamentary system is way more suitable [for Kuwait], as the presidential system requires an elected President and this is extraneous to our situation’.

Saad al-Abdullah al-Sabah (Minister of Interior): ‘Do you see the parliamentary system as the system that should be applied in Kuwait? Does this entitle the council to withdraw confidence from the government? I personally object to this system, [the parliamentary one] as it will lead us to many problems in the future’.

Abdullateef al-Ghanim (Speaker of the Council): ‘We can adopt [the parliamentary system] in principle, and we can add some modifications that are suitable to our situation in Kuwait’.

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<sup>62</sup> None of the Kuwait National Assembly, Library of the Faculty of Law or the main Library of Kuwait University have a copy of the theoretical comparison which Muhsin Hafez presented to the Constitution Committee. However, all constitutional experts have adopted the same theoretical framework in explaining the government system of Kuwait, presidential and parliamentary systems. This framework is discussed in depth in Chapter 6.

Muhsin Hafez (legal expert): 'It is possible to modify and amend both systems'.

Saad al-Abdullah al-Sabah (Minster of Interior): 'The parliamentary system requires that members of government are from the elected members in the parliament.'

Muhsin Hafez (legal expert): 'This is not a condition'.

Hummod al-Zaid al-Khalid (Minister of Justice): 'It is obvious from the discussion that Yacoub al-Humaidhi and I support the parliamentary system'.

Abdulateef al-Ghanim (Speaker of the Council): 'I agree with both of you'.

Saud Abdulrazaq: 'Me too. I agree with you'.

Saad al-Abdullah al-Sabah (Minister of Interior): 'I disagree with you and I request that we seek the opinion of members of the Constituent Council to express their views before we [the Constitution Committee] decide on the system we are adopting'.

Yacoub al-Humaidhi: 'We can mention [the disagreement over the political system] in the committee's report and we can present it now to the [Constituent] Council'.

Hummod al-Zaid al-Khalid (Minister of Justice): 'If we decide to present every single point on which we disagree to the Council, our work and discussions will be disrupted and we will not reach a conclusion'.

Saad al-Abdullah al-Sabah (Minister of Interior): 'Do you want to take a big leap instead of taking steps forward based on our situation and systems? Don't we have to evolve according to our circumstances?'

Humoud al-Zaid al-Khalid (Minister of Justice): ‘It is a leap when we adopt the presidential system. Whereas the parliamentary system will help us evolve in the right path and it is the system that is adopted in most of the countries worldwide, including England’.

Saad al-Abdullah al-Sabah (Minister of Interior): ‘We can seek the opinion of the Council and grant them sufficient time to think and decide on either system’.

Abdullateef al-Ghanim (Speaker of the Council): ‘We draft two projects [drafts] for the Constitution based on the mentioned systems. Then we ask the Council to choose the better project. This proposal is much better instead of taking the issue right away to the Council’.

Saad al-Abdullah al-Sabah (Minister of Interior): ‘My advice is that the system we suggest ought to be suitable for us. In my opinion, the presidential system is the system that can take us towards this direction’.

The Fifth Session ended with an agreement to summon another exceptional session to discuss whether Kuwait should adopt the presidential or parliamentary system.

In Session 5, debate on the government system was more focused and direct. The committee members had clearer perspectives: namely, that the presidential system could not apply to Kuwait, as the latter’s rulers are hereditary and unelected. It is apparent that the memorandum, presented by the jurist to explain the differences between the parliamentary and presidential systems, contributed greatly to filling in gaps in knowledge of the members on government systems in principle. For example, al-Khalid and al-Humaidhi became convinced that the parliamentary system would be more appropriate for Kuwait; not the presidential system, which they had haphazardly put forward at Session 4.

The only remaining reservation was that of the Minister of the Interior: a representative of the government and ruling family. Saad al-Abdullah al-Sabah expressed some concerns over the parliamentary system: which would grant the Council more powers, such as the ability to withdraw its confidence from the ministry and appoint ministers from the elected members. Al-Sabah's objections succeeded in delaying the final decision and opened the door to modifications.

#### **5.4.3 Example 3: Session 6 of the Constitution Committee**

The Sixth Session convened on 28 April 1962. Attendees included all five members of the committee; Muhsin Hafez; Othman Khalil Othman<sup>63</sup>, the constitutional expert; and Ali Mohammad al-Radwan, Secretary.

Saad al-Abdullah al-Sabah (Minister of Interior): 'Is it a new thing when I say that our objective is to find a stable system for our country, while we are in such circumstances? The parliamentary system is known for its complexities and instability'.

Humoud al-Zaid al-Khalid (Minister of Justice): 'It is the parliamentary system which will bring us the kind of stability you are keen to achieve'.

Othman Khalil Othman (constitutional expert):

I have read the memorandum drafted by my colleague Muhsin Hafez. It was updated and included the advantages and disadvantages of the presidential and parliamentary systems. All the drawbacks addressed by His Excellency, the Minister of the Interior on the parliamentary system were considered, such as instability of executive authority and all sorts of factional and parliamentary attempts to be in power. Also, the presidential system has its advantages and disadvantages, but regardless of where you stand on the presidential system, it only exists in the republican systems. Holding the head of state responsible for every single issue and criticizing him directly is thoroughly unaccepted in monarchies. Thus, defamation of the ruler in kingdoms and emirates does not exist and the person of the Amir or king is immune, inviolable and above any criticism and slander. In this context, we can think of having a merger between the parliamentary and presidential system in order to adopt the characteristics of each system and avoid their shortcomings as much as we can.

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<sup>63</sup> Othman was recruited from Egypt. His attendance was the first of its kind on both assemblies: The Constituent Council and Constitution Committee.

Saud al-Abdulrazaq (member): ‘What are the methods of merging the two systems together?’

Othman Khalil Othman (constitutional expert):

To achieve the requested stability without losing the parliamentary characteristics, we need to consider the following: Firstly, the person of the Amir is immune and no one is allowed to question or criticize him. [Secondly] we can also provide the position of the prime minister with a degree of stability. When the prime minister does not hold any ministerial position, this means that he is exempted from ministerial responsibility. Yes, he might be questioned by members of parliament; but in the worst case scenario, the MPs cannot withdraw confidence from the prime minister, but they can from any minister. For any mistake, ministers would be held accountable before the Parliament as officials, not the whole body of government. By approving these variants, Kuwait would not adopt the typical presidential or parliamentary system. Conversely, we have chosen something in between the two systems which is inspired from the reality of Kuwait.

Saad al-Abdullah al-Sabah (Minister of Interior): ‘We are keen to have this kind of stability that comes with the suggested system. Our main concern is the state, as for us, we will not stay forever’.

Saud al-Abdulrazaq (member): ‘Can Othman [constitutional expert] provide us with a memorandum explaining in detail how can we achieve stability when we adopt the parliamentary system in addition to the possible amendments, which he has already suggested?’

Othman Khalil Othman: ‘Yes, I can definitely do that’.

Abdullateef Thunayan al-Ghanim (Speaker of the Council): ‘Is it possible in the “in between system” you are suggesting to withdraw confidence from all the government? What is the solution if the prime minister is inefficient?’

Othman Khalil Othman (constitutional expert): ‘There are parliamentary traditions that can complete the written laws. One of the traditions: when the minister feels that he is losing his popularity, he should voluntarily give up his position and resign even if there is not a written constitutional provision’.

Muhsin Hafez (legal expert): But we are in a situation where the parliamentary traditions do not exist’.

Othman Khalil Othman (constitutional expert): ‘I meant the common parliamentary traditions that are followed in the parliamentary world’.

Abdulateef Thunayan al-Ghanim: ‘Does Othman [constitutional expert] have any comments on the subjects and articles discussed in the previous sessions?’

Othman Khalil Othman (constitutional expert):

I have read all the minutes of proceedings and I found it strong and written in a solid and coherent style. Nevertheless, I can contribute with some additions: especially, that I have noticed that the Constitution Committee did not finalize most of the articles and the majority of subjects were left without general consent. From my side, if I find anything new to add, I will bring it to the discussion.

In Session 6, then, the discussion on the governing system continued, but was more technical in nature. The constitutional expert explained why monarchies could not adopt a presidential system, as the King or Amir is immune and inviolable. He suggested some amendments to the parliamentary system to protect the prime minister by exempting him from any ministerial responsibility. With such an approach, the withdrawal of confidence from a government would be conditional, unlike in other parliamentary systems.

Ultimately, Othman suggested a compromise between the two systems, which would adopt the characteristics of both and avoid the shortcomings of each. This would render Kuwait’s governing system highly unconventional.



#### **5.4.4 Example 4: Session 7 of the Constitution Committee**

The Seventh Session convened on 22 May 1962. Attendees included all five members of the Constitution Committee; Muhsin Hafez, the legal expert; Othman Khalil Othman, the constitutional expert; and Ali Mohammad al-Radwan, Secretary.

The sessions covered above involved literal depictions translated from Arabic and were almost entirely devoted to discussions on the proposed system of government. However, from Session Seven onwards, the debates became manifold and broad. In each session, members discussed several issues, not necessarily pertinent to the interest of this thesis. To avoid prolongation, redundancy and irrelevant information, we focus now only on the extracts covering the debates of democracy and Islamic Sharia.

At Session 7, Othman Khalil Othman, the constitutional expert, presented a reviewed draft of the first section of the Constitution of Kuwait, based on the recommendations of the previous sessions. This included: The State and System of Government, General Provisions, The Head of State, Legislative Power, Executive Power, Judicial Power, General and Transitional Provisions. Othman did not present a complete draft of the Constitution, as he categorized the context of the second and third sections (The Fundamental Constituents of Kuwaiti Society, and Public Rights and Duties) as separate and independent from the first section. Othman had followed the consensus of constitutions worldwide, drafting the content of Sections 2 and 3 from the Universal Declaration of Human Rights (UDHR), issued on 10 December 1948 in Paris.

This was the first session at which the committee discussed the Sharia clause. The Minister of Justice initiated the following discussion:

Humoud al-Zaid al-Khalid (Minister of Justice): ‘According to the first draft, the state religion is Islam and Sharia is the main source of legislation, but the current draft does not include the Sharia clause. This phrase is very vital’.

Othman Khali Othman (constitutional expert):

I did not mean to exclude this clause, as I was the one who included it in the first place. I think it is better if we make it part of the Civil Law instead, as it is the core of all other laws. I have some reservations on using ‘the main source of legislation’. Therefore, I decided to avoid it and evade any future misconceptions. This might cause serious problems for the laws not derived from Sharia or the laws that are a source of controversy for the Islamic law. For instance, the Criminal Law does not coincide with Sharia, neither the laws pertinent to banking, insurance and loans. To avoid all these complications, I exclude it from the Constitution and I prefer having this clause in Kuwait Civil Law, just as in the case of Egypt’s Civic Code.

Saad al-Abdullah al-Sabah (Minister of Interior): ‘This clause is important’.

Muhsin Hafez (legal expert): ‘There is an advantage in adding this clause, and it is mentioned in the Constitution of Pakistan. It means that Sharia is not the only source of legislation, but it is one of the sources’.

Humoud al-Zaid Al-Khalid (Minister of Justice): ‘Yes indeed, misconceptions are expected to happen in relation to the laws that are not derived from the Islamic Sharia’.

Saud al-Abdulrazaq (member): ‘We can keep the clause as it is, to avoid any complications’.

Othman Khalil Othman (constitutional expert):

There is no problem if you decide to keep the Sharia clause. However, we can use a more flexible wording instead: ‘Islamic Sharia is a main source of legislation’, meaning that there are other main sources. In this case, this article would be specified for the state religion and Sharia as a source of legislation followed by another article dedicated to the state official language and the wording would be as follows: ‘The official language of the State is Arabic’.

As we can see, discussion of the Sharia clause took place during the Seventh Session. Al-Khalid, Minister of Justice, noted that unlike the previous draft of the Constitution, the reviewed draft at this session excluded the Sharia clause from its main text. The preceding draft identified Islam as

the state religion, and Sharia as ‘the main source of legislation’. Al-Khalid raised this issue to the committee, asking Othman for further clarification. For his part, the constitutional expert convinced the members that the wording of the Constitution provisions mattered. If the members insisted on including the Sharia clause, he believed that the wording should consist of: ‘Islamic Sharia should be a main source of legislation’. If not, he suggested following the Egyptian model and making the Sharia clause part of Kuwait’s Civic Law.

Surprisingly, the constitutional expert did not mention the historical controversy over the Sharia clause, which originated in the Arab world during the nineteenth century. However, he explained the technical aspect of it. In terms of possible wording, if the Constitution stated, ‘Sharia is a main source of legislation’, this would give legislators the flexibility to adopt other laws. By contrast, if the relevant article promulgated that, ‘Sharia is the main source of legislation’, this would enforce restrictions on legislators, who would have to abide by Sharia law only. Thus, Othman suggested following the Egyptian model, which maintained the Sharia clause in its Civic Code.

Similar to the debate on the system of government, the Sharia clause divided the committee members once again. The disagreement was between ‘a’ or ‘the’ main source of legislation. After a long session, the committee approved both the Sharia and democracy articles. In terms of Sharia provision, the members insisted that adding an article setting out the state religion (known as ‘the Sharia clause’) was mandatory. With regards to the disagreement over the wording, the committee favoured flexibility over rigidity; and chose to enact an article which could apply under both Islamic and Western law. The final phrasing of Article 2 was therefore as follows: ‘The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation’ (see Appendix).

In the case of Article 6 (the ‘democracy article’), the committee approved it by consensus, stating: ‘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’ (see Appendix).

#### **5.4.5 Example 5: Session 19 of the Constituent Council**

The Nineteenth Session of the Constituent Council convened on 15 October 1962. Attendees included all 20 members; Muhsin Hafez, the legal expert; Othman Khalil Othman, the constitutional expert; and Ali Mohammad al-Radwan, Secretary.

At Session 19, Council members discussed the complete draft of the Constitution of Kuwait; and the debate on Sharia reopened, amid more divisions and disagreement. The following extracts focus on the Preamble and the Sharia Clause.

The article covering democracy was approved directly with no further discussion. The Council agreed that the government system of Kuwait would be democratic; but left the explanation of the form of government to the Explanatory Memorandum. In other words, the Constitution did not state that Kuwait had adopted a parliamentary system; merely a democratic one.

##### ***5.4.5.1 Discussion of the Preamble***

Ali al-Radwan, Secretary of the Council, started the preamble discussion by reading the text for final deliberation:

In the name of Allah, the Beneficent, the Merciful, We, Abdullah al-Salim al-Sabah, Amir of the State of Kuwait being desirous of consummating the means of democratic rule for our dear country; and having faith in the role of this country in furthering Arab nationalism and the promotion of world peace and human civilization; and striving towards a better future in which the country enjoys greater prosperity and higher international standing, and in which also the citizens are provided with more political freedom, equality, and social justice; a future which upholds the traditions inherent in the Arab nature by enhancing the dignity of the individual, safeguarding public interest, and applying consultative rule yet maintaining the unity and stability of the country; and having considered Law Number I of 1962 concerning the system of Government during the period of transition; and upon the resolution of the Constituent Assembly; do hereby approve this Constitution and promulgate it (see Appendix).

Ahmad al-Khatib (Deputy Speaker):

I do notice a contradiction between the preamble and the provisions of the Constitution. [He quotes] ‘The citizens are provided with more political freedom, equality and justice...etc’. By going through the Constitution, I cannot see ‘more political freedoms’ as stated. I have to draw your attention to this crucial matter: when we approve this preamble, you need to bear in mind that we have agreed on giving our citizens more freedoms.

Othman Khalil Othman (constitutional expert): ‘I do believe that plenty of the Constitution provisions indicated political freedoms. You will notice that by the time we review each article’.

Ahmed al-Khatib (Deputy Speaker): ‘This preamble should be interpreted into a pragmatic and realistic account. Although discussing this matter is useless at this stage, the political freedoms need to be revisited, when the citizens realize its values. We members of the Council already have this impression that there is a vacuum between what is written in the preamble and the provisions of the Constitution’.

#### ***5.4.5.2 Discussion of the Sharia Clause***

Ali al-Radwan (Secretary): ‘Article Two states that the religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation’.

Khalifah Talal al-Jerry:

Mr. Speaker, since Kuwait is an Islamic State and Islam is the only religion, I do request to enact the following clause: ‘The main source of legislation’, instead of ‘a main source of legislation’. I insist that we adhere to our major ideals in words and deeds. Sticking to Sharia as ‘the main source of legislation’ means that we are achieving justice, human emancipation, and guarantee freedoms based on the methods drawn by Allah to his own people. This also means that we abide to our religion, and we extend the mission of our great prophet. We are also reassuring our faith in Allah, and its teachings to us on Earth. This is our goal and the goal of each Muslim. All legislation we enact in this distinguished Council must follow the guidelines of Allah and his prophet. We shall strive and work hard for the sake of [our nation] *Ummah*.

Ahmad Khalid al-Fawzan: ‘I support Khalifah’s proposal and I want Islamic Sharia to be the main source of legislation instead of a main source’.

Nayef al-Daboos: ‘Me too, I approve the suggested amendment’.

Saud Abdulaziz al-Abdulrazaq: ‘I support the proposal of my colleague Khalifah al-Jerry’.

The Speaker of the House now sought the opinion of Othman Khalil Othman, the constitutional expert.

Othman Khalil Othman:

Undoubtedly, we are all keen to abide by the regulations of Islamic Sharia, because it has precedence in securing freedoms, equality and social justice. However, Sharia itself left the door open to adopt new trends and norms in life affairs. In today's world, government systems derive from modern reality and other branches of Islamic Sharia. Although we want to comply with Sharia, at the same time, we want to give the legislator the opportunity to adopt modern laws that do not have origins in Sharia.

If we say Sharia is 'a main source' we are giving Sharia precedence without restricting the horizons for the legislator. Conversely, we gave him a responsibility to adjust between Islamic Sharia and urgent necessities of life. The legislator is you and your Council. However, when we say that Sharia is the main source of legislation, we are obliging the legislator to stick to Islamic Sharia even if there are other laws that he needs to apply. Yet, they do not exist in Sharia.

The two clauses are not drastically different. In the current clause, Sharia has precedence but it comes with other main sources that are in harmony with the modern reality and its necessities. If we adopt it, the other clause [the main source of legislation]: what would happen to the banks, companies, commercial deals, insurance and penal codes? All of this is not legislated in Sharia and may never be. Whereas, with the current clause [a main source of legislation], the legislator has the option to undertake Islamic Sharia or modern laws, and the final word is in the hands of the legislator which is the National Assembly.

Ahmad al-Fawzan: 'I thank the expert for his comprehensive explanation about the two clauses.

We have to enact this clause and we have to follow the religion of Islam. Laws are liable to change, whereas Islamic Sharia is eternal. Therefore, I believe we have to abide by Sharia and cut off the hands of thieves if necessary'.

Ahmed al-Khatib (Deputy Speaker):

I have a question for my colleague who supports cutting off hands and embracing the principle of an eye an eye [and a tooth for a tooth]. Are you aiming at the literal implementation of Sharia law? What are you trying to convey here? Is it: we are a Muslim country and we have to comply with the teachings of our religion? What I do understand from your suggestion that you want us to apply *Hudūd*?<sup>64</sup> Am I right?

Ahmad al-Fawzan: 'What I truly mean that our laws are derived from Islam and as far as cutting off hands is within the Islamic Sharia law, then I agree with it'.

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<sup>64</sup>The concept of punishment and penalty under Islamic law.

Mubarak al-Hassawi: ‘I do not see any problem in adopting the clause suggested by our colleague Khalifah, and I do not see a great disparity between “a main source” or “the main source”. Therefore, we should not spend longer time discussing ‘a’ or ‘the’ as both are fulfilling the meaning’.

Othman Khalil Othman (constitutional expert): ‘The difference between the two clauses has to do with the flexibility the legislator has with laws: to what extent does the legislator have to abide to Islamic law? The suggested clause obliges the legislator to abide by Sharia Law only. Whereas, when we say that Islamic Sharia is a main source of legislation, the legislator has to undertake Sharia and other laws’.

Ahmad al-Khatib: ‘This question for my colleagues who are supporting making the Islamic Sharia the main source of legislation: what about our situation [in Kuwait]? Can you tell us what would happen to the banks, companies, businesses and all our deals abroad?’

Khalifah Al-Jerry: We requested to add ‘*al*’ (the) to the word [source] but we never requested to state the following phrase: ‘The main source’. In this case, if we added the phrase ‘the main source’, this means that the meaning of the clause comes with restrictions, as indicated by the [constitutional] expert<sup>65</sup>.

Abdullatif al-Ghanim (Speaker of the Council): ‘The interpretations of your suggested clause would prevent the legislator in the future from enacting laws that do not exist in Sharia laws: are you still up for your suggestion?’

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<sup>65</sup> In Arabic linguistics, adopting either phrase, ‘the source’ or ‘the main source’, would mean the same thing. However, adopting ‘the main source of legislation’ instead of ‘a main source of legislation’ would limit the legislator to implement the laws of Islamic Sharia only.

Khalifah al-Jerry: ‘Yes, I still insist on adding the article ‘the’ instead of ‘a’ to the state religion clause’.

Humoud al-Zaid al-Khalid (Minister of Justice): ‘The Committee examined this Article closely. If you insist on adopting the absolute [version of] Islamic Sharia, what will be the fate of our hereditary system? The Islamic Sharia does not acknowledge the hereditary system, but it calls for Shura’.

Nayef al-Daboos: ‘I suggest we postpone discussing this Article’.

Abdulaziz Hamd al-Sager:

There are definitely Muslim countries which preceded us in several fields, and if we state that the religion of Islam is the main source of legislation, this means that we have to close [our] banks and companies. There is not one Kuwaiti national who would support this idea. About 90% of Kuwaitis are trading and dealing with banks and companies. In fact, these banks reward them with 5% or 7% interest on their assets, and earning this interest is taboo in Islam. Therefore, I urge you to reconsider this article with more understanding of reality and its necessities.

Nayef al-Daboos: ‘I request adjourning the discussion’.

Sulaiman al-Hadad: ‘Indeed, adjournment is a good idea’.

Abdullatif al-Ghanim: ‘Given its prominence, the majority want to adjourn discussing this Article. If we did not scrutinize this subject carefully, we might end up taking the wrong decision. Thus, I do not mind postponing voting on the Sharia clause’.

Final deliberation on the Sharia clause took place at Session 24 of the Constituent Council on 24 October 1962. Here, the Council ratified Article 2 without any objections, with it reading as follows: ‘The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation’ (see Appendix).



At Session 19, as we have seen, the Deputy Speaker was critical of the preamble: describing it as contradictory to the articles of the Constitution. His objection was the first of its kind in the Council. While members of the government were keen to secure more powers for the executive, the conservatives' main concern was how to enact Sharia as the only source of legislation, while al-Khatib and other reformists sought greater political freedoms. Al-Khatib's objection provided a reminder that drafting a contract between the people and their rulers was almost impossible.

Meanwhile, the suggestion to amend the Sharia clause and make it the only source of legislation reflected two major issues. First, the constitutional expert kept explaining the linguistic and technical differences between the two Sharia clauses without any information as to their origins. Second, when four members insisted on enacting the clause, it clearly owed to their conservative image of Kuwait. Al-Jerry, who initiated the proposal, changed his mind, because he simply had not understood the difference between the two options.

### **5.5 Evolution of the Sharia Clause in the Arab World**

The disputes over the Sharia clause were hardly exclusive to Kuwait. On the contrary, they reflected the broader debate between Sharia and democracy across much of the Arab world.

Constitutional clauses stating that 'Sharia is a main source of legislation' or 'the main source of legislation' originated in Syria and Egypt. In the 1950s, Syria was the first Arab country to adopt *fiqh*<sup>66</sup> as the main source of legislation (Lombardi, 2013, p. 737). It was not until 1962 that Kuwait ratified its own Sharia clause, which as we have seen, held: 'The religion of the state is Islam, and the Islamic Sharia shall be a main source of legislation'.

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<sup>66</sup> According to Lombardi, references to Sharia as a source of legislation were made in different terms in different constitutions. Some used the word *fiqh* (notably, Syria's 1950 Constitution): the equivalent of Islamic jurisprudence. For Lombardi, *fiqh* is 'a traditional scholarly interpretation of Islamic law', with some principles of Sharia (2013, p. 734).

Despite most twentieth century Arab constitutions being drafted by Egyptian jurists, Egypt itself did not adopt Sharia as a source of legislation until 1971, during the rule of Muhammad Anwar al-Sadat. In fact, Egypt's 1923 Constitution identified Islam as the state religion, but never enacted Sharia as a source of legislation. The 1952 military coup suspended the 1923 Constitution; Egypt endured several temporary constitutions without any Sharia clauses, under the rule of Jamal Abdel Nasser.

It is essential to shed light on the historical background of the Sharia clause for the following reasons:

1. It provides a threshold from which to understand the longstanding conflict and controversy between Sharia and democracy (see Chapter 3).
2. The Sharia debate is not merely a cultural or traditional issue, as some conservative voices tend to claim. The question of whether Sharia is 'a' or 'the' main source of legislation is in fact political - and requires further investigation.
3. There is a relationship between drafting the Constitution of Kuwait and the historical background of the Sharia clause in the Arab world. The MOPs only underscore that the debates on Sharia in the Kuwaiti Constituent Council were part of a broader debate on democracy versus Sharia across the Arab world.
4. Abdulrazaq al-Sanhuri, the Egyptian jurist, represented a common link between the Constitution of Kuwait and the conflict over the Sharia Clause in the Arab world more generally. Al-Sanhuri drafted the Kuwaiti Constitution and other civic laws in the region via a legal theory he had developed, which sought to accommodate Western and Islamic laws under one umbrella. The impact of the 'Sanhuri Code' on the Kuwaiti Constitution

and the Sharia/democracy debate in various Arab states was plainly impossible for this study to ignore.

What is in the wording of the Sharia clause? Why does it seem more complex in writing than it does verbally? The complexity resides in the wording. Reading the following two clauses in English might not affect or change the original meaning of the proposition:

- Sharia is a main source of legislation (*ash-Sharī'ah maṣḍar ra'īsī li t-tashrī'*) /

الشريعة الإسلامية المصدر الرئيسي للتشريع  
(*ash-Sharī'ah maṣḍar ra'īsī*)

However, in Arabic, application of 'the' and 'a' causes a profound shift in meaning. When a constitution states that Sharia is 'the main source of legislation', this means that state legislation is derived from Islamic Sharia only; but when it enacts that 'Sharia is a main source of legislation', state legislation is not confined to Islamic Sharia, and has the choice and flexibility to enforce other laws too. The question of wording, indeed, is first and foremost a linguistic issue.

### **5.5.1 The Rise of Religious Jurists**

During the nineteenth century, the Sharia clause was not especially controversial when first enacted in Arab constitutions; but proved neither popular nor effective. The Egyptian Constitution adopted the clause based on a suggestion from a member of the Constitution Drafting Committee, who had been inspired by the 1949 Sanhuri Code. The following clause was thereby added: 'The principles of the Islamic Sharia are a chief source of legislation'. Inserting such a clause had generally been a symbolic act; Egypt followed this trend without reservation (Lombardi, 2013, p. 754).

Yet in the nineteenth century, there was also an attempt by the *fuqahā'* to develop Islamic political theory. A generation of Islamic scholars adopted the school of Rashid Rida<sup>67</sup>, a Syrian Islamic thinker who suggested reforming state laws based on the enactment of Sharia and consultations with *fuqahā'*. In this context, we can understand the early twentieth century rise of Rida's Islamic thought: his followers managed to convince some Arab leaders that the enactment of Sharia was inevitable, because it embraces Islamic teachings and does not contradict the welfare of Muslim society.

Rida's disciples succeeded in creating an alliance with rulers based on mutual interests. For the latter, the *fuqahā'* were nothing more than a base, through which to win the hearts and minds of their people. For the former, convincing the rulers to adopt Sharia law was merely a starting point for their long-standing vision of the Islamic Caliphate. Since then, the enactment of Sharia in Arab constitutions became something of a legal ritual; but the wording of the Sharia clause has remained a source of controversy.

### **5.5.2 The Rise of Secular Rulers**

In the post-colonial era, the Arab world experienced a major rift between leaders and *fuqahā'*. The so-called coalition or alliance between both parties had been dissolved. Arab leaders broke religious norms, which had hitherto held that all state laws should be interpreted according to Islamic law. 'Accordingly, Arab constitutions during this period ceased to include any provisions indicating that the state was obliged to respect Islamic legal principles' (Lombardi, 2013, p. 739). The groundswell of independence across the region re-shaped the politics and aspirations of both rulers and ruled. Arab societies began questioning the validity of Sharia interpretations, and

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<sup>67</sup> Rashid Rida was the first religious jurist to call for the enactment of Sharia in state laws.

whether it could be incorporated into the laws of these newly independent states. Others were more protective of Islamic identity and opposed the separation between state and *fuqahā'*.

Meanwhile, some Muslim intellectuals, inspired by Western political thought, could not identify any violation of Islamic Sharia in adopting a secular perspective. This group held the *fuqahā'* responsible for being too rigid and strict in their interpretations of Sharia, leading directly to the rift with their rulers. Instead, they called for a modern understanding of Islamic law (Lombardi, 2013, pp. 737-40).

### **5.5.3 Sanhuri Code**

As noted earlier, this civic code was named after Abdulrazaq al-Sanhuri, the Egyptian legal theorist. According to Lombardi, unlike the traditional *fuqahā'*, Sanhuri was influenced by both Islamic thinking and European legal theory. His ideas provided an accommodation for both forms of law: '[Al-Sanhuri] suggested that the public interest might actually require modern Arab states to apply (or continue applying) many of these transplanted European rules - even though, in some areas, the government might reasonably decide instead to take a rule directly from the *fiqh* tradition' (Lombardi, 2013, p. 741).

Based on what this section has set out, then, the question of the Sharia clause appears to have gone through three distinct phases. Initially, the idea of enacting Sharia as the chief source of legislation lacked any focus on the question of 'the' or 'a main source of legislation'<sup>68</sup>. It was welcomed by Arab leaders, who formed an alliance with the *fuqahā'* of mutual benefit to both. Then, given the rigid, strict interpretations of the *fuqahā'*, newly independent Arab leaders condemned the absolute enactment of Sharia. Soon afterwards, with Arab nationalism

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<sup>68</sup> The inconsistency of Sharia enactment owed in part to Islamic political thought not having spread as it would more latterly, meaning the enactment of Sharia became a custom of national identity, rather than anything more significant.

dominating the region, the *fuqahā*’ were undermined and the rule of Islamic law pushed towards the fringes of society. Third, the Sanhuri Code brought back a balance: both Sharia and the adjustment and flexibility provided by European laws.<sup>69</sup> This was welcomed in the Arab world: with most Arab constitutions adopting this Code through an article entitled ‘State Religion’. This defines Islam as the state religion and Sharia as a main source of legislation.

The history of the Sharia clause reveals several important issues:

1. Arab constitutions drafted in the twentieth and twenty-first centuries adopted the same language and political direction, with only minor disparities in text, wording and interpretation.
2. Arab constitutions, very much including that of Kuwait, were drafted according to the Sanhuri Code. Yet the debate over the constitutional paradoxes in Kuwait shows that even Sanhuri’s balance is not ideal, because it is so non-specific. The Kuwaiti text adopted democracy, Sharia and Arab nationalism without sufficient theoretical explanation of any of these, or proper consideration of whether these different systems could be brought together. As with other Arab constitutions, the Kuwaiti Constitution is left appearing both general and controversial.
3. The minutes of the Constituent Council, Constitution Committee and the Explanatory Memorandum are the most important, enduring documents in Kuwaiti political history. Yet none of these documents mentioned or acknowledged the impact of the Sanhuri Code in the laws and Constitution of the State of Kuwait.

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<sup>69</sup> According to Lombardi, while the code was considered a successful attempt at harmonizing Islamic and European law, traditional *fuqahā*’ and scholars of the Muslim Brotherhood were very critical, describing it as ‘pseudo-Islamic’ (2013, pp. 741-72).

## **5.6 Conclusion**

Closely interrogating the discussions of the Kuwaiti Constitution Committee and Constituent Council has helped this study better understand the moves of members towards democracy, as well as their reasons in selecting a parliamentary system. To draw this chapter to a close, we now summarise the key findings from the research on the MOPs.

First, it was clearly positive that the Constitution of Kuwait was drafted and approved by an elected Council. Indeed, appointed members of the government chose not to participate in the committees: ensuring that the Constitution was drafted exclusively by the people of Kuwait.

The prominent role of Abdullah al-Salim al-Sabah, the Amir of Kuwait, in overcoming any obstacles facing the Council members in completing the Constitution was of especial importance. Not only was he fair and progressive, but he lent the opposition fully open ears. He rejected the efforts of his son, Saad al-Abdullah, the Minister of the Interior, to obstruct and obfuscate. These could have succeeded and alienated the opposition had it not been for the calm role of the Amir.

The impact of the Egyptian model was highly apparent. Kuwait recruited three Egyptian jurists, one of whom was Abd al-Razzaq al-Sanhuri, whose legal theory inspired and influenced many Arab constitutions. The MOPs proved that the members were dependent on the jurists for guidance and consultation, as they lacked the requisite knowledge and expertise in legal and constitutional affairs.

Yet despite this, the jurists' role was more technical when it came to controversial provisions. They found themselves needing to remodel and adjust the parliamentary system of Kuwait according to the Council's final decisions. For example, an appointed government and including

the Sharia clause were decisions made by members against the jurists' advice. In the end, the Constitution reflected the Kuwaiti spirit and established its own unique model, which merits deeper research and investigation beyond this thesis.

Two main subjects dominated the Council debates: democracy (Article 6) and Sharia (Article 2). Discussing whether the governing system would be parliamentary or presidential was a priority of the early sessions, for each system has its own structure and characteristics. The concept of democracy itself was not questioned by any of the members; but choosing between the forms of democratic government proved both critical and controversial. Even the articles related to democratic values - freedom, justice, equality and human rights - were not discussed, but approved directly: deriving as they did from the Universal Declaration of Human Rights. More importantly, after agreeing on a parliamentary system and re-modelling it according to the Kuwaiti case, the Constitution would describe the government system as 'democratic', but the explanation of the form of government was left to the Explanatory Memorandum (see Chapter 6).

The contribution of the Sanhuri Code to the laws and Constitution of Kuwait was never mentioned in the MOPs. When the constitutional jurist raised some concerns on the Sharia clause, and suggested more flexible wording, which would make Sharia a main source of legislation, he did not share any information on the historical background of the clause and how it had evolved in the Arab world. Some members were apprehensive that not including the Sharia clause would undermine the Arab-Islamic identity of Kuwait. Ultimately, the credit must go to the jurist, who successfully convinced the Council to make Sharia 'a', not 'the' main source of legislation.



Regardless of all these obstacles, the Constitution of Kuwait was ratified as scheduled on 11 November 1962. This was a great achievement; but the MOPs prove that consensus was difficult, and many compromises were needed: above all, the adoption of ‘a democratic system as a middle path between the two systems; the parliamentary and presidential system, with more leaning towards the first’ (see Chapter 6).

The MOPs also demonstrate that neither the government nor the Council’s members were fully satisfied even when the Constitution was close to ratification. The government (more particularly, the government representative) remained cautious over giving up some of its executive powers to the future parliament, such as appointing the elected members as ministers. The Deputy Speaker, meanwhile, criticized the contradictions between the preamble and the provisions of the Constitution, claiming that the ‘freedoms’ in the document were not as advertised.

Above all, and of enormous significance to this thesis, there remained no proper explanation or definition of the system of democracy and government adopted in Kuwait. Accordingly, the next chapter demonstrates the conceptual underpinnings of Kuwait’s government system: based on further exploration of the Constitution of Kuwait, the Explanatory Memorandum and the work of scholars of Kuwaiti constitutional law.

## **Chapter 6: The Conceptual Underpinnings of Kuwait's System of Government**

### **6.1 Introduction**

Kuwait's pathway to democracy has been discussed at several levels in this thesis: from the local and regional circumstances that led it to adopt democracy as a governing system (see Chapter 2); to the debates which took place in the Constituent Council, which endeavoured to draft, review and ratify the Constitution (see Chapter 5). This chapter seeks to explore and analyse the theoretical foundations of Kuwait's governing system, as explained by Kuwaiti constitutional law.

This is a political study on the democratic system of Kuwait – but it was essential to interrogate the literature on Kuwaiti constitutional law, to answer the questions related to the theoretical foundations of Kuwait's government system. Whether for technical or legalistic reasons, its theoretical underpinnings were predominantly established by constitutional law scholars. Thus, most of the literature looked at in this chapter specializes in Kuwaiti constitutional law, and was accessed at the Faculty of Law library, Kuwait University. All data set out here were in Arabic, translated by the researcher.

The broader aim of this chapter is to scrutinize the concepts and theory behind democracy as it is understood in Kuwait. We set out a definition and explanation of democracy from three different domains, based on Kuwaiti constitutional law: The Constitution of Kuwait; The Explanatory Memorandum; and scholars of constitutional law. In addition, the chapter will answer the following: (1) What is the model of democracy adopted by the Constitution of Kuwait? (2) What are the philosophical foundations of the Kuwaiti system of government? To answer these questions, it is paramount to demonstrate how Kuwait's supreme sources of legislation (its

Constitution and Explanatory Memorandum) define and explain democracy. These critical sources have rarely, if at all, been investigated thoroughly by political scientists.

## **6.2 Democracy in the Kuwaiti Constitution**

Article 6 of the Constitution of Kuwait states: ‘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’ (see Appendix). Accordingly, Article 6 has become known as the ‘Democracy Article’, or the ‘Governing System Article’.

Within the 183 articles of the Constitution, the word ‘democracy’ is mentioned only once - in Article 6. In addition, the preamble to the Constitution, a token of the Amir’s ratification of the latter, also mentions ‘democratic rule’. Other articles related to democratic values do not mention democracy directly; but do reflect liberal/ democratic values such as freedoms, justice and equality.<sup>70</sup> Yet the Constitution does not define democracy or explain the model or nature of democracy to be adopted.<sup>71</sup> On the contrary, it left this mission to the Explanatory Memorandum (EM), discussed in the next section.

## **6.3 Democracy in the Explanatory Memorandum**

Before we turn to the explanation of democracy in the EM, it is pertinent to address the definition and role of EM in the first place. Unlike other Memoranda, Kuwait’s EM was drafted with a ‘constitutional characteristic’: meaning it has the same supreme legal power as the Constitution, and amendments cannot be made without approval from the Amir and a majority vote of the National Assembly.<sup>72</sup>

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<sup>70</sup> See Appendix for the complete text of the following provisions in the Constitution of Kuwait: Articles 7, 29, 30, 35, 36, 37, 43, 44, 50, and 80.

<sup>71</sup> The Kuwaiti Constitution was written based on a contract between ruler and ruled; it is rigid and brief. This helps explain why it does not define or explain democracy.

<sup>72</sup> **Article 174:** ‘(1) The Amir or one-third of the members of the National Assembly have the right to propose a revision of the Constitution by amending or deleting one or more of its provisions or by adding new provisions. (2)

According to al-Tabtabai, in most cases, EMs are limited to defining and clarifying in detail the provisions of a national constitution. It generally reveals the rules, original interpretations of norms and concepts not mentioned in the original text. Normally, an EM is not part of legislation and as a result, does not have the same legal power as a constitution. In certain countries, EM drafters failed to accurately clarify a particular provision; almost always in these cases, the EM could not add to or amend any rule or provision in the main text of the constitution in question. In addition, the process of drafting the EM was separate and independent from that of the constitution. The latter required propositions, drafting, discussions, voting and ratification; the former was an entirely different process and did not entail the same procedures (al-Tabtabai, 2009, pp. 344-5).

Yet this was not the case with the EM of the Constitution of Kuwait. It is an integral part of the Constitution and holds the same legal power and value (al-Moqatei, 2013, pp.113-4). Moreover, Kuwait's constitutional doctrine defines the EM as 'the completing volume of the Constitution, although the content of the EM is an expanding explanation of the provisions of the Constitution' (al-Tabtabai, 2009, p. 348).

Thus, in Kuwait, the Constitution and EM form two sides of the same coin. Before the law, the two documents are as one: equal in value and authority. Why is this? The EM was discussed, drafted and approved by the same Constitution Committee as that which drafted the Constitution of Kuwait in 1962. The elected members of the Council decided to treat both documents as one

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If the Amir and the majority of the members constituting the National Assembly approve the principle of revision and its subject matter, the Assembly debates the Bill article by article. Approval by a two-thirds majority vote of the members constituting the Assembly is required for the Bill to be passed. The revision comes into force only after being sanctioned and promulgated by the Amir regardless of the provisions of Articles 65 and 66. (3) If the principle of revision or its subject matter is rejected, it may not be presented again before the lapse of one year from the rejection. (4) No amendment to this Constitution may be proposed before the lapse of five years from its coming into force'.

project. 'The EM of Kuwait is a source for many constitutional regulations applied today in Kuwait' (al-Tabtabai, 2009, p. 345). The consensus that the EM is equal to the Constitution derives from the principle that the constitution enacts the laws and the EM explains them in detail, to avoid any obscurity or vagueness.

Moreover, on 11 November 1962, Abdullah al-Salim al-Sabah, the late Amir (1950-1965) ratified the Constitution of Kuwait and the EM as one project, as specified by the Preamble of the Constitution:

In the name of Allah, the beneficent, the merciful. We Abdullah al-Salim al-Sabah, Amir of the State of Kuwait, desiring to use the means of democratic rule for our dear country; and, having faith in the role of this country in furthering Arab nationalism and the promotion of world peace and human civilization; and striving towards a better future in which the country enjoys greater prosperity and higher international standing, and in which also the citizens are provided with more political freedom, equality, and social justice, a future which upholds the traditions inherent in the Arab nation by enhancing the dignity of the individual, safeguarding public interest, and applying consultative rule yet maintaining the unity and stability of the country; and, having considered Law Number I of 1962 concerning the system of government during the period of transition; and upon the resolution of the Constituent Assembly do hereby approve this constitution and promulgate it (see Appendix).

The content of the EM is inviolable; in the case of any proposal to add to, review and amend it, it should abide by the same regulations of the constitutional amendments as stated in Article 174.

Whether the Constitution or the EM, the consent of the Amir and majority vote of two-thirds of Parliament is required, otherwise amendments cannot be sanctioned.<sup>73</sup>

Thus Article 6 enacts that democracy is the governing system of Kuwait, and the people are the source of all powers. Yet the Article does not provide any further explanation about the nature and model of democracy to be adopted. That said, though, Section 3 of the EM does describe democracy, as follows:

For ensuring the unity and stability of the government, the Constitution adopted a democratic system as a middle path between the two systems; the parliamentary and presidential system, with more leaning towards the first, because the presidential system exists only in the republics, and the main principal of the

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<sup>73</sup> Ibid.

presidential system is the head of state who is elected by the people for a few years, and he is responsible before his people and his representatives [Ministers] in particular. Additionally, it was wanted, by this leaning that the governance will not lose its popular character in the parliamentary oversight or defies the traditional heritage of the Shura as well as in the rapid reaction on the style of governance and the actions of the rulers. It is not a secret that if opinions remitted and the advice delayed, they would mostly lose their impact, and miss out on its role in guiding the governance and management alike.

It should be noted that these parliamentary virtues did not make the Constitution forget the defects of the parliamentary system, which were revealed by the constitutional experiments, and it did not obscure the view of the stability feature which is treasured by the presidential system. Perhaps for the parliamentary system the devil lies in the solidarity of ministerial responsibility to parliament, it is worrying that this responsibility will make the government a target of a relentless battle between the parties, and even makes this goal a major cause of being a member of this or that party. It is the most dangerous for the safety of the democratic governance to make this deviation a base for building political parties in the state instead of programs and principles. In addition, making the government a desire not just a mean to achieve a safest rule and a better life, and if democratic governance ends up like this, the rights and freedoms will be forfeited in the name of protecting them. As well as political action will be astray to become a trade in the name of patriotism, and then the ministerial solidarity will fall apart on the rock of hidden personal interests. Moreover, the public bloc inside and outside the parliament will be cracked, which loses the parliament its strength and the people their unity. For all of that it was a necessity to learn from the experiences of other countries in this respect; and get out as much as necessary from the logic of a pure parliamentary system, even though the system of the emirate is hereditary<sup>74</sup> (Explanatory Memorandum, 1962).

As we can see, the EM states that Kuwait adopted a system in between the parliamentary and presidential system; but without any explanation of or reference to the sources and characteristics of a democratic system. It is also plain that Section 3 goes to far greater lengths in critiquing the formation of political parties than explaining the parliamentary system, despite the former being a key feature of the latter. Further, Section 3 does not fully explain the reasons behind ‘more inclinations towards the parliamentary system’. The EM states that the presidential system only exists in republics where the people elect the head of state for a certain period of years; and that they are responsible before their people and especially, their representatives.

The EM also justifies Kuwait’s accommodation between the parliamentary and presidential systems, to protect the governing system from losing ‘its popular character in the parliamentary oversight or defies the traditional heritage of the Shura’. We might consider that this represents a kind of rapprochement between the Shura tradition and parliamentary system. Examining the MOPs of both the Constituent Council and the Constitution Committee reveals that government

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<sup>74</sup> The Explanatory Memorandum, Section 3.

and Council members were willing to adopt democracy as a Western system only as far as it did not contradict Kuwait's Islamic-Arab identity, which is integral to the country.

Thus, when the EM states that the system of government in Kuwait is not inclined to 'defy the traditional heritage of the Shura', this means that Kuwait does not intend to comprehensively abide by the traditions of the parliamentary system. Moreover, this rapprochement between democracy and Shura revived the views of some Islamic Sharia scholars, who had long contended that the tradition of Shura in Islam is in accordance with Western democratic systems (see Chapter 3).

The language of the EM is more rhetorical than theoretical. Although classical Arabic is known as metaphorical, this tends to be limited to fiction and literature - whereas legal/ constitutional language is usually rigid and difficult to understand, even for native speakers of Arabic. Again here, Kuwait's EM is entirely the inverse. In a constitutional document, we would invariably expect far more legal terms and theoretical explanations of concepts such as democracy. Whether the democratic system of Kuwait is parliamentary, presidential or both, the EM fails to explain the theoretical components of each system, as is even the case with the form of democracy adopted itself.

The EM indicates that Kuwait faces a conceptual dilemma between religious traditions and modern laws; confusion between Sharia law and democracy on the one hand, parliamentary and presidential systems on the other. Therefore, it was forthright about the challenges which would face the system of government as a result of merging the characteristics of parliamentary and presidential systems:

In order to determine the characteristics of the middle way approach between the parliamentary and presidential systems, and the position of the Constitution of Kuwait between both systems. Kuwait faces a dilemma between a theoretical stalemate and practical reality based on local requirements. In this regard,

Kuwait has two challenges: *fiqhiyyah*<sup>75</sup> and political. Thus, the best constitutional system is the one that can manage between both systems and try to solve the obstacles simultaneously (Explanatory Memorandum, Section 3).

The EM suggested that the best solution for such a political and jurisprudential dilemma would be to manage *between* the two systems, but never mentioned the mechanisms for doing so. These dilemmas were, in any case, entirely evident in the Constitution. For example, the provision of Sharia (Article 2) and democracy (Article 6) are deeply controversial and indeed, problematic: for the former enacts Sharia as ‘a main source of legislation’. Does this render the EM as the only legal text able to explain the provisions of the Constitution? Unhappily not; for the EM, as we have seen, merely sets out the combined parliamentary and presidential system; does not clarify each system; and is critical of political parties. All of which is deeply confusing and paradoxical.

How, then, can we coherently explain Kuwait’s system of government? The remainder of this chapter is given over to analysis of Kuwaiti constitutional law experts.

#### **6.4 Scholars of Law: The Theoretical Foundations of Democracy in Kuwait**

Fortunately, there is considerable consensus among Kuwaiti constitutional law scholars about the theoretical framework underpinning the country’s system of government. Without exception, scholars such as Ali al-Baz, Mohammad al-Fili and Abdulfatah Hassan adopted the same conceptual framework developed by Maurice Duverger, the French jurist, and applied it to the case of Kuwait. Duverger’s work was published in French, but three prominent Kuwaiti constitutional law scholars, Othman Abdulmalik al-Saleh, Mohammad al-Moqatei and Adel al-Tabtabai, translated it to Arabic: which proved a great asset for this study.

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<sup>75</sup> The word ‘*fiqhiyyah*’ is derived from ‘*fiqh*’ in Arabic: it is the equivalent of jurisprudence or legal doctrine, which the judiciary and constitutional law relies on in its rules and laws. See al-Tabtabai (2009, p. 69) for further explanations of *fiqh*.



The theoretical structure now set out follows the same trajectory as these scholars adopted in explaining the conceptual foundations of Kuwait's system of government. Their argument centres on viewing it as a hybrid system. Kuwait is a hereditary emirate, with mixed government, representative democracy, a semi-parliamentary system, Islamic and Arab identity. The following sections shed light on each of these fundamental characteristics. The models presented below were translated by the researcher.

#### **6.4.1 Hereditary Emirate (*'Imārah Wirāthiyyah*)**

According to Article 4, 'Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah'. The Head of State is neither a King nor a Sultan, but instead, an Amir: derived from Mubarak's lineage since his reign (1896-1915). As Article 4 of the Constitution sets out:

Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah. The heir apparent shall be designated within one year, at the latest, from the date of accession of the Amir. His designation shall be affected by an Amiri Order upon the nomination of the Amir and the approval of the National Assembly which shall be signified by a majority vote of its members in a special sitting. In case no designation is achieved in accordance with the foregoing procedure, the Amir shall nominate at least three of the descendants of the late Mubarak al-Sabah of whom the National Assembly shall pledge allegiance to one as heir apparent. The heir apparent shall have attained his majority, be of sound mind, and a legitimate son of Muslim parents. A special law promulgated within one year from the date of coming into force of this Constitution shall lay down the other rules of succession in the emirate. The said law shall be of a constitutional nature and therefore shall be capable of amendment only by the procedure prescribed for amendment of the Constitution (see Appendix).

Article 175 also specifies that: 'The provisions relating to the Amiri System in Kuwait and the principles of liberty and equality, provided for in this Constitution, may not be proposed for revision except in relation to the title of the Emirate or to increase the guarantees of liberty and equality' (see Appendix).

Thus, the hereditary Amiri system gives the title of Amir to the Head of State (as set out in Article 4) - but is flexible in cases of changing this title to King and then Kingdom; Sultan, then Sultanate. Such flexibility does not alter the core of the hereditary system – but while the ruling

system is Amiri, it is possible to change from Emirate to Kingdom by following the procedures stated in the Constitution (al-Moqatei, 2013-2014, pp. 128-30; al-Saleh, 2003, pp. 213-4).

The Constitution lays out the basic laws of the hereditary Emirate and procedures for appointing the Crown Prince, leaving other details to a special law to be issued within one year.

Accordingly, the Crown Prince, Sheikh Sabah al-Salim al-Sabah, signed the Law of the Hereditary Emirate on 30 January 1964. Article 9 of this law states: ‘This law has a constitutional nature. It cannot be amended unless following the same procedures specified in the Constitution to amend the Constitution’.

#### **6.4.2 Mixed Government (*Hukūmah Mukhtalaṭah*)**

Scholars differentiate between types of government based on three categories: (1) Mechanisms used to appoint the Head of State; (2) Source of power; (3) Rule of law. According to al-Saleh, an absolute government means that people do not participate in any way in selecting or electing their ruler. Absolutism stems from autocratic methods such as heredity or personal appointment (i.e. when the current ruler appoints the future ruler). Absolutism can also occur via revolution or coup (al-Saleh, 2003, p. 211).

Democratic government, by contrast, is derived from the people, the source of all powers, through universal suffrage (al-Saleh, 2003, p. 212). A mixed government or a ‘mixed constitution’ defines the system of government as a combination of democracy, aristocracy and monarchy. Yet there are different forms of mixed government too. For example, al-Saleh (2003), al-Tabtabai (2009) and al-Moqatei (2013) all adopted Duverger’s model, set out below.

#### **6.4.2.1 *Le Gouvernement Mixte par Juxtaposition (al-ḥukūmah al-mukhtalaṭah bi at-tajāwur)***

According to al-Saleh, this type of mixed government has different forms, but all are based on the principle that government has two bodies: one autocratic (appointed by a monarch), the other democratic (elected by the people). Examples include:

1. Elected council and a hereditary monarch or dictator.
2. A parliament with two councils: the first is an elected parliament, such as the House of Commons in the UK; the second is autocratic, such as the House of Lords, where membership is either by appointment or hereditary.
3. One council, which includes appointed and elected members simultaneously, such as the Kuwait National Assembly (Al-Saleh, 2003, pp. 214-5).

#### **6.4.2.2 *Le Gouvernement Mixte par Combinaison (al-ḥukūmah al-mukhtalaṭah bi at tadākhul)***

This form of mixed government combines autocratic and democratic elements, but these do not merge. Examples of this include:

1. *Le Suffrage de Ratification (al- 'iqtirā ' at-taṣḍīqī 'aw bi at-taṣḍīq)*

Members of Cabinet are appointed, not elected. However, they cannot take office without popular consent, which can only be provided through public referendum.

2. *Le Suffrage de Presentation الإقتراع الترشيحي أو بالترشيح*

This is the opposite of *Le Suffrage de Ratification*: the role of the electorate is limited to nominating members of the Cabinet, whose ratification is in the hands of an autocratic power, such as a king. According to al-Moqatei, the US applies *Le Suffrage de Presentation* in appointing government ministers and Supreme Court judges. The President nominates the officials; the Senate ratifies the nominations (al-Moqatei, 2009, pp. 131-3; al-Saleh, 2003, p. 216).

#### 6.4.2.3 *Le Gouvernement Mixte par Fusion (al-ḥukūmah al-mukhtalaṭah bi al-`indimāj)*

In this type of mixed government, the mechanism for selecting members of Cabinet is superficially democratic; but electorates are limited to a certain class of people, which in practice, makes it autocratic. According to al-Moqatei, oligarchy and aristocracy are examples of governments by the few or a minority. The oligarchy in apartheid South Africa granted the suffrage to the white minority, while excluding the black majority; in this case, race was the main component of the governing system. Aristocracy is another form of mixed government which was dominant in early modern Europe; only aristocrats were eligible to vote (al-Moqatei, 2013, p. 132).

Based on Duverger's paradigm of mixed government, scholars of Kuwaiti constitutional law describe the government of Kuwait as 'mixed', as it combines autocratic and democratic elements. They also concur that its characteristics are of *le gouvernement mixte par juxtaposition* and *le gouvernement mixte par combinaison*.

The common characteristics between the Kuwaiti system and the former lie in there being two independent bodies in the government. The first is autocratic; in the case of Kuwait, this is the Amir of Kuwait. As Article 4 of the Constitution states: 'Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah'. The second is democratic: in the case of Kuwait, the National Assembly, a majority of whose members are elected, as specified in Article 80 of the Constitution: 'The National Assembly is composed of fifty members elected directly by universal suffrage and secret ballot in accordance with the provisions prescribed by the electoral law. Ministers who are not elected members of the National Assembly are considered *ex-officio* members thereof' (see Appendix).

Moreover, the nature of Parliamentary membership also conforms to *le gouvernement mixte par juxtaposition*: The National Assembly combines elected and appointed (one third of its representation, ministers) members. Article 56 of the Constitution states: ‘Ministers are appointed from amongst the members of the National Assembly and from others. The number of Ministers in all shall not exceed one-third of the number of the members of the National Assembly’ (see Appendix).

In terms of similarities with *le gouvernement mixte par combinaison*, in Kuwait, the Amir appoints the Crown Prince, but this is not complete without ratification by the elected Parliament. Before ratification, members convene in a private session and by majority vote, pledge allegiance to the new Crown Prince, as specified in Article 4:

Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah. The heir apparent shall be designated within one year, at the latest, from the date of accession of the Amir. His designation shall be affected by an Amiri Order upon the nomination of the Amir and the approval of the National Assembly, which shall be signified by a majority vote of its members in a special sitting. In case no designation is achieved in accordance with the foregoing procedure, the Amir shall nominate at least three of the descendants of the late Mubarak al-Sabah of whom the National Assembly shall pledge allegiance to one as heir apparent.

## **6.5 Representative Democracy in Kuwait**

As discussed earlier, there are three forms of democracy: direct, indirect and representative.

Scholars of Kuwaiti constitutional law class Kuwait as a representative democracy. The following section elaborates on why they have reached this consensus.

According to al-Saleh and al-Moqatei, direct democracy ‘is the rule of people for themselves by themselves directly without any form of representation’ (al-Saleh, 2003, p. 219). Historically, it began in ancient Athens. As it represents the will of the people truly and directly, it is known as ‘innocent democracy’; and as it is both the oldest and (largely) obsolete in the modern world, it is also described as ‘ancient democracy’ (al-Moqatei, 2013, p. 137).

Further, al-Saleh holds that direct democracy aims to secure the participation of all citizens in decision-making; and eliminate any form of discrimination between ruler and ruled. However, al-Saleh also views the implementation of direct democracy in today's world as 'impractical'. In ancient Athens and Sparta, citizens used to convene in one place and cast their votes orally on issues related to the city state, which were far from complicated. Al-Saleh therefore concludes that direct democracy can only exist in small states or regions (as is the case in certain Swiss provinces, such as Glaris, Unterwald and Appenzell).

In defence of direct democracy, al-Saleh also highlights the arguments of French philosopher, Jean-Jacques Rousseau (1712-1778), in *The Social Contract*.

Rousseau argues that direct democracy is the only form of real democracy in opposition to the representative democracy that was adopted in England at that time. For Rousseau, popular sovereignty shall not be surrendered; and the will of the people is not liable for any form of representation. Therefore, Rousseau was critical of English representative democracy and he considered the English people free for a limited period of time; that is during the period of electing members of parliament but after elections the English citizen is a slave without any authority (al-Saleh, 2003, pp. 219-20).

Semi-direct democracy, meanwhile, is a combination between some elements of direct democracy and indirect democracy in one system. The semi-direct model has the features of indirect/representative democracy, based on the principle of elections, parliament and the process of representation. Examples include when the electorate selects the candidates and elect them to represent the nation, legislate under the name of the people, and practice all sorts of authority on its behalf.<sup>76</sup> By contrast, direct democracy resides in powers such as popular initiative, popular veto, popular referendum, popular dissolution, and revocation and recall; the latter, in which the electorate has the right to terminate the service of any member of parliament (al-Saleh, 2003, p. 221).

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<sup>76</sup> The United States and Switzerland are examples of semi-direct democracy (al-Moqatei, 2013-4, p. 137).

Representative/indirect democracy is the most common form of democracy practiced in the modern world. Unlike direct democracy, the people do not practice their powers by themselves, but their role is limited to the election of representatives who work in their name, and that of the nation (al-Saleh, 2003, pp. 221-2). According to Kuwaiti constitutional law scholars, there are four pillars of any representative democracy, which have been successfully adopted by the Kuwaiti system:

1. Elected Parliament: without this, the people cannot practice their legislative powers. It is mandatory that all members of any indirect democracy are elected. Scholars argue that Article 80 of the Constitution of Kuwait does fit the requirements for an ‘elected parliament’, as it states: ‘The National Assembly is composed of fifty members elected directly by universal suffrage and secret ballot in accordance with the provisions prescribed by the electoral law. Ministers who are not elected members of the National Assembly are considered *ex-officio* members thereof’ (see Appendix).

Of course, we have already noted that one-third of the National Assembly are appointed – yet the Constitution considers them as Members of Parliament. This raises the question of whether Kuwait really does meet the preconditions for representative democracy: is the majority of MPs the same as ‘all’? (al-Saleh, 2003, p. 223)

2. Members of Parliament represent the entire nation. The moment a candidate becomes an MP, their responsibilities exceed the limits of their constituency. In representative democracies, MPs represent the entire nation. For Kuwaiti constitutional experts, Article 107 meets this criterion: ‘A member of the assembly represents the whole nation. He safeguards the public interest and is not subject to any authority in the discharge of his duties in the assembly or its committees.’

3. While in session, Parliament is independent of the electorate - meaning that following election, an MP is not subject to any sort of influence by their electors. On the contrary, the will of representatives shall be separate and independent from the will of their electorates during the parliamentary term. This is reflected by the very same Article 107: ‘A member of the assembly represents the whole nation. He safeguards the public interest and is not subject to any authority in the discharge of his duties in the assembly or its committees’.

Thus, the Constitution of Kuwait limits the role of the electorate to election day only. Al-Saleh (2003, p. 224) notes that no article in the Constitution grants the electorate any right to share power with Parliament beyond the day of elections. This means that the Constitution meets the second requirement of representative democracy.

4. Parliament is elected for a definite time period. To guarantee it represents the will of the people and grants the electorate the right to evaluate the performance of members, Article 83 states: ‘The term of the national assembly is four calendar years commencing with the day of its first setting. Elections for the new assembly take place within sixty days preceding the expiry of the said term, due regard being given to the provisions of Article 107’<sup>77</sup>.

Based on the above, Kuwaiti constitutional law scholars conclude that Kuwaiti democracy is representative and indirect. Yet as we have noted, they appear to have ignored a critical pillar of any form of representative democracy. Can we really consider Parliament as elected by the people when it features 16 appointed ministers based not on popular approbation, but on their professional expertise? This challenge not only applies to the theoretical debate on Kuwaiti

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<sup>77</sup> This Article continues: ‘Members whose term of office expires may be re-elected. The term of the Assembly may not be extended except for necessity in time of war and by law’.



democracy; but it impacts upon all aspects of Kuwait's system of government, and even on its credibility itself.

## **6.6 Kuwaiti Parliamentary Democracy**

As well as considering it a hereditary emirate and representative democracy, Kuwait's constitutional law experts also describe it as a parliamentary democracy. The EM specifies a middle path between parliamentary and presidential systems, with more inclination towards the former. This section sets out how Kuwaiti constitutional law experts have defined and explained this middle path; what are the parliamentary and presidential characteristics of Kuwait's governing system, and the origins of its parliamentary system?

According to Maurice Hauriou<sup>78</sup>, a parliamentary system is a form of government based on a representative system, a flexible separation of powers and cooperation between the executive authority and parliament. The link between the executive and parliament is the government, which shares responsibility with the head of state to manage the state's affairs. However, the government, which is responsible to parliament, is unable to perform any of its executive tasks without enjoying the confidence of the latter (al-Saleh, 2003, p. 228).

Based on Hauriou's definition, al-Saleh explains 'the legal and sociological characteristics of the parliamentary system'. The legal characteristics consist of three pillars. First, any parliamentary system is based on a flexible separation of powers, which allows for some form of cooperation. Second, this cooperation cannot be achieved without a balance of powers. This idea of equilibrium grants the executive and the legislative the same leverage to interfere with each other. For example, as the government is responsible before parliament, the latter has the right to withdraw its confidence; but the former also has the right to dissolve parliament and invoke

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<sup>78</sup> Maurice Hauriou (1856-1929) was a French jurist, whose school of thought influenced French administrative law during the eighteenth and nineteenth centuries.

public opinion in case of any unresolved disputes. The third pillar is that of a dual executive, whereby executive power is situated in 'two presidents': the monarch, who reigns, not rules; and the prime minister, who heads the executive and is responsible before parliament.

According to al-Saleh, the sociological characteristics of parliamentary democracy also consist of three elements. The historical element refers to the origins of the parliamentary system: specifically, to eighteenth and nineteenth century England. The monarchical system evolved from absolute monarchy, constitutional monarchy and *Orleaniste* monarchy; with parliamentary democracy emerging to curtail the autocratic rule of the monarch (al-Saleh, 2003, p. 230).

However, according to al-Moqatei, other factors also changed the nature of English monarchy, such as the language barrier between the German-speaking King George I and his government. In 1717, George did not attend the Council of Ministers, nor did he meet with the Speaker of the House. Language continued to be an obstacle throughout the reigns of George II and George III. This increased the necessity to create the position of prime minister, establish the doctrine of ministerial responsibility and, indeed, a dual executive (al-Moqatei, 2013-4, p. 141).

For al-Saleh, the second element is economic. To him, the parliamentary system only exists in capitalist regimes, which embraces the principles of liberalism as a philosophy (al-Saleh, 2003, p. 230).

The third and final element is political. Al-Saleh emphasizes that one of the main traditions of the parliamentary system is the freedom to form political parties, ensuring that all members are able to practise their rights openly and freely, and form a parliamentary opposition (Ibid).

### 6.6.1 Parliamentary or Presidential?

Kuwaiti constitutional law scholars argue, then, that democracy in Kuwait contains some parliamentary and presidential characteristics. In terms of the former, inherent in a dual executive is that the monarch only has symbolic powers; powers are carried out through the monarch's ministers. Given that the monarch reigns but does not rule, the prime minister is responsible politically before the parliament – and Article 54 of the Kuwaiti Constitution would appear to adopt this very principle: 'The Amir is the Head of State. His person is immune and inviolable'. Article 55 continues: 'The Amir exercises his powers through his ministers'. Yet that said, the Kuwaiti Prime Minister is always appointed by the Amir.

Moreover, Kuwait has adopted a flexible separation between powers, as specified in Article 50: 'The system of government is based on the principle of separation of powers functioning in cooperation with each other'. According to al-Saleh, this separation leads to cooperation: several forms of this are mandated by the Constitution in Articles 99, 100, 101, 102, 107, 112 and 114.<sup>79</sup>

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<sup>79</sup> **Article 99:** 'Every member of the National Assembly may put to the prime minister and to ministers questions with a view to clarifying matters falling within their competence. The questioner alone has the right to comment once upon the answer'.

**Article 100:** '(1) Every member of the National Assembly may address to the prime minister and to ministers interpellations with regard to matters falling within their competence. (2) The debate on such an interpellation shall not take place until at least eight days have elapsed after its presentation, except in case of urgency and with the consent of the minister concerned. (3) Subject to the provisions of Articles 101 and 102, an interpellation may lead to the question of no-confidence being put to the Assembly'.

**Article 101:** '(1) Every Minister is responsible to the National Assembly for the affairs of his ministry. 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. (2) Withdrawal of confidence from a minister is by a majority vote of the members constituting the Assembly excluding ministers. Ministers do not participate in the vote of confidence'.

**Article 102:** '(1) The prime minister does not hold any portfolio; nor shall the question of confidence in him be raised before the National Assembly. (2) Nevertheless, if the National Assembly decides, in the manner specified in the preceding article, that it cannot co-operate with the prime minister, the matter is submitted to the head of state. In such a case, the Amir may either relieve the prime minister of office and appoint a new cabinet or dissolve the National Assembly. (3) In the event of dissolution, if the new Assembly decides by the above-mentioned majority vote that it cannot co-operate with the said prime minister, 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'.

The presidential characteristics of the Kuwaiti parliamentary system in Kuwait are, however, more controversial. To begin with, Kuwaiti constitutional law scholars have neither defined nor explained the term ‘presidential system’ in the same way as they have for the parliamentary system. The EM does state that Kuwait is a combination of both systems, but it leans towards the parliamentary one, without going into any detail as to why. Indeed, the EM does not even specifically determine whether the system is parliamentary or presidential: contenting itself with the ‘middle path between the two systems’: ‘Some of the aspects in the Constitution of Kuwait can be partially closer to the presidential system, noting that Kuwait is not a typical model of a traditional parliamentary system’ (al-Saleh, 2003, p. 233).

In parliamentary democracy, the appointment of ministers shall be from elected members of parliament – but in Kuwait’s case, the Constitution left the appointment of ministers open to the executive (chiefly, the Amir). The Amir appoints the Prime Minister; and on his behalf, the Prime Minister appoints the ministers, as specified in Article 56:

The Amir shall, after the traditional consultations, appoint the prime minister and relieve him of office. The Amir shall also appoint ministers and relieve them of office upon the recommendation of the prime minister. Ministers shall be appointed from amongst the members of the National Assembly and from others<sup>80</sup>.

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**Article 107:** ‘(1) The Amir may dissolve the National Assembly by a decree in which the reasons for dissolution is indicated. However, dissolution of the assembly may not be repeated for the same reasons. (2) In the event of dissolution, elections for the new Assembly are held within a period not exceeding two months from the date of dissolution. (3) 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. (4) A member of the Assembly represents the whole nation. He safeguards the public interest and is not subject to any authority in the discharge of his duties in the assembly or in its committees’.

**Article 112:** ‘Upon a request signed by five members, any subject of general interest may be put to the National Assembly for discussion with a view to securing clarification of the government’s policy and to exchanging views thereof. All other members also have the right to participate in the discussion’.

**Article 114:** ‘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 officials must produce testimonials, documents, and statements requested from them’.

<sup>80</sup> The Article continues: ‘The number of Ministers in all shall not exceed one-third of the number of the members of the National Assembly’.

Moreover, the new government does not require the consent and confidence of Parliament to function. Instead, the Amir appoints and relieves ministers of their positions; in other words, consent and confidence is the Amir's alone to provide. And still more troubling, the constitutional right of the legislative to withdraw its confidence in the Prime Minister and his ministers is, in effect, impracticable. In practice, the Constitution refers such cases to the Amir. Article 101 states: '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'. But Article 102 effectively overrides this, thwarting the powers of the legislative:

The prime minister shall not hold any portfolio, nor shall the question of confidence in him be raised before the National Assembly. Nevertheless, if the National Assembly decides, in the manner specified in the preceding article, that it cannot co-operate with the prime minister, the matter shall be submitted to the head of state. In such a case, the Amir may either relieve the prime minister of office and appoint a new cabinet or dissolve the National Assembly. In the event of dissolution, if the new assembly decides by the above-mentioned majority vote that it cannot co-operate with the said prime minister, 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.

Furthermore, the Prime Minister and his ministers are collectively responsible before the Head of State. The law entitles the Amir to question and evaluate any minister, as specified in Article 58: 'The prime minister and the ministers shall be collectively responsible to the Amir for the general policy of the state. Every minister shall also be individually responsible to the Amir for the affairs of his ministry'. This characteristic is that of a presidential system: namely, the responsibility of the government before the monarch, not the other way around.

It is evident that jurists have adapted the laws towards the Amir instead of Parliament, as shown by the examples of a no confidence vote and the appointment of unelected ministers. This begs the question: can Kuwait's system of government genuinely be described as a 'middle path between the parliamentary and presidential system'; or is one of al-Saleh's key

conclusions, that ‘the system of Kuwait is partially close to the presidential system’, rather more apposite?

That said, al-Saleh considers that the theoretical pillars of parliamentary democracy cannot be implemented in practice. He refers to political parties in the US and UK, noting how they subject their representatives to the party’s political programme and agenda, meaning that they become a representative of their electorate. Moreover, al-Saleh also questions whether the will of *’Ummah* (the nation) can be homogenous and united. He considers that every nation is divided by social classes, each of which attempts to defend its rights and further its interests through its representatives.

Indeed, al-Saleh’s position is that it is difficult to classify Kuwait’s system as any of presidential, parliamentary or *le Regime d’assemblee* (conventional). This does confirm the idea of a middle path, with the Constitution establishing a balance between presidential and parliamentary democracy. From this, we can perhaps understand why al-Saleh described the Constitution of Kuwait as ‘moderate by all directions’.

### **6.6.2 *Le Parlementarisme Orleaniste / al-Barlamāniyyah al-’Ūrliyāniyyah***

According to al-Saleh, the system of government in Kuwait coincides in principle with the parliamentary system in Orleans, which ruled France in the nineteenth century (1830-1848).

From his point of view, al-Saleh states that ‘the contemporary model of the parliamentary system we are familiar with today is not based on a particular theory. However, it has evolved historically: starting from the absolute monarchies to the parliamentary republics which emerged in between the limited monarchies (constitutional monarchies) and the *Orleaniste* parliamentary system’ (2003, p. 235).

Unfortunately, al-Saleh failed to provide much by way of further explanation on the evolution of the French parliamentary system in general; the *Orleaniste* system in particular. Instead, he mainly focused on the common features of both *Orleaniste* and Kuwaiti systems, which are very much worthy of further exploration:

1. One of the main characteristics of the semi-presidential system in nineteenth century Orleans was the ‘dual executive’, meaning that both the monarch and the prime minister had political power over the government. In the case of Kuwait, al-Saleh argues that the Constitution gives both the Amir and the government the same characteristic of the ‘dual executive’ which existed in Orleans. For example, on the powers of the Amir towards his government, Article 55 states: ‘The Amir shall exercise his powers through his Ministers’. In return, both the prime minister and ministers are held accountable before the Amir, as enacted in Article 58: ‘The prime minister and the ministers shall be collectively responsible to the Amir for the general policy of the state. Every minister shall also be individually responsible to the Amir for the affairs of his ministry’ (see Appendix).
2. Al-Saleh also refers to one of the main characteristics of constitutional monarchy - that ‘the monarch in the parliamentary system reigns but does not rule’. This was not the case in Orleans; neither was it in Kuwait. Inspired by the French parliamentary system, al-Saleh highlights that the Monarch in Orleans enjoyed a vast, hugely effective number of powers. This is remarkably similar to the powers granted to the Amir of Kuwait.<sup>81</sup> Constitutionally, Articles 51, 52, 53 entitle the Amir to powers alongside the legislative, executive and judicial authorities;<sup>82</sup> he also appoints the Crown Prince and the Prime

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<sup>81</sup> Chapter II of the Constitution of Kuwait (Articles 54-78) tackle all the powers and responsibilities of the Amir of Kuwait (see Appendix).

<sup>82</sup> **Article 51:** ‘Legislative powers shall be vested in the Amir and the National Assembly in accordance with the Constitution’.

Minister,<sup>83</sup> and promulgates laws.

## 6.7 Critiques of Kuwait Parliamentary System

As we have noted, the EM states that Kuwait has adopted an intermediary path between the parliamentary and the presidential systems, with more inclinations towards the former to ensure stability of its government. Yet critics have questioned the validity of this explanation. The absence of political parties, limited electoral base and appointment of fully one-third of Cabinet members are chief causes of such scepticism. The following sheds light on each issue, in the aim of verifying the true nature of Kuwait's system of government.

### 6.7.1 Non-Partisan Parliament

Political parties are neither banned nor remotely effective in the Kuwaiti National Assembly. The Constitution of Kuwait does not include any articles in relation to forming or banning political parties – but crucially, entitles the Amir and Parliament to ‘initiate, sanction and promulgate laws’<sup>84</sup>. Mustafa Kamil and Eidan al-Ta’an note that there is no mention of parties in the

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**Article 52:** ‘Executive power shall be vested in the Amir, the Cabinet and the Ministers in the manner specified by the Constitution’.

**Article 53:** ‘Judicial power shall be vested in the courts which shall exercise it in the name of the Amir within the limits of the Constitution’.

<sup>83</sup> **Article 4:** ‘Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah. The heir apparent shall be designated within one year, at the latest, from the date of accession of the Amir. His designation shall be effected by an Amiri order upon the nomination of the Amir and the approval of the National Assembly, which shall be signified by a majority vote of its members in a special sitting. In case no designation is achieved in accordance with the foregoing procedure, the Amir shall nominate at least three of the descendants of the late Mubarak al-Sabah of whom the National Assembly shall pledge allegiance to one as heir apparent. The heir apparent shall have attained his majority, be of sound mind, and a legitimate son of Muslim parents. A special law promulgated within one year from the date of coming into force of this Constitution shall lay down the other rules of succession in the emirate. The said law shall be of a constitutional nature and therefore shall be capable of amendment only by the procedure prescribed for amendment of the Constitution’.

**Article 56:** ‘The Amir shall after the traditional consultations appoint the Prime Minister and relieve him of office. The Amir shall also appoint ministers and relieve them of office upon the recommendation of the Prime Minister. Ministers shall be appointed from amongst the members of the National Assembly and from others. The number of Ministers in all shall not exceed one third of the number of the members of the National Assembly’.

<sup>84</sup> **Article 65:** ‘The Amir shall have the right to initiate, sanction and promulgate laws. Promulgation of laws shall take place within 30 days from the date of their submission by the National Assembly to the Amir. This period shall be reduced to seven days in case of urgency. Such urgency shall be decided upon by a majority vote of the members constituting the National Assembly. Official holidays shall not be counted in computing the promulgation period. If the period of promulgation expires without the head of state demanding reconsideration, the bill shall be considered as having been sanctioned and shall be promulgated’.



Constitution's Explanatory Memorandum; and use this to argue that the legislature therefore has the right to issue a new law even if it has no constitutional reference (Kamil and al-Ta'an, 2008).

However, this chapter argues to the contrary - namely, that the EM is critical of political parties and regards them as among the chief flaws of the parliamentary system. Section 3 of the Explanatory Memorandum (EM) states:

The major problem of the parliamentary system resides in collective ministerial responsibility before the parliament that can expose the ruling system to numerous conflicts with different parties. There is no more risk to the safety of democratic rule than considering the formation of political parties prior to reinstating principles and enterprises. The formation of political parties makes ruling a target not a means to develop the ruling system... if this is the case, eventually, democratic rule will no longer protect rights and freedoms, on the contrary, they will be threatened. Moreover, political activism will turn to be more of a business under the name of patriotism. Thus, the consequences will affect all parties: members of Cabinet will no longer act collectively; personal interests will replace the welfare of the State, the national movement within and outside parliament will be undermined, and the unity of the nation will be divided. Consequently, the legacy of representative councils will be jeopardized. As a result, Kuwait wished to learn from the mistakes of other countries which endorsed a parliamentary system by avoiding all theoretical aspects that would contradict with Kuwait's political interests: above all, that it is a hereditary emirate' (al-Mudhakkirah at-tafsiryah li dustur dawlat al-kuwayt, 1962, pp. 53-4).

Section 3, then, constitutes a critique of the formation of political parties and a rhetorical justification of why Kuwait adopted a parliamentary system without political parties. Its language is clearly more rhetorical than theoretical, but this undermines the EM: which is supposed to define and explain novel, vague or obscure articles in the Constitution, and which enjoys identical levels of legal power.<sup>85</sup> While the Constitution itself does not include any article that legalizes or prevents the formation of political parties, the EM contradicts this, depicting parties as more curse than blessing.

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**Article 109:** 'A member of the Assembly shall have the right to initiate bills. No bill initiated by a member and rejected by the National Assembly may be re-introduced during the same session'.

**Article 79:** 'No law may be promulgated unless it has been passed by the National Assembly and sanctioned by the Amir'.

<sup>85</sup> By law, the power of the Constitution is identical to that of the Explanatory Memorandum. The EM is an integral part of the Constitution, drafted to interpret and explain any vague or obscure concept or provision. Moreover, both the Constitution and EM enjoy supreme value by law. The EM was drafted and discussed by the same Constitution Committee, formed by elected members of the Constituent Council, which drafted the Constitution in 1962. Most importantly, when the complete draft was presented to the Amir of Kuwait for ratification, both the Constitution and EM were presented as one project, and both were ratified together on 11 November 1962.

Al-Najjar, al-Rumaihi and al-Ghabra all concur that the absence of political parties is one of the shortcomings of democracy in Kuwait, but each form different views beyond that. Al-Najjar notes that the Internal Chart of the National Assembly allows only unelected members of cabinet to act collectively in Parliament:

Elected members are not allowed to speak and be represented as a united bloc; this makes the government the only de facto political party permitted to operate in Parliament...The government ministers move among the elected members as a unified body; while elected members can speak only as individuals (al-Najjar, 2000, pp. 247-8).

The absence of political parties is far from a conventional state of affairs in any recognizable democracy. Article 1 of The Internal Charter of the National Assembly states:

The National Assembly consists of 50 members. Members of parliament shall be elected in universal, secret and direct elections in accordance with the Elections Law. The National Assembly considers unelected ministers members in the Assembly based on their positions. The number of Ministers should not exceed one third of the members of the National Assembly.<sup>86</sup>

With fully one third of the total members of parliament appointed ministers by the Amir, this suggests neither a genuinely parliamentary system, nor a government chosen according to the Constitution. Moreover, as Kuwaiti history has shown (and this thesis set out in detail in Chapter 2), banning political parties within an elected Parliament is in practice neither realistic nor pragmatic. The non-authorization of parties has not prevented members of parliament and political activists from forming informal political blocs or groups based on their ideology, tribe, religious sect or social class.

Moreover, as Moḥammed al-Rumaihi puts it, there is no democracy without political parties. For him, the latter are a reflection of human nature; it is normal that people differ and disagree based on their different interests and political stances. The role of political parties is therefore to constitute, organize and reflect these differences. Al-Rumaihi adds that ballot boxes and political

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<sup>86</sup> *al-Māddah al-ʿAwwalīyah fī al-lāʾihah ad-dākhiliyyah fī majlis al-ʿummah - Dawlat al-Kuwayt, al-Qānūn raqam (12) aṣ-ṣādīr fī 1963*. For a complete version of the Kuwait National Assembly Internal Charter, Law 12/1963, see: <http://www.kna.kw/clt-html5/run.asp?id=2025>

parties are the two main pillars of democracy, which manage the conflicted interests of the public, while helping remove to the margins any political tradition or trend that can breed tribalism, sectarianism or ethnic division. Yet this means that an absence of parties will lead people to create their own versions - resulting, as in Kuwait, in the formalization of tribal, sectarian and provincial division (al-Rumaihi, 2012).

That said, although unofficial political groups in Parliament can attract public support and media attention, they are rendered ineffective and impotent by law. Al-Ghabra even considers that ‘the unofficial nature of political parties in the Parliament of Kuwait affects policy making.’<sup>87</sup> In this case, decision-making and drafting legislation is subject to MPs’ personal views, given that no law regulates these groups. Any MP affiliated with a political bloc can easily vote against or withdraw from it and remain independent. Such chaos leads to political tensions and personal disputes among MPs (al-Ghabra, 2014; al-Najjar, 2000, pp. 247-8).

### **6.7.2 Limited Electoral Base**

Who is eligible to vote? According to Article 1 of the Electoral Law:

Every Kuwaiti citizen who has reached the age of 21 years old are entitled to vote except those naturalized citizens who have not completed 20 years of naturalization since the coming into effect of Law No.15 of 1959 of the Kuwait Citizenship Law. A woman shall abide by the laws and regulations of the Islamic Sharia to vote and run for office.

Thus, three categories - gender, age and year of citizenship - are used to determine eligibility to vote. Women were deprived of this right until 2005, with a reduction in age still under consideration; naturalized citizens were allowed to vote after 10 years’ residence until 1995; and it is illegal for members of the police or armed forces to vote or run for office.

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<sup>87</sup> Point was reinforced in an interview with Shafeeq al-Ghabra, political scientist at Kuwait University, Kuwait City: 1 April 2013.

There have been two amendments to Article 1. The first related to the number of years completed by naturalized citizens, raised from 10 to 20 years in 1995. The old text, amended on 26 August 1995, was as follows: ‘All male Kuwaitis who have reached the age of 21 years are entitled to vote except those naturalized citizens who have not completed ten years of naturalization since the coming into effect of Law No.15 of 1959 in regard to Kuwait Citizenship Law’.

The second amendment was made in 2005 and pertained to granting women the right to vote and run for office for the first time. However, the legislature added the following clause to the main text of Article 1: ‘A woman shall abide by the laws and regulations of the Islamic Sharia to vote and run for office’. This is wholly contradictory. Whereas the first clause states that ‘every Kuwaiti citizen is eligible to vote’ - meaning that the law grants both men and women the right to vote as long as they are 21 years old or over, without any form of discrimination - the last clause states: ‘A woman shall abide by the laws and regulations of Islamic Sharia to vote and run for office’.

When the first clause was amended in 2005 from ‘all Kuwaiti males’ to ‘every Kuwaiti citizen’, this ended a form of discrimination imposed against women for more than four decades; not by the Constitution, but by Kuwaiti Electoral Law. The Constitution opposes all forms of discrimination and prejudice, and Article 29 is explicit about equality and justice: ‘All people are equal in human dignity and in public rights and duties before the law without distinction to race, origin, language or religion’. Adding the Sharia clause as a precondition to allow women to practice their political rights is both biased and contradictory. This is another example of the unresolved conflict between democracy and Sharia, discussed at length in Chapter 5.

What, then, does the Sharia clause actually mean? What is really expected of women MPs and voters? Conforming to Islamic dress code is really the only argument that Islamist MPs can employ against their female counterparts; but both constitutionally and traditionally, freedoms are respected in Kuwait, and women have the freedom of choice to dress conservatively or otherwise. Article 30 secures this by stating that ‘personal liberty is guaranteed’.

Islamists, however, considered female representation a significant political defeat, and pledged to complicate the process even if women won seats in Parliament.<sup>88</sup> The women’s suffrage bill had begun as an Amiri decree by Jaber al-Ahmad al-Sabah, the late Amir of Kuwait (1977-2006), who presented it to Parliament on 25 May 1999. According to Article 79, ‘no law may be promulgated unless it has been passed by the National Assembly and sanctioned by the Amir’, meaning that a decree requires a majority vote to pass through Parliament. In this case, in unprecedented fashion, the decree was voted down twice by conservative and Islamist MPs. The first vote took place on 23 November 1999; a majority of 44-21 voted against. The second vote was on 2 August 1999 and very close to passing; but voted down by 32-30.<sup>89</sup>

The final vote was held on 16 May 2005 and proved a milestone for democracy in Kuwait: passing with a majority of 35-23, with one abstention. Article 1 of the Electoral Law was amended, with female participation significantly expanding the country’s electoral base. The

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<sup>88</sup> In 2009, four women - Aseel al-Awadhi, Rola Dashti, Salwa al-Jassar and Massouma al-Mubarak - were elected for the first time in Kuwait’s history; while the government appointed a female minister, Moudhi al-Humood, as Minister of Education and Higher Education. At the opening session on 31 May 2009, three Islamist MPs, Ali al-Omair, Waleed al-Tabtabei and Jamaan al-Herbish objected to the attendance of two of the new female MPs (al-Awadhi and Dashti) and a Cabinet member for violating the Sharia and Article 1 of the Electoral Law, and not being committed to the Islamic dress code.

<sup>89</sup> The data on gender and women suffrage in Kuwait were collected based on two interviews with Kawther al-Joan, Head of Kuwait’s Women’s Development Institute in Kuwait City, on 26 March 2014. Another interview with Nouria al-Sadani, historian and women’s rights activist in Kuwait City, was held on 28 March 2014.

2006 election was the first to feature women's participation; there were 28 female candidates, while female turnout exceeded 40%.<sup>90</sup>

The second category tackled by the Electoral Law has involved a possible reduction in the age limit of the franchise from 21 to 18, not least because '45% of Kuwait's population is under [the age] of 25' (Kinninmont, 2012, p. 5). Since 1994, numerous resolutions<sup>91</sup> have been introduced aiming for such an outcome, but none have been successful. It has proven a rare issue with consensus among many MPs, regardless of their politics or ideology. Several representatives have addressed the issue from different angles. For example, in 1994, Ahmad Baqer, Mufarej Nahar al-Mutairi and Sharee al-Ajmi highlighted that the electoral base comprised just 82,000, only 7% of eligible voters, and noted the criticism which Kuwait had faced from the local and international media. In addition, reducing the franchise to age 18 has proven successful in countries as diverse as Egypt, Argentina, Uruguay, Germany, the US, UK, France and Austria.<sup>92</sup>

In the same context, al-Najjar also raises concerns about the 'the narrowness of the electoral base' and describes this as one of the main obstacles facing democracy in Kuwait. His main concern is the impact of the limited electoral base on the legacy of Parliament as 'the legitimate representative of the people' (al-Najjar, 2000, p. 248).

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<sup>90</sup> 'Intikhābāt al-Kuwayt: 'a'lā nisbat 'iqbāl.. wa as-sabab al-mara'ah, Jarīdat ash-Sharq al-'Awasaf, al-'adad (10076), bi tārikh 30 June 2006.

<http://archive.aawsat.com/details.asp?section=1&article=370858&issueno=10076>.

<sup>91</sup> Reducing the age of the electorate was discussed and presented as a draft Bill in Parliament in 1994, 1997, 1999, 2003, 2006, 2007, 2009, 2014 and 2015.

<sup>92</sup> *ba'd 'iqtirāḥāt niyābiyyah 'adīdah.. taqlīṣ sinn al-'iqtirā'ui'ilā al-wājihah mujaddadan, Jarīdat al Muḥammad Nāṣir, 'Anbā', 22 November 2015.*

<http://www.alanba.com.kw/ar/kuwait-news/603530/22-11-2015--بعد-اقتراحات-نيابية-عديدة-تقليص-سن-الاقتراع-الى-الواحدة-مجددا/>

Al-Rubei et al (1999) raise the issue from a legal point of view. They argue that every 18-year-old citizen is considered responsible before the law in Kuwait and by Sharia. The necessary legal age to obtain a driving licence, start a family, run a business and be prosecuted in the courts is eighteen. This means that lowering the franchise would only be in line with Kuwaiti law in many other aspects.<sup>93</sup>

Pressure built up in November 2015, when the government, through the guise of the Deputy Prime Minister and Minister of the Interior, demonstrated their support too. This was welcomed by Parliament, is expected to be discussed and implemented soon.<sup>94</sup>

### **6.7.3 Appointed Cabinet and Elected Parliament = Unconstitutional Government**

As already discussed, besides the 50 elected members, the Amir appoints both the Prime Minister and ministers - who are considered as MPs because of their positions.<sup>95</sup> Cabinet members enjoy equal power to elected members, except in cases of a no confidence vote against any minister.<sup>96</sup> According to Article 56:

The Amir shall, after the traditional consultations appoint the Prime Minister and relieve him of office. The Amir shall also appoint ministers and relieve them of office upon the recommendation of the Prime Minister. Ministers shall be appointed from amongst the members of the National Assembly and from others. The number of ministers in all shall not exceed one-third of the number of the members of the National Assembly.

The total number of Cabinet members, including the Prime Minister, is therefore 16 (no more than one third of the fifty members of the National Assembly). After each election, a new government must be formed by the Prime Minister and approved by both the Amir and

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<sup>93</sup> *ba 'd 'iqtirāḥāt niyābiyyah 'adīdah.. taqlīṣ sinn al-'iqtirā 'ui 'ilā al-wājihah mujaddadan, Jarīdat al-Kuwayt, 'i dād: Muḥammad Nāṣir, 'Anbā', 22 November 2015.*

<http://www.alanba.com.kw/absolutenmnew/templates/print-article.aspx?articleid=603>

<sup>94</sup> *nuwwāb "li al-'anbā": takhfīḍ sinn an-nākhīb 'alā 18 'āman khuṭwah fī al-'ittijāh aṣ-ṣaḥīḥ, Jarīdat al-'Anbā', 25 November 2015, 'i dād: Sulṭān al-'Abdān, 'Abdullh al-Bālūl, Khālid ash-Shammārī, Badr as-Suhayl, al-Kuwayt.*

<http://www.alanba.com.kw/absolutenmnew/templates/print-article.aspx?articleid=604>

<sup>95</sup> **Article 80:** '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. Ministers who are not elected members of the National Assembly shall be ex-officio members thereof'.

<sup>96</sup> **Article 101:** '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 confidence'.

Parliament. For it to be deemed a constitutional government, it must include at least one elected minister (*Wazīr Muḥallil*).

In fully 34 governments since independence in 1961, the Amir and Prime Minister have invariably proven extremely cautious and reserved over the number of elected ministers. Either one or two elected ministers are usually appointed to avoid any constitutional crisis, although this is not guaranteed. In case of any disagreement with the government, the elected minister/ministers can always resign (al-Najjar, 2000, pp. 248-9).

However, there have been some exceptions. For example, in 1992, for the first and only time in the history of Kuwait, the Prime Minister, Saad al-Abdullah al-Sabah, appointed six elected members from the opposition. This owed to the promises made to the opposition by the Kuwaiti government in exile during the Iraqi occupation. Here then, it is necessary to provide some context of the period leading up to the invasion and occupation.

The final parliament before the Iraqi invasion was the 1985 *majlis*, dissolved in 1986 by the Amir, the late Sheikh Jaber al-Ahmad al-Sabah (1977-2006). Parliamentary life was therefore absent from Kuwait for four years; government took the form of direct rule only. The dissolution occurred because of local and regional factors which ignited the opposition; the government could not deal with MPs' continuous insistence on questioning ministers on issues related to fiscal violations and corruption. Between 21 and 24 June 1986, a group of MPs presented four requests for such interrogations.<sup>97</sup> Regionally, Kuwait was a target for a series of terrorist

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<sup>97</sup> *al-Kuwayt min ad-dustūr 'ilā al-'iḥtilāl, Muḥammad al-Yūsufī, aṭ-ṭab'ah al-'ulā* 2013, *al-mu'assasah al-'arabiyyah li ad-dirāsāt wa an-nashr, Bayrūt*, part 2, p. 191.



attacks<sup>98</sup>; while tensions between Kuwait and Iran resulted in several attempts ‘to blow up Kuwait’s oil pipelines with five closely-timed bombs, an incident widely believed to be a reprisal for Sheikh Jaber’s support of Iran in the long running war against Iraq’ (Kifner, 1986).

In consequence, the dissolution was issued along with orders to suspend some constitutional articles. The Amiri Decree, issued on 3 July 1986, dissolved Parliament and suspended the following four articles of the Constitution. First, Section 3 of Article 56, which states: ‘The number of ministers in all shall not exceed one-third of the numbers of the National Assembly’. The main reason behind suspending this section lay in a desire to appoint a new government of 21 ministers, instead of the 16 specified in the Constitution.

Second, the Decree also suspended the enactment of Article 107 as related to dissolution:

The Amir may dissolve the National Assembly by a decree in which the reasons for dissolution shall be indicated. However, dissolution of the assembly may not be repeated for the same reasons. In the event of dissolution, elections shall be held within a period not exceeding two months from the date of dissolution.

Third, Article 174 states:

The Amir or one-third of the members of the National Assembly have the right to propose a revision of the Constitution by amending or deleting one or more of its provisions or by adding new provisions. If the Amir and the majority of the members constituting the National Assembly approve the principle of revision and its subject matter, the Assembly debates the Bill article by article. Approval by a two-thirds majority vote of the members constituting the Assembly is required for the Bill to be passed. The revision comes into force only after being sanctioned and promulgated by the Amir, regardless of the provisions of Articles 65 and 66.<sup>99</sup> If the principle of revision or its subject matter is rejected, it may not be presented again before

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<sup>98</sup> On 25 May 1985, the Amir’s motorcade was exposed to a series of terrorist attacks. On 11 July, two explosions took place in traditional coffee shops in ash-Sharq and as-Sālmiyyah: 11 were killed and 89 were injured. See also: <http://www.nytimes.com/1986/07/04/world/kuwait-dissolves-its-parliament.html>

<sup>99</sup> **Article 65** [Promulgation of Laws, Initiative of the Amir]: ‘(1) The Amir has the right to initiate, sanction, and promulgate laws. Promulgation of laws takes place within 30 days from the date of their submission by the National Assembly to the Amir. This period is reduced to seven days in case of urgency. Such urgency is decided upon by a majority vote of the members constituting the National Assembly. (2) Official holidays are not counted in computing the promulgation. (3) If the period of promulgation expires without the head of state demanding reconsideration, the bill is considered as having been sanctioned and is promulgated’.

**Article 66** [Bills]: ‘Reference of a bill for reconsideration is by a decree stating the grounds therefore. If the National Assembly 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. If the bill does not receive the said majority, it may not be reconsidered during the same session. If the National Assembly, in another session, considers the same

the lapse of one year from the rejection. No amendments to this Constitution may be proposed before the lapse of five years from its coming into force.

The suspension of Article 174 reflected Section 2 of the 1986 Decree of Dissolution: namely, that the Amir and Council of Ministers are entitled to execute the responsibilities of the National Assembly as specified in the Constitution. This means that the legislative authority is absent, leaving the task of amending or proposing any new bill to the government. The decree stated that new bills would be issued as decrees from the Amir; in case of emergency, they could be issued as orders.

Fourth: Article 181 was the final suspended article which prohibited any sort of suspension for any article of the Constitution. It protected the immunity of MPs and the proceedings of the Assembly, which should not be stopped under any circumstances: '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 period'. The Amiri Decree suspended all of the above.

Thus, a new government was formed, and tensions between it and the opposition reached a peak. All attempts by the latter to restore Parliament and the Constitution failed. This situation continued until the Iraqi invasion took place on 2 August 1990. Following this, the government in exile promised the opposition to respond to their appeals if it attended the national conference in Jeddah, Saudi Arabia, and pledged allegiance to the al-Sabah family as the legitimate rulers of Kuwait.

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bill by a majority vote of its members, the Amir sanctions and promulgates the bill as law within 30 days from its submission to him'.

The conference was held between 13 and 15 October 1990, with the Amir publicly promising that in the event of Kuwaiti liberation, the government was committed to restoring Parliament, enacting all articles of the 1962 Constitution, and governing the country democratically. The government met its pledge to the people of Kuwait and opposition following liberation.

#### **6.7.4 Separation of Powers**

Constitutional experts (for example, Othman Abdulmalik al-Saleh, Adel al-Tabtabai, and Mohammad al-Moqatei), note that parliamentary systems are based on a separation of powers; but that Kuwait adopted a ‘flexible separation between powers’, requiring cooperation among the legislative, executive and judicial authorities. As specified in Article 50: ‘The system of government is based on the principle of separation of powers functioning in cooperation 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’.

Al-Saleh also notes that:

Both the legislative and executive powers have regulatory responsibilities towards each other and their rights are secured to raise questions, present interpellations for any member of cabinet, discuss an issue of general interest, seeking clarifications, information or requesting documents. Legislatures can also delegate Member of Parliament to investigate on certain critical issues.<sup>100</sup> Moreover, the Parliament has the right to withdraw confidence of any minister except the Prime Minister<sup>101</sup> (al-Saleh, 2003, p. 233).

The scholars referred to above describe Kuwait as having a ‘mixed system’, with characteristics associated with both parliamentary and presidential systems. Indeed, it is apparent that within Kuwait’s ‘flexible separation between powers’, there is more inclination towards a presidential system - which raises many questions over the separation of powers itself, especially given that Kuwait is ruled by a monarchy.

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<sup>100</sup> See Appendix for Articles 99, 100, 101, 102, 112, 114.

<sup>101</sup> See Appendix for Articles 101, 102.

According to Article 4, 'Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah'. This gives the Amir very considerable powers, which he is entitled to use as Head of State. So much so that constitutional experts classify the powers of the Amir under the characteristics of a presidential system. Al-Tabtabai explains the status of the monarch within the parliamentary system: 'In the parliamentary system, the monarch does not rule but reigns. This means that the role of the monarch is symbolic. Whereas, the case is totally different in the Constitution of Kuwait as the Amir has effective powers which can sometimes exceed the legislative, executive and judicial powers'.

The following section explains the powers of the Amir and the characteristics of the presidential system adopted by Kuwait. On legislative power, Article 51 states: 'Legislative power shall be vested in the Amir and the National Assembly in accordance with the Constitution.' On executive power, Article 52 enacts: 'Executive power shall be vested in the Amir, the Cabinet and the ministers, in the manner specified by the Constitution'. On the judiciary, Article 53 holds: 'Judicial power shall be vested in the Courts, which shall exercise in the name of the Amir within the limits of the Constitution'.

The first presidential characteristic of the Kuwaiti system is that of the Royal prerogative. According to Articles 51, 52 and 53, the Amir shares power with the legislative, executive and judicial authorities equally; but as a hereditary sovereign, the Amir is conferred further Royal prerogatives by the Constitution. By law, the Amir is the only power who can issue Royal prerogatives (known as *Awāmir Amiyriyya* and *Amr Amīrī*), such as nominating and appointing the Crown Prince; or appointing the Prime Minister and ministers. It is also the Amir's constitutional right to hold any ministry responsible for its work, as specified in Article 58: 'The Prime Minister and the ministers are collectively responsible to the Amir for the general policy

of the state. Every minister also is individually responsible to the Amir for the affairs of his ministry’.

The second presidential characteristic is that of appointed ministers in an elected Parliament. The Constitution does not require that ministers can only be elected members as ministers. On the contrary, Article 56 permits newly assigned ministers to be from within or outside Parliament.

Third, the formation of the new government does not require Parliament’s approval or endorsement. The Amir’s endorsement is sufficient. Fourth, Parliament does not have the right to withdraw its confidence from the Prime Minister; instead, it can ‘decide not to cooperate with the prime minister’, albeit with very similar practical consequences.<sup>102</sup> Fifth, the government is responsible to the Amir and Parliament can be dissolved by the latter<sup>103</sup> (al-Tabtabai, 2009, pp. 474-6).

The ‘separation between powers’ has invariably been employed as a shield by scholars, to justify the claim that the political system of Kuwait is more parliamentary than presidential. However, the opposite is greatly apparent: as a minimum, Kuwait’s system is very confusing, described by Fahad Rashed al-Mutairi as ‘biased and contradictory’. To prove this, al-Mutairi drew comparisons between, for example, Articles 6 and 56. Article 6 enacts democracy as the governing system of Kuwait; but Article 56 states that the formation of government is by appointment. Al-Mutairi also raises questions over ‘the source of all powers’: is it the Amir, or the people? Article 6 denotes that ‘sovereignty resides in the people, the source of all powers’; but executive, legislative and judicial powers are all vested in the Amir, as indicated in Articles 51, 52 and 53.

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<sup>102</sup> See Appendix for Article 102.

<sup>103</sup> See Appendix for Article 107.

Al-Mutairi refers critically to the definition and explanation of the government system, as set out in the EM. The latter is the only official document to define the ‘democracy’ referred to in the Constitution: ‘The democracy which the Constitution of Kuwait adopted chooses to be in the middle way between the parliamentary and presidential system, with more inclination towards the parliamentary system’ (Explanatory Memorandum, 1962). As al-Mutairi infers, ‘by this definition, the Constitution of Kuwait is similar to the concept of the Islamic Economy, which only exists in the imagination of those who created the terminology’<sup>104</sup> (al-Mutairi, 2012).

Not surprisingly, there is considerable confusion over the responsibilities of each political branch, and possible overlapping in power distribution. It is referred to as a ‘flexible separation between powers’ because of the clause of cooperation mentioned in Article 50<sup>105</sup>: namely, that the legislative, executive and judicial must cooperate with each other - but in practice, cooperation is totally different from power distribution and balance between powers.

Moreover, as we have seen these powers are in any case more inclined towards those of a presidential system. This applies very much to foreign and security affairs too. The Amir, as Article 67 stipulates, is ‘the Supreme Commander of the Armed Forces’, responsible for appointing and dismissing officers; he is also allotted the power to ‘declare defensive war by decree’ by Article 68. Article 69 even gives the Amir the power to declare martial law by decree, with the National Assembly not allowed a say on its continuation or otherwise for up to fifteen days afterwards (and if it is not in sitting, potentially much longer); while Article 70 gives the

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<sup>104</sup> Dustūr Munhāz *wa mutanāqid*, Fahad Rāshid al-Muṭayrī, Jarīdat al-Jarīdah, 29 October 2012.

<http://www.aljaridaonline.com/news/index/2012568679/>

<sup>105</sup> **Article 50:** ‘The system of Government is based on the principle of separation of powers functioning in cooperation 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’.

Amir the power to agree treaties by decree, albeit these can only be ratified and put into law by Parliament.<sup>106</sup>

## **6.8 Conclusion**

This chapter has set out how, taken together, the Constitution, Explanatory Memorandum (EM) and Kuwaiti constitutional law scholars have defined democracy in the Emirate. Among its 183 separate provisions, the Constitution of Kuwait refers to the term ‘democracy’ only once, in Article 6, which describes democracy as the government system of the State of Kuwait.

Internationally, constitutions differ from one to another based on whether they are unwritten, rigid, flexible, long, or short; but in the case of Kuwait, the Constitution is written, rigid and concise. In effect, the drafters of the Constitution simply passed responsibility for explaining democracy along with other important articles to the EM.

However, the EM’s explanation of democracy is controversial and confusing. It describes the democratic system of Kuwait as a combination of the parliamentary and presidential system,

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<sup>106</sup>**Article 67:** ‘The Amir is the Supreme Commander of the Armed Forces. He appoints and dismisses officers in accordance with law’.

**Article 68:** ‘The Amir shall declare defensive war by decree. Offensive war is prohibited’.

**Article 69:** ‘The Amir shall proclaim Martial Law in the cases of necessity determined by law and in accordance with the procedure specified therein. The proclamation of Martial Law shall be by decree. Such decree shall be referred to the National Assembly within the fifteen days following its issue, for a decision on the future of Martial Law. If the proclamation takes place during the period the National Assembly is dissolved, it shall be referred to the new Assembly at its first sitting. Martial Law may not continue unless a decision to that effect is made by a majority vote of the members constituting the Assembly. In all cases, the matter shall be referred to the National Assembly in accordance with the foregoing procedure, every three months’.

**Article 70:** ‘The Amir shall conclude treaties by decree and shall transmit them immediately to the National Assembly with the appropriate statement. A treaty shall have the force of law after it is signed, ratified and published in the Official Gazette. However, treaties of peace and alliance; treaties concerning the territory of the State, its natural resources or sovereign rights, or public or private rights of citizens; treaties of commerce, navigation and residence; and treaties which entail additional expenditure not provided for in the budget, or which involve amendment of the laws of Kuwait; shall come into force only when made by a law. In no case may treaties include secret provisions contradicting those declared’.

with more inclination towards the former; but provides no analysis of the characteristics of the latter, and even included a fierce critique of the formation of political parties. Moreover, the language used in explaining democracy is more rhetorical than theoretical, more descriptive than analytical, rendering the explanation incoherent and obscure. According to Kuwaiti constitutional doctrine, the Constitution and the EM are the supreme legal source; yet such vagueness in explaining the system of government made supplying a more accurate definition ever more challenging.

Thus - and given that a theory of Kuwaiti democracy is remarkably absent in its political literature - the thesis turned its attention towards constitutional scholars. Their work, heavily influenced by French theoreticians, confirms that Kuwait has not adopted a particular model of democracy: instead, its system of government is hybrid and, it would appear, internationally unique. It is democratic, hereditary, representative, parliamentary and influenced by its Islamic and Arabic heritage.



## **Chapter 7: Conclusion**

### **7.1 Introduction**

The researcher has attempted to answer the question, 'Is Kuwait a democracy?' by focusing on the constitutional and conceptual foundations of its system of government. Throughout, this study has noted the many contradictions inherent in Kuwait's version of democracy; which in theory at least, is very much a pioneering model within a region known for autocratic regimes. Delving into the reasons which led a small tribal emirate to leap at the opportunity of constitutional democracy was therefore of critical importance.

The study has interrogated historical, constitutional and conceptual elements, with the goal of understanding democracy as defined by the Constitution of Kuwait and debated by the members of the Constituent Council, which was responsible for drafting and ratifying it in 1962.

### **7.2 Historical Factors**

In Chapter 2, the researcher set out the history of Kuwait's governing system: from Kuwait's establishment during the seventeenth century, through to its independence and ratification of its Constitution in 1962. Prior to its emergence as a modern state, its ruling traditions were, in essence, affected by the ruler's personality. The reigns of three rulers from the al-Sabah dynasty, Sabah I (1752-1762), Mubarak the Great (1896-1915), and Abdullah al-Salim al-Sabah (1950-1965), were especially important in such regard.

The Shura, or principle of consultations, was adopted by Kuwait in 1752, and used to appoint its first legitimate ruler. The appointment of Sabah bin Jabir occurred not by force, but through consent and consensus. Although he was a descendant of one of the most prominent tribes in Eastern Arabia, his appointment had little or nothing to do with nepotism; and owed instead to his pre-eminent diplomatic and political skills. The notables of Kuwait sought his residency and

availability all year round, and his proficiency in running its affairs while they were busy travelling the world to conduct trade and dive in search of pearls.

Shedding light on the protocol behind appointing Sabah I helped this study answer the key question of: what are the origins of democracy in Kuwait? By focusing on the tradition of joint governing, we learned the following:

1. The appointment of Sabah I was very much a political assignment conducted within the Shura tradition. There was an agreement between Sabah I and the notables to jointly rule Kuwait.
2. The tradition of joint governing involved consultation, consent, consensus, free discussion, and decision-making based on placing public welfare above personal interest. All of this is part of the Shura tradition, derived from the *Quran* and *Sunnah*.
3. The tradition of joint governing survived in Kuwait for more than a century, lasting from Sabah I's appointment in 1752 to Mohammad bin Sabah's reign between 1892 and 1896. In other words, joint governing became part of Kuwait's political culture, embedded within its society. It also enforced the political partnership between ruler and ruled. However, under Mubarak, this tradition began to fade. When Mubarak's sons followed in their father's footsteps, and the country faced its first succession crisis, the notables sought to institutionalize joint governing by calling for the establishment of the Shura Council in 1921, and Legislative Council in 1938.
4. Appointing the ruler by following the principles of Shura is accompanied by traditional protocol (such as their nomination); and ends with *al-Bay'ah*, the ceremony which the notables attend to pay their allegiance. By looking closely at the process of *al-Bay'ah*, an analogy with direct participation in ancient democracy becomes apparent. Both traditions

were exclusive to certain social classes; they are based on direct participation, but do not rely in any way on any form of representation as would be recognized in modern democracy. This is what has led Islamic scholars to argue for the compatibility of Islam with democracy.

### **7.2.1 Mubarak the Great**

Mubarak's accession in 1896 marked a turning point in Kuwaiti history. He was very much an authoritarian, who curtailed all forms of communication and consultation, and expected full compliance with his orders. He rebuked three merchants for expressing their dissent against his decision to increase import taxes. This created real tension between ruler and ruled, with matters escalating when he prevented both merchants and divers from taking part in the annual diving season. In response, accompanied by their families and supporters, the merchants took a stand against Mubarak's tyranny, and left Kuwait for neighbouring towns.

At regional level, however, Mubarak proved a resilient diplomat, shrewd politician and ambitious Sheikh, who was keen to protect Kuwait and secure its independence. He was ever conscious of the international competition surrounding his Sheikhdom: particularly between the Ottoman and British Empires. Therefore, when his rule was threatened, he skilfully played both Empires off against each other: continuing to pay allegiance to the Ottomans, while negotiating protection from the British. Covertly, he signed the Anglo-Kuwaiti Treaty in January 1899; this was not made public until 1903. The Treaty was the highlight of Mubarak's reign, and covered the protection of Kuwait, the ruler and the properties of the al-Sabah family, in both Kuwait and other territories.

Overall, Mubarak's reign completely redefined the ruling traditions of Kuwait, the ramifications of which were as follows:

1. The Shura tradition and the principles of joint governing disappeared, and were replaced by autocracy.
2. By ignoring the voices of the Kuwaiti public and ending all forms of consultation with them, Mubarak made real enemies among his own people.
3. In signing the Anglo-Kuwaiti Treaty in 1899, Mubarak protected himself, the al-Sabah dynasty and its future lineage, and secured the independence of Kuwait.
4. Yet the people could not accept the destruction of the joint governing tradition. The first confrontation between the ruler and Kuwaiti merchants occurred over the diving season, which represented the only source of income for most Kuwaitis.
5. Autocratic rule continued even after Mubarak's death in 1915. His successors were his sons Jabir (1915-1917) and Salim (1917-1921), both of whom followed their father's lead.

### **7.2.2 Succession Crisis and the Shura Council**

However, when Salim died in 1921, Kuwait faced its first genuine succession crisis. This provided the drive behind the notables' decision to confront the ruling family and seek to restore joint governing. They drafted and signed a petition requesting: (1) An immediate reconciliation in the House of Sabah and approval of one pattern of succession; (2) That the al-Sabah family chose one of three candidates to be the tenth ruler of Kuwait; (3) An end to all forms of autocratic rule and restoration of joint governing; (4) The establishment and election of the first Shura Council to represent the people of Kuwait; (5) That the new ruler would be made Head of this Council.

Initially, the House of Sabah complied with the notables' demands, and appointed Ahmad al-Jaber al-Sabah (1921-1950) as ruler. The new Amir was not in favour of any form of representation, and only approved the appointment of 12 notables to the newly established Shura Council because he knew that it would not last. Indeed, through this very decision, Ahmad hindered the potential for free and equal elections; he pretended to support the Council, but it only lasted two months, thanks to constant disputes among members.

Several important questions arise from Kuwait's first appointed Council: chief amongst them, its' all too brief existence:

1. Would the Amir have approved its establishment had it not been for the succession crisis and political pressure from the notables? Given his personality, clearly not. Prior to the succession crisis, Kuwait had experienced 24 years of authoritarian rule. This is what led the notables to stress the need for a Shura Council - but may also have been the template which the new Amir looked to.
2. The crisis marked a major shift in the notables' position towards the ruling family. When Sabah I was appointed in 1752, and during the process of *al-Bay'ah*, ruler and ruled were partners; there was a clear agreement to run Kuwait jointly. In 1921, recognizing the opportunity presented by Salim's death, the notables took the lead: signing a petition to resolve the internal affairs of the ruling House and seeking approval of the Emirate's first representative Council.

In other words, they had entirely shifted in political tactics: moving from the simple, direct and verbal traditions which followed the appointment of Sabah I, to institutionalising (effectively, codifying) the joint governing tradition. Although their

efforts at an elected council were thwarted, we cannot underestimate the role they played in establishing the Shura Council. Jill Crystal, indeed, describes ‘the 1921 Council [as] a dress rehearsal for the Legislative Assembly’ (1995, p. 42). This study fully concurs: The Council was indeed a dress rehearsal for the future of representative democracy and ultimately, an elected parliament in Kuwait.

### **7.2.3 Legislative Council**

The Legislative Council of 1938 was the second representative council in Kuwaiti history. Many scholars regard it as the Emirate’s first official representative assembly – because unlike the Shura Council, it was elected. The 1938 Council was formed after 17 years of political stagnation. Since the dissolution of the Shura Council, the country had lacked any form of representation. Moreover, the oil discovery of 1936 brought to an end any obvious need for partnership between the Amir and the merchants: freeing the former from economic dependence on the latter. The first thing which the Amir did in response was put pressure on the merchants by building new alliances with tribes. At the same time as increasing customs taxes, he sought to buy the allegiance of other members of the ruling family.

Key to the formation of the 1938 Council was the role played by the merchants, who reorganized themselves and formed Kuwait’s first opposition group, named ‘the 1938 Movement’. They approached the Amir with a reform plan, which called for free elections, an elected council, a constitution, and the appointment of Crown Prince Abdullah al-Salim al-Sabah as Head of the Council.

Although the Amir was greatly mistrustful of representative councils, he could not ignore these demands, for a variety of reasons:

1. By 1938, the opposition had a power base in Kuwaiti society, and were critical to its successful functioning. Merchants had invested their own money in establishing specialized councils in education, justice, health and municipalities, providing public services to Kuwaitis. This allowed them the chance to dominate local affairs and to win public confidence.
2. Unlike the Shura Council, the founding of the Legislative Council was not merely a reaction to a political crisis. The opposition endeavoured to avoid the mistakes committed in 1921, so changed tactics. Instead of confronting the government with their political agenda, they focused on public opinion and expanding their political base. Henceforth, the opposition began to expand, and include a new middle class of young, educated Kuwaitis.
3. From the point that the government began to arrest key opposition figures for speaking up and calling for reform, the opposition effectively united as one party: forming an electorate of 150 representatives of prominent Kuwaiti families, electing 14 members of the Legislative Council. All attempts by the Amir to suspend the Council's work failed; by July 1938, he had no alternative other than to approve it.

However, the Council was scarcely any sort of democratic panacea either. With an electorate of just 150, the suffrage was not expanded in any discernible way. In light of this, how could the Council have seriously claimed to represent all segments of Kuwaiti society? In modern democratic terms, the electorate should be inclusive of all citizens. Yet the 1938 electorate conforms rather more to the idea of oligarchy: rule by the few, even if elected in the process.

As we have noted, the 1938 opposition had a clear vision, reform plan, and even enacted a law which stated that a constitution would be drafted. Many of their aims were briefly successful; but

the Legislative Council ultimately only lasted for six months. In Chapter 2, we noted how its major mistake lay in undermining and antagonising the government by taking over too many responsibilities. The Basic Law of the Legislative Council did not consider the principle of separation of powers remotely carefully enough. Instead, it allowed its members a vast number of powers without any distinction being drawn between the legislative and executive. In many cases, Council members took on roles hitherto preserved for the government.

Of course, many merchants had experience in funding and supervising specialized councils, which covered a wide range of public services – but their overreach infuriated both the Amir and the government. Accordingly, the Council was swiftly dissolved.

#### **7.2.4 Constituent Council**

Following Kuwaiti independence on 19 June 1961, the inauguration of the Constituent Council on 20 January 1962 represented a major milestone in the country's transition to a modern state. Its main mission was to draft and ratify Kuwait's first Constitution. Each of the ten constituencies would be represented by two elected members (Dashti and Marafi, 2013, p. 11).

There was a high level of participation at the elections: a reflection, we might infer, of national pride and jubilation. For more than four decades, the people of Kuwait had fought for both independence and an elected, representative body. In 1961-2, their dream came true. Kuwait declared independence and 90% of Kuwaiti men (women were excluded) cast their votes, in preparation for the drafting of the country's first Constitution. More than two centuries on from Sabah I's appointment under the principles of joint governing, there remained a fervour among Kuwaitis for political partnership with their rulers. Various domestic and regional events then led the Emirate to expedite ratification of the Constitution and adopt democracy:



1. Qasim's threats towards Kuwait, which he claimed was part of Iraqi territory: and sought to render its independence as null and void.
2. The prompt reaction of the Kuwaiti government: which sent a diplomatic delegation, headed by the Minister of Finance, to Cairo and other Arab League capitals, to win their support and form a coalition against Iraq's sabre rattling. During the tour, the Amir was urged to adopt parliamentary democracy as a bulwark against Kuwait's hostile neighbour.
3. The prominent role played by Kuwaiti nationalists in coming together and forging close ties with President Nasser of Egypt. This rather confirmed the saying: 'A friend in need is a friend indeed'. Nasser was one of the first Arab leaders to pledge to support and protect Kuwait. He also delegated three prominent constitutional experts to draft the Constitution of Kuwait, and other laws based on the Egyptian legal model.
4. The leadership of Abdullah al-Salim al-Sabah contributed profoundly to completion of the Constitution and adoption of democracy. Without his strenuous efforts and mediation attempts between the government and Council members, the Constitution would not have been ready on time. Like his people, the Amir was eager to see his country take the lead in adopting a democratic system of government. Indeed, he was himself an advocate of political reform and believer in political participation. He was a friend of the opposition and supporter of the Arab Nationalist Movement. To date, Kuwaitis acknowledge his achievements by referring to him as *'Abū ad-Dustūr* (The Father of the Constitution).

### **7.3 Constitutional Factors**

To understand the roots and origins of Kuwait's government system, it was necessary to examine the concept of democracy as defined in the Constitution of Kuwait. In Chapter 5, the researcher examined the Minutes of Proceedings (MOPs) of both the Constituent Council and Constitutional Committee: scrutinising the historical events, debates on democracy and Islamic

Sharia, which led the Council members to approve democracy as Kuwait's system of government.

The aim of examining the MOPs lay in understanding where the members stood on the adoption of an essentially Western system, democracy, within a conservative society which held firm to tradition and Islamic teachings. How did they perceive the concept of democracy, and adjust it to their culture? Moreover, the debates which took place on the governing system also highlight the strong Egyptian impact on the drafting of the Kuwaiti Constitution.

The MOPs proved an eye-opening experience for this study. They revealed huge confusion and even out-and-out fallacies about the form of government in Kuwait, what democracy means and involves, and especially, its contradictions with Islamic Sharia. The key findings were as follows:

1. The notion of democracy was mentioned only once in the Constitution's text (other than in the Preamble, an opening statement by the Amir).<sup>107</sup> Article 6 of the Constitution was designated to identify the government system of Kuwait: which, it states, is democratic.<sup>108</sup>

Overall, the Constitution is remarkably limited in explaining the country's system of government – albeit, Article 6 states that the people, the main component in defining any democracy, are the source of all powers; while there are several articles associated with

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<sup>107</sup> The Preamble to the Constitution of Kuwait states: 'In the name of Allah, the Beneficent, the Merciful, we, Abdullah al-Salim al-Sabah, Amir of the State of Kuwait being desirous of consummating the means of democratic rule for our dear Country; and, having faith in the role of this country in furthering Arab nationalism and the promotion of world peace and human civilization' (see Appendix for the complete text of the Preamble and the Constitution).

<sup>108</sup> **Article 6** states: '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'.

democratic values, such as freedoms, equality and justice. These articles were inspired by The Universal Declaration of Human Rights (UDHR), issued in Paris in 1948.<sup>109</sup>

2. Members lacked any constitutional or conceptual background or knowledge on democratic systems. Some of them failed to draw the correct distinction between parliamentary and presidential systems; others possessed very basic information. In all cases, hiring legal and constitutional experts was essential if these issues were to be successfully dealt with.
3. Debates on the government system were basic and limited. To decide on the theoretical trajectory of the Constitution, from early on during the sessions, the legal expert urged members to decide on the form of democracy. Yet the resulting discussions did not include any form of introduction or background about democratic systems. Instead, they focused mainly on the highlights of presidential and parliamentary systems. When the

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<sup>109</sup> **Article 7:** ‘Justice, liberty, and equality are the pillars of society; co-operation and mutual help are the firmest bonds between citizens’.

**Article 24:** ‘Social justice shall be the basis of taxes and public imposts’.

**Article 29:** ‘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’.

**Article 30:** ‘Personal liberty is guaranteed’.

**Article 36:** ‘Freedom of opinion and of scientific research shall be guaranteed. Every person shall have the right to express and propagate his opinion verbally, in writing or otherwise, in accordance with the conditions and procedures specified by law’.

**Article 37:** ‘Freedom of the press, printing and publishing shall be guaranteed in accordance with the conditions and manner specified by law’.

**Article 43:** ‘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. No one may be compelled to join any association or union’.

**Article 50:** ‘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’.

jurists realized the limited knowledge of the Council members, they presented two detailed memoranda, explaining the disparity between the two systems.

To be more specific: The MOPs inform us merely that the presidential system applies to republics; and as Kuwait is a monarchy, therefore inapplicable. They also inform us that parliamentary systems can be modified, especially when appointing elected members of the government.

4. The government representative on the Constitution Committee had some reservations in adopting the parliamentary system. He favoured the presidential system, even though it suited republics, not monarchies. His concerns related to the powers secured by parliamentary systems for elected members, including the withdrawal of confidence from the government; and forming a Cabinet of elected members only. This led the jurists to propose a merger between parliamentary and presidential systems, with some modifications.
5. The Constitution Committee agreed to this merger: taking into special consideration that Kuwait is a monarchy, and the person of the Amir is immune and inviolable. Moreover, the jurists also modified the law to give the government more guarantees. For example, they exempted the prime minister both from any ministerial position, and the responsibility to avoid confidence in his person being withdrawn.
6. When Article 6 was presented for final deliberation in the Constituent Council, it was approved promptly.
7. The MOPs did not mention anything about the historical controversy over the Sharia clause: which had first occurred in the Arab world during the nineteenth century (see Chapter 5). Instead, the constitutional expert explained it to the Council from a technical

point of view. At first, the jurist suggested that the phrase, ‘Sharia is a main source of legislation’, should not be included at all - believing that, as in Egypt, Sharia should be applied in Kuwaiti civic law instead. However, the members objected, and insisted that the Sharia clause, central to their sense of Kuwaiti identity, should be included.

There followed a prolonged debate on semantics. As the legal expert explained, if the Constitution stated, ‘Sharia is a main source of legislation’, this would allow legislators the flexibility to adopt other laws. However, if it instead said: ‘Sharia is the main source of legislation’, this would leave legislators bound to implement it, without exception.

Ultimately, the members adopted a Sharia clause which allowed for greater flexibility, with Article 2 stating: ‘The religion of the state is Islam and the Sharia shall be a main source of legislation’ (See Appendix).

#### **7.4 Conceptual Factors**

Conceptual factors involve the theories and concepts adopted and applied by this study, in its aim to understand Kuwaiti democracy from its roots and origins. It was covered on three levels. In Chapter 3, we defined the concept of democracy in the Western and Islamic worlds and highlighted the controversies and debates around the subject. In Chapter 4, we focused on the three classical models of democracy developed by David Held, which cover ancient Athens, the Italian republics, and the rise of liberal thought during the European Renaissance. We elaborated on the institutional and constitutional characteristics of each model; as well as the political ideals and philosophical principles which influenced Western political thought in general; democratic thought in particular.

In Chapter 6, the study uncovered the philosophical foundations of Kuwait’s government system, as developed by Kuwaiti constitutional law scholars. This is the first research of its kind (i.e. in

politics) to focus on conceptual perspectives of Kuwaiti democracy, based on interpretation and analysis of the Kuwaiti Constitution, Explanatory Memorandum (EM), and Minutes of Proceedings of the Constitution Committee and Constituent Council.

In terms of conceptual factors, the key findings of this study are as follows:

1. Whether in the Western or Islamic world, definitions of the concept of democracy are vague and misleading. There is no consensus in the literature on one definition and explanation beyond the literal meaning of democracy: 'Rule by people'. Muslim scholars are far less concerned about the detail of democratic ideals than the compatibility of Islam with democracy: with great disagreement all too apparent on this point.  
  
Complicating matters is the view of some Islamic scholars that democracy is the Western version of Shura (the Islamic principle of consultations). In fact, the former has always been a system of government; whereas, the latter is purely an Islamic tradition.
2. There are institutional and constitutional parallels between the emergence of democracy in Kuwait and ancient democracy. There is a clear resemblance between classical Athens and modern Kuwait in terms of the limited participation of citizens. Both described their constitutions as democratic, meaning that supposedly, the people rule and are the source of all powers. Yet both oversee limited, restricted participation based on gender, class and age discrimination. This is very much a case of 'democracy of the few' (see Chapter 6).  
  
There is also a parallel between the medieval Italian republics and newly independent Kuwait. Emancipating these republics from ecclesiastical dominance was the main concern of political theorists and philosophers. The Italian republics reached a point

whereby the legislation of mixed constitutions was the only way of securing peace and stability.

In the case of Kuwait, the conflict between democracy and Islamic Sharia was one of the main sticking points while drafting the Constitution. Kuwait refers to its system of government as democratic; yet Sharia is a main source of legislation. Like the Italian republics, Kuwait therefore has a mixed constitution (see Chapter 4).

3. Chapter 6 provided a depiction of the democratic theory adopted by Kuwait in terms of its parliamentary democracy (as set out in the EM). Yet surprisingly, the literature on Kuwait constitutional law was random, sparse and peripheral. The literature does not adopt a particular theory or school of thought, while its explanations are scattered and wholly lacking in depth. At times, it relies upon the early principles of English constitutional monarchy; at others, on the semi-presidential, Orleanist system of nineteenth century France. Moreover, its conceptual framework is very much influenced by the French school – but it does not provide any real detail or sense of theoretical direction. Sometimes, it refers to Jean-Jacques Rousseau; at others, to Maurice Duverger. Overall, then, a key conclusion of this study centres upon the lack of substance and cogency in the theoretical framework of Kuwait’s system of government. The available sources either rely on obsolete examples or are very basic and classical in explaining democracy in Kuwait, despite it being a contemporary, modern state.

## **7.5 Final Reflections**

What, then, are this study’s reflections on all the constitutional and conceptual issues discussed regarding democracy in Kuwait? First, we should note that since its ratification on 11 November 1962, the Constitution of Kuwait has never been amended. Counter-intuitively, perhaps

(especially given what was noted in Chapter 6), this owes in no small part to the Constitution's liberal spirit, which precludes Islamic Sharia from becoming the only source of legislation<sup>110</sup>. This is embodied in Article 175: 'The provisions relating to the Amiri system in Kuwait and the principles of liberty and equality, provided for in this Constitution, may not be proposed for revision except in relation to the title of the Emirate or to increase the guarantees of liberty and equality' (see Appendix).

In other words, the Constitution can only be liable amended under two specific conditions: whether the proposed changes would secure more freedoms and liberties; and if a majority vote of Parliament and consent of the Amir are secured. This makes Article 174 very much worth highlighting, as it is unusually lucid in explaining the required procedures to propose a constitutional amendment and what it takes to pass it:

Either the Amir or one-third of the members of the National Assembly shall have the right to propose a revision of the Constitution by amending or deleting one or more of its provisions or by adding new provisions. If the Amir and the majority of the members constituting the National Assembly approve the principle of revision and its subject matter, the Assembly shall debate the bill article by article. Approval by a two-thirds majority vote of the members constituting the Assembly shall be required for the bill to be passed. The revision shall come into force only after being sanctioned and promulgated by the Amir regardless of the provisions of Articles 65 and 66 of this Constitution. If the principle of revision or its subject matter is rejected, it shall not be presented again before the lapse of one year from the rejection. No amendment to this Constitution may be proposed before the lapse of five years from its coming into force (See Appendix, Article 174).

The crux of this study lay in the sheer complexity of attempting to define the democratic system of Kuwait. That a newly independent, very small state adopted democracy and customized it according to its culture and society was remarkable, especially given the prevalence of authoritarian regimes in the region. Yet neither the Constitution nor the Explanatory

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<sup>110</sup> **Article 2:** 'The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation' (see Appendix).



Memorandum truly explain the country's merger between the parliamentary and presidential systems. And this failure to properly explain Kuwait's government system has proven a major stumbling block to political stability. Since independence in 1961, there has been persistent tension between the government and parliament, with the latter dissolved on 11 separate occasions since 1967; while the legislative, executive and judicial branches remain closely intertwined, with the principle of a separation of powers poorly reflected.

However, the voices of reformists, who seek a fully-fledged parliamentary democracy, have never been silenced. The most recent attempts at political reform occurred in 2012, when the parliamentary opposition, political activists, scholars and non-governmental organization representatives began to speak and write openly in support of parliamentary democracy. Their demands included the formation of political parties, broadening the electoral base, independence of the judiciary, far greater separation of powers, and the end of censorship with regard to freedoms of expression, the press, and association.

This leads the study to conclude that the roots of the political impasse which Kuwait has so often experienced since its independence lie in its peculiar constitutional and conceptual trajectory since the Constitution was ratified in 1962 (see Chapters 5 and 6). Accordingly, it recommends the following:

1. Long overdue, wholly necessary reform of Kuwait's political system should be a truly national project, incorporating all segments of society including the government.

Demands for political reform should not be a slogan used only in election campaigns to win the hearts and minds of voters. Kuwait has the potential to be the Gulf region's first fully fledged democracy or constitutional monarchy – but only if a long-term plan and political vision is adopted not by the opposition, but by the government.

2. To foster interest in studying Kuwaiti politics by funding research programs, scholarships and exchange programmes. It is also vital to connect the public sector - including The Higher Council for Planning, Ministry of Foreign Affairs, Ministry of Information and Kuwait National Assembly - with research institutions worldwide. Lack of research could ultimately hinder the Kuwaiti system: for as we have noted, there has been a profound lack of detailed political attention paid to Kuwait's system of government, not to mention its continued fitful integration with democratic practices. Instead, almost all research in this area has hitherto been left to the field of constitutional law. This cannot remain the case as Kuwait moves into the future.
3. Kuwait must learn from its history. The existential crisis of 1961, when Qasem of Iraq threatened to annex Kuwait, united the people, and led them to adopt democracy and ratify one of the most liberal constitutions in the region. Kuwait should not stand idly by and wait for a similar crisis before uniting in common cause once more. Its parliament, government, ruling House and people should, surely, seek to work together and mature the country's democratic experience sooner, rather than later.

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# **Appendix**

## **The Constitution of the State of Kuwait**

### **National Assembly**

**Issued on November 11, 1962**

In the name of Allah, the Beneficent, the Merciful, we Abdullah al-Salim al-Sabah, Amir of the State of Kuwait being desirous of consummating the means of democratic rule for our dear country; and having faith in the role of this country in furthering Arab nationalism and the promotion of world peace and human civilization; and striving towards a better future in which the country enjoys greater prosperity and higher international standing, and in which also the citizens are provided with more political freedom, equality and social justice; a future which upholds the traditions inherent in the Arab nature by enhancing the dignity of the individual, safeguarding public interest, and applying consultative rule yet maintaining the unity and stability of the country; and having considered law number I of 1962 concerning the system of government during the period of transition; and upon the resolution of the Constituent Assembly, do hereby approve this constitution and promulgate it.

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### **Part I - The State and System of Government**

#### **Article 1**

Kuwait is an Arab State, independent and fully sovereign. Neither its sovereignty nor any part of its territory may be relinquished. The people of Kuwait is a part of the Arab Nation.

#### **Article 2**

The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation.

#### **Article 3**

The official language of the State is Arabic.

#### **Article 4**

Kuwait is a hereditary emirate, the succession to which shall be in the descendants of the late Mubarak al-Sabah. The Heir Apparent shall be designated within one year, at the latest from the

date of accession of the Amir. His designation shall be effected by an Amiri order upon the nomination of the Amir and the approval of the National Assembly, which shall be signified by a majority vote of its members in a special sitting. In case no designation is achieved in accordance with the foregoing procedure, the Amir shall nominate at least three of the descendants of the late Mubarak al-Sabah of whom the National Assembly shall pledge allegiance to one as Heir Apparent. The Heir Apparent shall have attained his majority, be of sound mind, and a legitimate son of Muslim parents. A special law promulgated within one year from the date of coming into force of this constitution shall lay down the other rules of succession in the emirate. The said law shall be of a constitutional nature and therefore shall be capable of amendment only by the procedure prescribed for amendment of the constitution.

#### **Article 5**

The flag, emblem, badges, decorations, and National Anthem of the State shall be specified by law.

#### **Article 6**

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.

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### **Part II - Fundamental Constituents of Kuwaiti Society**

#### **Article 7**

Justice, liberty, and equality are the pillars of society; co-operation and mutual help are the firmest bonds between citizens.

#### **Article 8**

The State safeguards the pillars of society and ensures security, tranquility, and equal opportunities for citizens.

#### **Article 9**

The family is the corner-stone of society. It is founded on religion, morality, and patriotism. Law shall preserve the integrity of the family, strengthen its ties and protect under its auspices motherhood and childhood.

**Article 10**

The State cares for the young and protects them from exploitation and from moral, physical and spiritual neglect.

**Article 11**

The state ensures aid for citizens in old age, sickness or inability to work. It also provides them with services of social security, social aid and medical care.

**Article 12**

The state safeguards the heritage of Islam and of the Arabs and contributes to the furtherance of human civilization.

**Article 13**

Education is a fundamental requisite for the progress of society assured and promoted by the state.

**Article 14**

The state shall promote science, letters, and the arts and encourage scientific research therein.

**Article 15**

The state cares for public health and for means of prevention and treatment of diseases and epidemics.

**Article 16**

Property, capital and work are fundamental constituents of the social structure of the state and of the national wealth. They are all individual rights with a social function as regulated by law.

**Article 17**

Public property is inviolable and its protection is the duty of every citizen.

**Article 18**

Private property is inviolable. No one shall be prevented from disposing of his property except within the limits of the law. No property shall be expropriated except for the public benefit in the circumstances and manner specified by law, and on condition that just compensation is paid.

Inheritance is a right governed by the Islamic Sharia.

### **Article 19**

General confiscation of the property of any person shall be prohibited. Confiscation of particular property as a penalty may not be inflicted except by a court judgment in the circumstances specified by law.

### **Article 20**

The national economy shall be based on social justice. It is founded on fair co-operation between public and private activities. Its aim shall be economic development, increase of productivity, improvement of the standard of living, and achievement of prosperity for citizens, all within the limits of law.

### **Article 21**

Natural resources and all revenues therefrom are the property of the state. It shall ensure their preservation and proper exploitation due regard being given to the requirements of State security and the national economy.

### **Article 22**

Relations between employers and employees and between landlords and tenants shall be regulated by law on economic principles, due regard being given to the rules of social justice.

### **Article 23**

The State shall encourage both co-operative activities and savings, and supervise the system of credit.

### **Article 24**

Social justice shall be the basis of taxes and public imposts.

### **Article 25**

The state shall ensure the solidarity of society in shouldering burdens resulting from public disasters and calamities and provide compensation for war damages or injuries received by any person as a result of the discharge of his military duties.

### **Article 26**

Public office is a national service entrusted to those who hold it. Public officials, in the exercise of their duties, shall aim at the public interest. Aliens may not hold public offices except in the cases specified by law.

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## **Part III - Public Rights and Duties**

### **Article 27**

Kuwaiti nationality shall be defined by law. No deprivation or withdrawal of nationality may be effected except within the limits prescribed by law.

### **Article 28**

No Kuwaiti may be deported from Kuwait or prevented from returning thereto.

### **Article 29**

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.

### **Article 30**

Personal liberty is guaranteed.

### **Article 31**

No person shall be arrested, detained, searched or compelled to reside in a specified place, nor shall the residence of any person or his liberty to choose his place of residence or his liberty of movement be restricted, except in accordance with the provisions of law. No person shall be subjected to torture or to degrading treatment.

### **Article 32**

No crime and no penalty may be established except by virtue of law, and no penalty may be imposed except for offences committed after the relevant law has come into force.

### **Article 33**

Penalty is personal.

### **Article 34**

An accused person is presumed innocent until proved guilty in a legal trial at which the necessary guarantees for the exercise of the right of defense are secured. The infliction of physical or moral injury on an accused person is prohibited.

### **Article 35**

Freedom of belief is absolute. The State protects the freedom of practicing religion in accordance with established customs, provided that it does not conflict with public policy or morals.

### **Article 36**

Freedom of opinion and of scientific research shall be guaranteed. Every person shall have the right to express and propagate his opinion verbally, in writing or otherwise, in accordance with the conditions and procedures specified by law.

### **Article 37**

Freedom of the press, printing and publishing shall be guaranteed in accordance with the conditions and manner specified by law.

### **Article 38**

Places of residence shall be inviolable. They may not be entered without the permission of their occupants except in the circumstances and manner specified by law.

### **Article 39**

Freedom of communication by post, telegraph and telephone and the secrecy thereof shall be guaranteed; accordingly censorship of communications and disclosure of their contents shall not be permitted except in the circumstances and manner specified by law.

### **Article 40**

Education is a right for Kuwaitis, guaranteed by the state in accordance with law and within the limits of public policy and morals. Education in its preliminary stages shall be compulsory and free in accordance with law. Law shall lay down the necessary plan to eliminate illiteracy. The state shall devote particular care to the physical, moral and mental development of youth.

### **Article 41**

Every Kuwaiti has the right to work and to choose the type of his work. Work is a duty of every citizen necessitated by personal dignity and public good. The state shall endeavor to make it available to citizens and to make its terms equitable.

### **Article 42**

There shall be no forced labor except in the cases specified by law for national emergency and with just remuneration.

### **Article 43**

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. No one may be compelled to join any association or union.

#### **Article 44**

Individuals shall have the right of private assembly without permission or prior notification, and the police may not attend such private meetings. Public meetings, processions and gatherings shall be permitted in accordance with the conditions and manner specified by law, provided that their purpose and means are peaceful and not contrary to morals.

#### **Article 45**

Every individual shall have the right to address the public authorities in writing over his signature. Only duly constituted organizations and bodies corporate shall have the right to address the authorities collectively.

#### **Article 46**

Extradition of political refugees is prohibited.

#### **Article 47**

National defense is a sacred duty, and military service is an honor for citizens which shall be regulated by law.

#### **Article 48**

Payment of taxes and public imposts is a duty in accordance with law which shall regulate exemption of small incomes from taxes in such a way as to maintain the minimum standard of living.

#### **Article 49**

Observance of public order and respect for public morals are a duty incumbent upon all inhabitants of Kuwait.

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### **Part IV - Powers**

#### **Chapter I - General Provisions**

#### **Article 50**

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.

**Article 51**

Legislative power shall be vested in the Amir and the National Assembly in accordance with the constitution.

**Article 52**

Executive power shall be vested in the Amir, the cabinet, and the ministers, in the manner specified by the constitution.

**Article 53**

Judicial power shall be vested in the Courts, which shall exercise it in the name of the Amir within the limits of the constitution.

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**Chapter II - The Head of State**

**Article 54**

The Amir is the Head of the State. His person shall be immune and inviolable.

**Article 55**

The Amir shall exercise his powers through his Ministers.

**Article 56**

The Amir shall, after the traditional consultations, appoint the Prime Minister and relieve him of office. The Amir shall also appoint Ministers and relieve them of office upon the recommendation of the Prime Minister. Ministers shall be appointed from amongst the members of the National Assembly and from others. The number of Ministers in all shall not exceed one third of the number of the members of the National Assembly.

**Article 57**

The Cabinet shall be re-constituted in the manner specified in the preceding Article at the beginning of every legislative term of the National Assembly.



### **Article 58**

The Prime Minister and the Ministers shall be collectively responsible to the Amir for the general policy of the State. Every minister shall also be individually responsible to the Amir for the affairs of his ministry.

### **Article 59**

The Law referred to in Article 4 of this constitution shall specify the conditions under which the Amir shall exercises his constitutional powers.

### **Article 60**

Before assuming his powers, the Amir shall take the following oath at a special sitting of the National Assembly: ‘I swear by Almighty God to respect the constitution and the laws of the State, to defend the liberties, interests and properties of the people and to safeguard the independence and territorial integrity of the Country.’

### **Article 61**

In the event of his absence outside the country and the inability of the Heir Apparent to act as deputy for him, the Amir shall appoint, by an Amiri Order, a deputy who shall exercise his powers during his absence. The said Amiri Order may include a specified arrangement for the exercise of the said powers on behalf of the Amir or a limitation of their scope.

### **Article 62**

The Amir’s Deputy shall satisfy the qualifications laid down in Article 82 of this Constitution. If he is a Minister or a member of the National Assembly, he shall not take part in the ministerial functions or in the work of the Assembly during the period he is acting as Deputy for the Amir.

### **Article 63**

Before assuming his powers the Amir’s Deputy shall, at a special sitting of the National Assembly, takes the oath mentioned in Article 60 of this constitution with the following phrase added thereto: ‘and be loyal to the Amir.’ In case the National Assembly is not in session, the Oath shall be taken before the Amir.

### **Article 64**

The provisions of Article 131 of this constitution shall apply to the Amir’s Deputy.

### **Article 65**

The Amir shall have the right to initiate, sanction, and promulgate laws. Promulgation of laws shall take place within thirty days from the date of their submission by the National Assembly to

the Amir. This period shall be reduced to seven days in case of urgency. Such urgency shall be decided upon by a majority vote of the members constituting the National Assembly. Official holidays shall not be counted in computing the promulgation period. If the period of promulgation expires without the Head of State demanding reconsideration, the bill shall be considered as having been sanctioned and shall be promulgated.

#### **Article 66**

Reference of a bill for reconsideration shall be by a decree stating the grounds therefore. If the National Assembly confirms the bill by a two-thirds majority vote of its members the Amir shall sanction and promulgate the bill within thirty days from its submission to him. If the bill does not receive the said majority, it shall not be reconsidered during the same session. If the National Assembly, in another session, confirms the same bill by a majority vote of its members, the Amir shall sanction and promulgate the bill as law within thirty days from its submission to him.

#### **Article 67**

The Amir is the Supreme Commander of the Armed Forces. He appoints and dismisses officers in accordance with law.

#### **Article 68**

The Amir shall declare defensive war by decree. Offensive war is prohibited.

#### **Article 69**

The Amir shall proclaim Martial Law in the cases of necessity determined by law and in accordance with the procedure specified therein. The proclamation of Martial Law shall be by decree. Such decree shall be referred to the National Assembly within the 15 days following its issue, for a decision on the future of Martial Law. If the proclamation takes place during the period the National Assembly is dissolved, it shall be referred to the new Assembly at its first sitting. Martial Law may not continue unless a decision to that effect is made by a majority vote of the members constituting the Assembly. In all cases the matter shall be referred to the National Assembly in accordance with the foregoing procedure every three months.

#### **Article 70**

The Amir shall conclude treaties by decree and shall transmit them immediately to the National Assembly with the appropriate statement. A treaty shall have the force of law after it is signed, ratified and published in the official gazette. However, treaties of peace and alliance; treaties concerning the territory of the State, its natural resources or sovereign rights, or public or private rights of citizens; treaties of commerce, navigation and residence; and treaties which entail additional expenditure not provided for in the budget, or which involve amendment of the laws

of Kuwait; shall come into force only when made by a law. In no case may treaties include secret provisions contradicting those declared.

#### **Article 71**

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 shall have the force of law, provided that they shall not be contrary to the constitution or to the appropriations included in the budget law. Such decrees shall be referred to the National Assembly within the 15 days following their issue if the Assembly is in being. If it is dissolved or its legislative term has expired such decrees shall be referred to the next Assembly at its first sitting. If they are not thus referred, they shall retrospectively cease to have the force of law, without the necessity of any decision to that effect. If they are referred and the Assembly does not confirm them, they shall 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.

#### **Article 72**

The Amir shall by decree, issue the regulations necessary for the execution of laws without amending or suspending such laws or making any exemption from their execution. A law may prescribe a less formal instrument than a decree for the issue of the regulations necessary for its execution.

#### **Article 73**

The Amir shall by decree, issue regulations for public order and health, and regulations necessary for the organization of public services and administration not conflicting with any law.

#### **Article 74**

The Amir shall appoint and dismiss civil and military officials and diplomatic representatives to foreign countries in accordance with law. He shall also accept credentials of the representatives of foreign countries.

#### **Article 75**

The Amir may, by decree, grant a pardon or commute a sentence. However, general amnesty shall not be granted except by a law and then only in respect of offences committed prior to the proposal of the amnesty.

#### **Article 76**

The Amir shall confer Orders of Honor in accordance with law.

#### **Article 77**

Coins shall be minted in the name of the Amir in accordance with law.

**Article 78**

Upon the accession of the Head of State his annual emoluments shall be fixed by a law for the duration of his reign.

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**Chapter III - Legislative Power**

**Article 79**

No law may be promulgated unless it has been passed by the National Assembly and sanctioned by the Amir.

**Article 80**

The National Assembly shall be composed of 50 members elected directly by universal suffrage and secret ballot in accordance with the provisions prescribed by the electoral law. Ministers who are not elected members of the National Assembly shall be considered ex-officio members thereof.

**Article 81**

Electoral constituencies shall be determined by law.

**Article 82**

A member of the National Assembly shall:

- (a) Be a Kuwaiti by origin in accordance with 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.

**Article 83**

The term of the National Assembly shall be four calendar years commencing with the day of its first sitting. Elections for the new Assembly shall take place within the 60 days preceding the expiry of the said term, due regard being given to the provisions of Article 107. Members whose

term of office expires may be re-elected. The term of the Assembly may not be extended except for necessity in time of war and by a law.

#### **Article 84**

If, for any reason, a seat in the National Assembly becomes vacant before the end of the term, the vacancy shall be filled by election within two months from the date on which the Assembly declares the vacancy. The mandate of the new member shall last until the end of that of his predecessor. If the vacancy occurs within six months prior to the expiry of the legislative term of the Assembly, no successor shall be elected.

#### **Article 85**

The National Assembly shall have an annual session of not less than eight months. The said session may not be prorogued before the budget is approved.

#### **Article 86**

The Assembly shall start its ordinary session during the month of October of every year upon a convocation by the Amir. If the decree of convocation is not issued before the first of the said month, the time for the meeting shall be deemed to be 9 a.m. on the third Saturday of that month. If such day happens to be an official holiday, the Assembly shall meet on the morning of the first day thereafter.

#### **Article 87**

Notwithstanding the provisions of the preceding two Articles, the Amir shall summon the National Assembly to hold its first meeting within two weeks of the end of the general election. If the decree of convocation is not issued within the said period, the Assembly shall be deemed to have been convoked for the morning of the day following these two weeks, due regard being given to the relevant provision of the preceding Article. If the date of the meeting of the Assembly falls after the annual date mentioned in Article 86 of the constitution, the term of the session specified in Article 85 shall be reduced by the difference between the said two dates.

#### **Article 88**

The National Assembly shall by decree be called to an extraordinary session if the Amir deems it necessary, or upon the demand of the majority of the members of the Assembly. In an extraordinary session, the Assembly may not consider matters other than those for which it has been convened except with the consent of the Cabinet.

#### **Article 89**

The Amir shall announce the prorogation of ordinary and extraordinary sessions.

### **Article 90**

Every meeting held by the Assembly at a time or place other than that assigned for its meeting shall be invalid, and resolutions passed thereat shall, by virtue of law, be void.

### **Article 91**

Before assuming his duties in the Assembly or in its committees, a member of the National Assembly shall take the following oath before the Assembly in a public sitting: 'I swear by Almighty God to be faithful to the country and to the Amir, to respect the constitution and the laws of the state, to defend the liberties, interests, and properties of the people and to discharge my duties honestly and truthfully.'

### **Article 92**

The National Assembly shall elect at its first sitting and for the duration of its term a president and a deputy president from amongst its members. If either office becomes vacant, the Assembly shall elect a successor for the remainder of its term. In all cases, election shall be by an absolute majority vote of the members present. If this majority vote is not attained in the first ballot, another election shall be held between the two candidates receiving the highest number of votes.

If more than one candidate receives an equal number of votes in the second place, all such candidates shall participate in the second ballot. In this case, the candidate who receives the greatest number of votes is elected. If there is a tie in this last ballot, the choice shall be by lot.

The oldest member shall preside over the first sitting until the president is elected.

### **Article 93**

The Assembly shall form within the first week of its annual session, the committees necessary for its functions. These committees may discharge their duties during the recess of the Assembly with a view to submitting their recommendations to it when it meets.

### **Article 94**

Sittings of the National Assembly shall be public, though they may be held in secret upon the request of the government, the president of the Assembly or of ten of its members. The debate on such request shall be held in secret.

### **Article 95**

The National Assembly shall decide 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.

### **Article 96**

The National Assembly shall be the competent authority to accept resignation of its members.

### **Article 97**

For a meeting of the National Assembly to be valid more than half of its members must be present. Resolutions shall be passed by an absolute majority vote of the members present, except in cases where a special majority is required. When votes are equally divided, the motion shall be deemed to be rejected.

### **Article 98**

Immediately upon its formation, every cabinet shall present its programme to the National Assembly. The Assembly may make comments with regard to such a programme.

### **Article 99**

Every member of the National Assembly may put to the Prime Minister and to Ministers questions with a view to clarifying matters falling within their competence. The questioner alone shall have the right to comment once upon the answer.

### **Article 100**

Every member of the National Assembly may address to the Prime Minister and to Ministers interpellations with regard to matters falling within their competence. The debate on such an interpellation shall not take place until at least eight days have elapsed after its presentation, except in case of urgency and with the consent of the Minister concerned. Subject to the provisions of Articles 101 and 102 of the constitution, an interpellation may lead to the question of no-confidence being put to the Assembly.

### **Article 101**

Every minister shall be responsible to the National Assembly for the affairs of his ministry. If the Assembly passes a vote of no-confidence against a minister, he shall be 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. Ministers shall not participate in the vote of confidence.

### **Article 102**

The Prime Minister shall not hold any portfolio; nor shall the question of confidence in him be raised before the National Assembly. Nevertheless, if the National Assembly decides, in the manner specified in the preceding Article, that it cannot co-operate with the Prime Minister, the matter shall be submitted to the Head of State. In such a case, the Amir may either relieve the Prime Minister of office and appoint a new cabinet or dissolve the National Assembly. In the event of dissolution, if the new Assembly decides by the above mentioned majority vote that it cannot co-operate with the said Prime Minister, 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.

### **Article 103**

If, for any reason, the Prime Minister or a minister vacates his office, he shall continue to discharge the urgent business thereof until his successor is appointed.

### **Article 104**

The Amir shall open the annual session of the National Assembly whereupon he shall deliver an Amiri speech reviewing the situation of the country and the important public matters which happened during the preceding year, and outlining the projects and reforms the government plans to undertake during the coming year. The Amir may depute the Prime Minister to open the Assembly or to deliver the Amiri speech.

### **Article 105**

The National Assembly shall choose from amongst its members, a committee to draft the reply to the Amiri Speech which will embody the comments and wishes of the Assembly. After the said reply has been approved by the Assembly, it shall be submitted to the Amir.

### **Article 106**

The Amir may, by a decree adjourn the meeting of the National Assembly for a period not exceeding one month. Adjournment may be repeated during the same session with the consent of the Assembly and then once only. A period of adjournment shall not be counted in computing the duration of the session.

### **Article 107**

The Amir may dissolve the National Assembly by a decree in which the reasons for dissolution shall be indicated. However, dissolution of the Assembly may not be repeated for the same reasons. In the event of dissolution, elections for the new Assembly shall be 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 shall then continue functioning until the new Assembly is elected.

#### **Article 108**

A member of the Assembly represents the whole nation. He shall safeguard the public interest and shall not be subject to any authority in the discharge of his duties in the Assembly or in its committees.

#### **Article 109**

(1) A member of the Assembly shall have the right to initiate bills. (2) No bill initiated by a member and rejected by the National Assembly may be re-introduced during the same session.

#### **Article 110**

A member of the National Assembly shall be free to express any views or opinions in the Assembly or in its committees. Under no circumstances shall he be held liable in respect thereof.

#### **Article 111**

Except in cases of flagrante delicto, no measures of inquiry, search, arrest, detention, or any other penal measure may be taken against a member while the Assembly is in session, except with the authorization of the Assembly. The Assembly shall be notified of any penal measure that may be taken during its session in accordance with the foregoing provision. The Assembly shall always at its first meeting be notified of any such measure taken against any of its members while it was not sitting. In all cases, if the Assembly does not give a decision regarding a request for authorization within one month from the date of its receipt, permission shall be deemed to have been given.

#### **Article 112**

Upon a request signed by five members, any subject of general interest may be put to the National Assembly for discussion with a view to securing clarification of the Government's policy and to exchanging views thereon. All other members shall also have the right to participate in the discussion.

#### **Article 113**

The National Assembly 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.

#### **Article 114**

The National Assembly shall at all times have 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 officials must produce testimonials, documents, and statements requested from them.

#### **Article 115**

The National Assembly shall set up, among its annual standing committees, a special committee to deal with petitions and complaints submitted to the Assembly by citizens. The committee shall seek explanation thereon from the competent authorities and shall inform the person concerned of the result. A member of the National Assembly may not interfere with the work of either the Judicial or the Executive Power.

#### **Article 116**

The Prime Minister and Ministers shall be given the floor whenever they ask for it. They may call for assistance upon any senior officials or depute them to speak on their behalf. The Assembly may ask for a minister to be present whenever a matter relating to his ministry is under discussion. The cabinet shall be represented in the sittings of the Assembly by the Prime Minister or by some ministers.

#### **Article 117**

The National Assembly shall lay down its standing orders which shall include the procedure of the Assembly and its committees and the rules pertaining to discussion, voting, questions, interpellation and all other functions prescribed in the constitution. The standing orders shall prescribe the sanctions to be imposed on any member who violates order or absents himself from the meetings of the Assembly or the committees without a legitimate excuse.

#### **Article 118**

The maintenance of order in the National Assembly shall be the responsibility of its president. The Assembly shall have a special guard under the authority of the president of the Assembly. No armed forces may enter the Assembly have stationed close to its gates unless so requested by the president.

#### **Article 119**

The remuneration of the president of the National Assembly, the deputy president and the members shall be fixed by law. In the event of a modification of the said remuneration, such modification shall not take effect until the next legislative term.

### **Article 120**

Membership of the National Assembly shall be incompatible with public office except in the cases where compatibility is permitted in accordance with the constitution. In such cases, the right to the remuneration for membership and the right to the salary of the public office shall not be cumulated. The law shall specify other cases of incompatibility.

### **Article 121**

During his mandate a member of the National Assembly shall not be appointed on the board of directors of a company, nor shall he participate in concessions granted by the government or by public bodies. Further, during the said mandate, he shall not buy or rent any property of the state, nor shall he let, sell or barter any of his property to the Government, except by public auction or tender, or in compliance with the system of compulsory acquisition.

### **Article 122**

During their mandate, members of the National Assembly with the exception of those occupying a public office not incompatible with the membership of the National Assembly may not be awarded decorations.

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## **Chapter IV - The Executive Power**

### **Section I**

#### **The Cabinet**

### **Article 123**

The Council of Ministers shall have control over the departments of the state. It shall formulate the general policy of the government, pursues its execution and supervises the conduct of work in government departments.

### **Article 124**

A law shall determine the remuneration of the prime minister and the ministers. All other provisions regarding ministers shall apply to the prime minister unless otherwise stated.

### **Article 125**

A minister shall satisfy the qualifications laid down in Article 82 of the constitution.

### **Article 126**

Before assuming office, the prime minister and ministers shall take before the Amir, the oath specified in Article 91 of the constitution.

### **Article 127**

The prime minister shall preside over the meetings of the Council of Ministers and supervises the coordination of work among the various ministries.

### **Article 128**

Deliberations of the Council of Ministers shall be secret. Resolutions shall be passed only when the majority of its members are present and with the approval of the majority of those present. In case of an equal division of votes the side on which the prime minister has voted shall prevail. Unless they resign, the minority shall abide by the opinion of the majority. Resolutions of the Council of Ministers shall be submitted to the Amir for approval in cases where the issue of a decree is required.

### **Article 129**

The resignation of the prime minister or his removal from office shall involve the resignation or removal of all other ministers.

### **Article 130**

Every minister shall supervise the affairs of his ministry and shall execute therein the general policy of the government. He shall also formulate directives for the ministry and supervise their execution.

### **Article 131**

While in office, a minister shall not hold any other public office or practice, even indirectly, any profession, or undertake any industrial, commercial, or financial business. Furthermore, he shall not participate in any concession granted by the government or by public bodies or cumulate the ministerial post with membership of the board of directors of any company. Further, during the said period, a minister shall not buy or take on hire any property of the state even by public auction, nor shall he let, sell, or barter any of his property to the government.

### **Article 132**

A special law shall define the offence which may be committed by ministers in the performance of their duties, and shall specify the 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 therefrom.

### **Article 133**

Law shall regulate general and municipal self-governing bodies in such a way as to ensure their independence under the direction and supervision of the government.

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## **Section II – Financial Affairs**

### **Article 134**

No general tax may be established, amended, or abolished except by a law. No one may be exempted, wholly or partially, from the payment of such taxes in the cases specified by law. No one may be required to pay any other tax, fee, or imposition except within the limits of law.

### **Article 135**

Law shall prescribe rules for the collection of public funds and the procedure for their expenditure.

### **Article 136**

Public loans are shall be concluded by a law. The government may grant or guarantee a loan by a law, or within the limits of the funds appropriated for the said purpose in the budget.

### **Article 137**

General and local self-governing bodies may grant or guarantee loans according to law.

### **Article 138**

Law shall lay down the rules for the protection of state properties, their administration, the conditions of their disposal, and the limits within which any of these properties may be relinquished.

### **Article 139**

The financial year shall be fixed by law.

### **Article 140**

The government shall draw up the annual budget, comprising the revenue and expenditure of the state, and submits it to the National Assembly for examination and approval at least two months before the end of each current financial year.

#### **Article 141**

The budget shall be discussed in the National Assembly part by part. None of the public revenues may be allocated for a specific purpose except by law.

#### **Article 142**

Law may appropriate Specific funds for more than one year if the nature of the expenditure so requires, provided that each budget shall include the funds allocated for that year, or alternatively, an extraordinary budget covering more than one financial year shall be drawn up.

#### **Article 143**

The budget law may not include any provisions establishing a new tax, increasing an existing tax, amending an existing law, or evading the issue of a special law on a matter in respect of which the Constitution provides that a law should be issued.

#### **Article 144**

The budget shall be issued by a law.

#### **Article 145**

If the budget law has not been promulgated before the beginning of the financial year, the preceding budget shall be applied until the new one is issued and revenues shall be collected and disbursements made in accordance with laws in force at the end of the preceding year. However, if the National Assembly has approved one or more parts of the new budget, they shall be put into effect.

#### **Article 146**

Any expenditure not included in the budget, or in excess of the budget appropriations, as well as the transfer of any fund from one part of the budget to another, shall be effected by law.

#### **Article 147**

In no case shall the maximum estimate of expenditure, included in the budget law or the laws amending it, be exceeded.

#### **Article 148**

Law shall specify general budgets, both independent and annexed, to which the provisions regarding the budget of the state shall be applied.

**Article 149**

The final accounts of the financial administration of the state for the preceding year shall be submitted, within four months following the end of the said year, to the National Assembly for consideration and approval.

**Article 150**

The government shall submit to the National Assembly, at least once during each ordinary session, a statement upon the financial position of the state.

**Article 151**

A financial control and audit commission shall be established by a law, shall ensure its independence. The commission shall be attached to the National Assembly and assists the government and the National Assembly in controlling the collection of the state revenues and the disbursement of its expenditures within the limits of the budget. The commission shall submit to both the government and the National Assembly an annual report on its activities and its observations.

**Article 152**

No concession for exploitation of either a natural resource or a public service may be granted except by a law and for a limited period. In this respect, the preparatory measures shall facilitate the operations of prospecting and exploration and ensure publicity and competition.

**Article 153**

No monopoly shall be granted except by a law and for a limited period.

**Article 154**

Law shall regulate currency and banking and determine standards, weights, and measures.

**Article 155**

Law shall regulate salaries, pensions, compensation, subsidies and gratuities which are a charge on the state treasury.

**Article 156**

Law shall lay down provisions relating to the budgets and the final accounts of local bodies and authorities which have a public legal personality.

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### **Section III - Military Affairs**

#### **Article 157**

Peace is the aim of the state, and the safeguard of the integrity of the country, which is part of the integrity of the Greater Arab World, is a trust devolving upon every citizen.

#### **Article 158**

Military service shall be regulated by law.

#### **Article 159**

The state alone shall establish armed forces and public security bodies and that in accordance with law.

#### **Article 160**

Mobilization, general or partial, shall be regulated by law.

#### **Article 161**

A Supreme Defense Council shall be set up to conduct affairs relating to defense, to the safeguard of the integrity of the country and to the supervision of the armed forces, in accordance with law.

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### **Chapter V - The Judicial Power**

#### **Article 162**

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

#### **Article 163**

In administering justice, judges shall not be subject to any authority. No interference whatsoever shall be allowed with the conduct of justice. Law shall guarantee the independence of the Judiciary and shall state the guarantees and provisions relating to judges and the conditions of their irrevocability.



#### **Article 164**

Law shall regulate the courts of various kinds and degrees and specifies their functions and jurisdiction. Except when Martial Law is in force, military courts shall have jurisdiction only over military offences committed by members of the armed and security forces within the limits specified by law.

#### **Article 165**

Sittings of the courts shall be public save in the exceptional cases prescribed by law.

#### **Article 166**

The right of recourse to the courts is guaranteed to all people. Law shall prescribe the procedure and manner necessary for the exercise of this right.

#### **Article 167**

The Public Prosecution Office shall conduct penal charges on behalf of society. It shall supervise the affairs of judicial police, the enforcement of penal laws, the pursuit of offenders and the execution of judgments. Law shall regulate this body, lays down its duties, and defines the conditions and guarantees for those who assume its functions. As an exception, law may entrust to the public security authorities the conduct of prosecutions in misdemeanors in accordance with the manner prescribed by law.

#### **Article 168**

The Judiciary shall have a Supreme Council which shall be regulated, and its duties defined by law.

#### **Article 169**

Law shall regulate the settlement of administrative suits by means of a special chamber or court, and shall prescribe its organization and the manner of assuming administrative jurisdiction including the power of both nullification and compensation in respect of administrative acts contrary to law.

#### **Article 170**

Law shall organize the body which shall render legal advice to ministries and public departments and shall draft bills and regulations. Law shall also regulate the representation of the state and other public bodies before the courts.

### **Article 171**

A council of state may be established by a law to assume the functions of administrative jurisdiction, rendering legal advice, and drafting bills and regulations mentioned in the preceding two Articles.

### **Article 172**

Law shall prescribe the method of resolving conflicts of jurisdiction or of judgments between the various kinds of courts.

### **Article 173**

Law shall specify the judicial body competent to decide upon disputes relating to the constitutionality of laws and regulations and shall determine its jurisdiction and procedure. Law shall ensure the right of both the government and the interested parties to challenge the constitutionality of laws and regulations before the said body. If the said body decides that a law or a regulation is unconstitutional, it shall be considered null and void.

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## **Part V - General and Transitional Provisions**

### **Article 174**

Either the Amir or one-third of the members of the National Assembly shall have the right to propose a revision of the constitution by amending or deleting one or more of its provisions or by adding new provisions. If the Amir and the majority of the members constituting the National Assembly approve the principle of revision and its subject matter, the Assembly shall debate the bill article by article. Approval by a two-thirds majority vote of the members constituting the Assembly shall be required for the bill to be passed. The revision shall come into force only after being sanctioned and promulgated by the Amir regardless of the provisions of Articles 65 and 66 of this constitution. If the principle of revision or its subject matter is rejected, it shall not be presented again before the lapse of one year from the rejection. No amendment to this constitution may be proposed before the lapse of five years from its coming into force.

### **Article 175**

The provisions relating to the Amiri system in Kuwait and the principles of liberty and equality, provided for in this constitution, may not be proposed for revision except in relation to the title of the emirate or to increase the guarantees of liberty and equality.

#### **Article 176**

The powers of the Amir, specified in this constitution, may not be proposed for revision when a deputy Amir is acting for him.

#### **Article 177**

The application of this constitution shall not affect treaties and conventions previously concluded by Kuwait with other states and international organizations.

#### **Article 178**

Laws shall be published in the Official Gazette within two weeks of their promulgation and shall come into force one month after their publication. The latter period may be extended or reduced for any law by a special provision included in it.

#### **Article 179**

Laws shall apply to that which takes place after the date of their coming into force, and thus have no effect in respect of that which has taken place before such date. However, in other than penal matters, a law may, with the approval of a majority vote of the members constituting the National Assembly prescribe otherwise.

#### **Article 180**

All provisions of laws, regulations, decrees, orders, and decisions, in effect upon the coming of this Constitution into force, shall continue to be applicable unless amended or repealed in accordance with the procedure prescribed in this Constitution, provided that they are not contrary to any of its provisions.

#### **Article 181**

No provision of this constitution shall 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 period.

#### **Article 182**

This constitution shall be published in the Official Gazette and shall come into force on the date of the meeting of the National Assembly which shall not be later than January 1963.

#### **Article 183**

Law Number 1 of 1962 concerning the system of government during the period of transition shall continue to be in force, and the present members of the Constituent Assembly shall

continue in the exercise of their duties specified in the said law, until the meeting of the National Assembly.

**Abdullah al-Salim al-Sabah, Amir of the State of Kuwait**

Issued at the Seif Palace on the 14<sup>th</sup> of *jumada al-thani* 1382, corresponding to the 11<sup>th</sup> of November 1962.

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