

Separation of Powers in the Kuwaiti Criminal Justice System

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ABDULRAHMAN ALHAJRI

School of Law

Middlesex University

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ABSTRACT

Discussions of the separation of powers tend to be related to the administrative state. By contrast, this research addresses the question of separating powers within the criminal justice system of Kuwait, examining the function of this division and the structures that are designed to protect the rights of citizens. Despite being formally regulated according to democratic principles, the criminal justice system of Kuwait has been described as excessively controlled by executive bodies. Currently, there appears to be a lack of research explaining how numerous criminal justice bodies in Kuwait can effectively promote the principles of freedom, democracy, and equality before the law, and separation of powers is an important factor which can be connected to such outcomes. The research aims to provide insights into the separation of powers between institutions and to assess its effectiveness in addressing the principles stated in the Constitution of Kuwait. The origins of the modern Kuwaiti criminal justice system will also be explored, with a focus on British jurisdiction (as a past influence) and French, Egyptian and Islamic law (as continuing influences). This development history makes Kuwait an excellent example of the fusion and diffusion of law, which, although it has been investigated widely, is still a topic of interest among modern researchers, alongside human rights and their protection through the criminal law system. This is one of the first studies to discuss the separation of powers in the Kuwaiti criminal justice system as a mixed phenomenon that can influence the protection of Kuwaiti citizens' human rights at each stage of law enforcement and prosecution.

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1. Introduction

1.1 Overview of the Research

The Separation of Powers in a criminal justice system can be regarded as a method of protecting citizens' rights from bias, corruption, and inequality in judging.¹ The history of the phenomenon has involved several milestones and was the product of the minds of multiple notable figures. For example, Aristotle introduced a number of constitution-related ideas in his *Politics*, especially in books two – seven, which considered citizenship, types of regimes, and constitution. With respect to separation of powers, the author distinguished between “the deliberative body, the magistracies and the judges” in book four, suggesting that such separation could prevent absolute power.²

Furthermore, in his criticism of the then-existing patriarchal system of power, Locke focused on separation of powers in the context of legislation and formulated the “principle of legislative supremacy in the sense that it envisions the legislature as having an initiating place on the assembly line of law-making/law enforcement”³, arguing that an “authority that is able to give laws to others must necessarily be the superior of the latter”.⁴ It may be inferred that Locke did not only try to distinguish the judicial system; he also implied that

¹ David Samuels, ‘Separation of Powers’ in C Boix and SC Stokes (eds), *The Oxford Handbook of Comparative Politics* (OUP 2009) 703, 706. See also David A. Carrillo and Danny Y. Chou, ‘California Constitutional Law: Separation of Powers’ (2010) 45 *USFL Review* 655, 657; Sharon Jacobs, ‘The Statutory Separation of Powers’ (2018) 378 *Yale Law Journal* 378, 379-381; Koen Lenaerts, ‘Some reflections on the separation of powers in the European Community’ (1991) 28 *Common Market Law Review* 11, 11-15; Thomas Merrill, ‘The Constitutional Principle of Separation of Powers’ (1991) 1991 *The Supreme Court Review* 225, 225-230; Eric Posner, ‘Balance-Of-Powers Arguments, The Structural Constitution, And The Problem Of Executive “Underenforcement”’ (2018) 164 *Yale Law Journal* 1677, 1677-1679; Zachary Price, ‘Funding Restrictions and Separation of Powers’ (2018) 71 *Vanderbilt Law Review* 357, 358, 364.

² Aristotle, *Politics* (H. Rackham [transl]) (Cambridge University Press, 1932), at 1297b–1298a. See also Gerard Conway, ‘Recovering a Separation of Powers in the European Union’ (2011) 17 *European Law Journal* 304, 306.

³ Jeremy Waldron, ‘Separation of Powers in Thought and Practice’ (2013) 54 *Boston College Law Review* 433, 441.

⁴ John Locke, *Two Treatises on Government* (Industrial Systems Research 2009) at 188.

there was a hierarchy of the branches of power, with the legislative one being the “supreme power”.⁵

However, the principle of separating powers was most clearly formulated by Montesquieu, who focused on the idea of separation of powers between “the three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the judiciary in regard to matters that depend on the civil law”.⁶ Montesquieu based his view on a comprehensive analysis of a variety of systems, including ancient ones (for example, those of “Romans” and “Barbarians”)⁷ and those that were contemporary at the time (for example, that of England).⁸ While not the first to pinpoint the idea of separation of powers, Montesquieu is believed to be the first person to fully and explicitly formulate the idea of tripartite separation of powers, aiming to “prevent the concentration of all power in the hands of a single ruler”.⁹

It is also noteworthy that the Islamic practice of using separation of powers started with Umar ibn Al-Khattab (634-644 AD), who was the second Caliph of Islam. He may have been the first person to implement a form of separation of powers, in particular, to isolate the judiciary from the executive branch.¹⁰ This outcome was achieved by appointing both judges and governors in the provinces, both of which were supposed to be under the supervision of the Caliph.¹¹ This measure ensured their independence from each other, although, eventually, the judiciary depended on the Caliph. The papers on the topic do not

⁵ *Ibid.*

⁶ Charles Baron De Montesquieu, *The Spirit of Laws* (Cosimo 2011) at 151.

⁷ *Ibid.* at 95.

⁸ *Ibid.* at 151.

⁹ Anthony Murphy and Alan Stoica, ‘Sovereignty: Constitutional and Historical Aspects’ (2015) 2 *Bulletin of the Transilvania University of Braşov* 219, 224.

¹⁰ Myra Williamson, ‘The diffusion of Western Legal Concepts in Kuwait: Reflections on the State, the Legal System, and Legal Education’ in S Farran, J Gallen and C Rautenbach (eds), *The Diffusion of Law: The Movement of Laws and Norms around the World* (Routledge 2016) at 32.

¹¹ Sharifah Hayaati Syed Ismail al-Qudsy and Asmak Ab Rahman, ‘Effective Governance in the Era of Caliphate `Umar Ibn Al-Khattab (634-644)’ (2011) 18 *European Journal of Social Sciences* 612, 620; see also Ata ur Rehman, Mazlan Ibrahim and Ibrahim Abu Bakar, ‘The Concept of Independence of Judiciary in Islam’ (2013) 4 *International Journal of Business and Social Science* 67, 68.

connect the Caliph's decision to Aristotle.¹² Thus, the Islamic roots of separation of powers can also be found, and they are related to the practice of separation of powers. It can also be argued that Islam as such can support separation of powers due to the religions' moral ideals,¹³ as well as the concept of impartial justice ("Adl"), which is a common notion in Islam.¹⁴ Thus, the concept of separation of powers can be connected to the history of certain countries, as well as their religion, which might have had lasting effects on modern-day separation of powers.

The discussions around the separation of powers appear to be related to administrative or public law in the majority of cases. In her study, Barkow states that although scholars have written many works on the separation of powers in a state, they "have wholly ignored the criminal state".¹⁵ Barkow mentions at least a dozen works that illustrate her point, explaining that she had analysed only a small sample of the literature.¹⁶ She does not specify the jurisdictions studied in the literature, but she specifically discusses the US and points out that the US criminal justice separation of powers was not studied extensively. It is noteworthy that the majority of the works that she mentions were written in the previous century. Still, the problem appears to have been carried into the new century: the consideration of the administrative side of separation of powers is exemplified by multiple works, including those by Koven, Bruff, Kamali, and Tribe.¹⁷ There are also works like those by Haljan and Nelson and Ringsmuth which can be used to illustrate the papers that

¹² *Ibid.*

¹³ Williamson, *supra* (n 10) at 32-33.

¹⁴ Rehman et al., *supra* (n 11) at 70.

¹⁵ Rachel Barkow, 'Separation of Powers and the Criminal Law' (2006) 58 *Stanford Law Review* 989, 989.

¹⁶ *Ibid.* at 992.

¹⁷ Steven Koven, 'Separation of Powers, Rule of Law, and the Bush Administration' (2009) 11 *Public Integrity* 347-361; see also Harold Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State*. (Carolina Academic Press 2006) 1-526; Mohammad Hashim Kamali, 'Separation of Powers: An Islamic Perspective' (2014) 5 *Islam and Civilisational Renewal* 471-488; Laurence Tribe, 'Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine' (2016) 126 *The Yale Law Journal Forum* 86-106.

mention the judiciary in the context of separation of powers, but such examples seem to be underrepresented and they do not focus on the topic.¹⁸

At the same time, it is important to achieve the separation of powers in the field of justice as it allows the judicial system to be independent and it improves its legitimacy, which is highlighted, for example, by Hall.¹⁹ An analysis of Ashworth's conclusions can be interpreted to suggest that this importance also correlates with a history of challenges in ensuring the judiciary's independence, which the author recognises as "failures of state-led criminal justice".²⁰ These failures can be the result of the difficulties the judiciaries experience in resisting external pressures, which the government is supposed to reduce, if not nullify. Similarly, Barkow demonstrates that the administrative and criminal perspectives on the separation of powers are noticeably different, and in practice, few safeguards, including individual rights as delineated in the Constitution, are applied to the latter.²¹ Still, as claimed by Ashworth, "it should remain the responsibility of the state towards its citizens to ensure that justice is administered by independent and impartial tribunals".²² Thus, the authors demonstrate the significance and complexity of criminal-matter separation of powers, which indicates the need to acknowledge and study it. The present thesis aspires to do so.

In his analysis of the criminal justice, Ashworth also refers to the principle of the rule of law, stating that the "state ought, out of fairness to the people in respect of whom its

¹⁸ Done Haljan, *Separating Powers: International Law Before National Courts*, (Springer 2013) at 230-231; see also Tom Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy' (2009) 53 *American Journal of Political Science* 971-989.

¹⁹ Matthew Hall, 'The Semiconstrained Court: Public Opinion, The Separation Of Powers, And The U.S. Supreme Court's Fear Of Nonimplementation' (2013) 58 *American Journal of Political Science* 352, 352-353; see also Clark, *supra* (n 18) 971, 971-989.

²⁰ Andrew Ashworth, 'Responsibilities, Rights, and Restorative Justice' (2002) 42 *British Journal of Criminology* 578, 590-591.

²¹ Barkow, *supra* (n 15) 989, 1031.

²² Ashworth, *supra* (n 20) 590.

coercive powers are being exercised, to insist on ‘rule of law’ principles”.²³ Due to its connection to separation of powers, the concept of the rule of law should be considered. Arguably, the idea existed since the times of ancient Greece, and it is evidenced to be referenced in the Magna Carta of 1215.²⁴ There is no individual definition of the concept, but the idea presupposes ensuring the supremacy of law to the point where “our law itself will rule (govern) us, not the wishes of powerful individuals”.²⁵ In other words, the rule of law is opposed to the rule of individuals who can abuse their power. Also, the rule of law requires the equality of people in the face of the law.²⁶ The concept can be viewed as a moral ideal.²⁷

In fact, as can be shown by the study of Thompson’s perception of the rule of law, only “just” law can be incorporated into the concept. The idea of the importance of the rule of law did not stop Thompson from criticising the legislation that protected privileged groups at the expense of minorities.²⁸ Therefore, the rule of law is mostly concerned with the idea of constraining the ruling class from abusing their power. A similar suggestion is made in “Opposing the Rule of Law” by Nick Cheesman: here, it is highlighted that the rule of law is mostly a theoretical concept that is predominantly introduced to ensure the lack of absolute power, but it requires just laws and well-developed means of enforcing them, as well as equality, for actual justice to take place.²⁹

²³ Ashworth, *supra* (n 20) 582.

²⁴ Williamson, *supra* (n 10) at 32.

²⁵ Margaret Jane Radin, ‘Reconsidering the Rule of Law’ in R Bellamy (ed), *The Rule of Law and the Separation of Powers* (Routledge 2016) at 37.

²⁶ Williamson, *supra* (n 10) at 33.

²⁷ Radin, *supra* (n 25) at 39-40.

²⁸ Daniel Cole, “‘An Unqualified Human Good’: E.P. Thompson and the Rule of Law’ (2001) 28 *Journal of Law and Society* 177, 179.

²⁹ Nick Cheesman, *Opposing the Rule of Law* (Cambridge University Press 2015) at 47.

According to Williamson, the idea is especially applicable to Islam because Islamic leaders are supposed to act “in accordance with God’s law”.³⁰ However, the author states that in practice, the rule of law is not always observable even when the leaders of particular countries are Muslim. For instance, the Kuwaiti Constitution “severely curtails who is eligible to be the leader,” which implies that there are individual people who hold power.³¹ As for the equality of people, the Kuwaiti Constitution guarantees this principle, stating that “people are peers in human dignity and have, in the eyes of the Law, equal public rights and obligations”.³² In real life, this principle is not always observed,³³ which highlights the importance of studying the Kuwaiti judiciary to determine its strengths and weaknesses. Thus, the application of the idea of the rule of law to Kuwait justifies the present critique, and the concept of the rule of law is related to separation of powers because it aims at protecting people from power abuse. However, they are not the same, and the present work focuses on separation of powers.

The current research aims to examine how the separation of powers in the criminal justice system of Kuwait contributes to addressing citizens’ rights, with the focus on the principles mentioned in the Constitution of Kuwait. Article 50 of the Kuwaiti Constitution declares the principle of separation of powers at the level of the state: “In conformity with the provisions of the Constitution the system of government shall be established on the basis of separation and cooperation of powers”, and moreover, “No Authority shall be allowed to waive all or part of its jurisdiction as prescribed in this Constitution”.³⁴ Still, the legal background for the separation of powers principles in the state is not derived solely from the Constitution. Much attention will be paid to discussing the effect of British jurisdiction

³⁰ Williamson, *supra* (n 10) at 32-33.

³¹ *Ibid.* at 33.

³² Constitution of Kuwait, 1962, art. 29.

³³ Williamson, *supra* (n 10) at 33.

³⁴ Constitution of Kuwait, 1962, art. 50.

(as a past influence), as well as the continuing impact of the French and Egyptian law on the development of the criminal justice system in a country that gained independence from the United Kingdom in 1961.³⁵ The term “British jurisdiction” is used here the way it is used by Hijazi who employs it to describe the type of jurisdiction that was established in Kuwait by the British government in 1925 and existed until 1961.³⁶ From now on, it will be used without quotation marks as a purely historical term in this thesis. Furthermore, it is important to take into account the fact that Kuwait has been significantly influenced by Islam, but that Muslim law does not affect all the areas of the law of Kuwait; mostly, it touches family and financial law.³⁷

Based on this information, the study will examine the extent to which an effective separation of powers exists in the Kuwaiti criminal justice system. The first step is a general overview of the intricate net of functions that are shared and divided between institutions and personnel, and which are typical of the country’s criminal justice system. The second step is a discussion of critical problems in the system and its functioning, involving the question of the protection of citizens’ rights. The Kuwaiti criminal justice system can be described as mixed in its origins.³⁸ Also, it is not fully protected from *over-bureaucratisation*, dishonest or wrongful conduct, possible biases, and unfairness.³⁹ Due to the significance of these challenges, the analysis of police structures, prosecutors’ responsibilities, and the judiciary, with a focus on the role of Article 50 in determining the separation of powers, are the most important parts of this research.

³⁵ Nathan Brown, ‘Mechanisms of Accountability in Arab Governance’ (United Nations, 2001) accessed 25 December 2016, 1, 8; see also Ahmad Hijazi, ‘Kuwait: Development from a Semitribal, Semicolonial Society to Democracy and Sovereignty’ (1964) 13 *The American Journal of Comparative Law* 428, 437; Daniel Treisman, ‘The Causes of Corruption: A Cross-National Study’ (2000) 76 *Journal of Public Economics* 399, 403.

³⁶ Hijazi, *supra* (n 35) 428, 436.

³⁷ Herbert Liebesny, *The Law of the Near and Middle East: Readings, Cases, and Materials* (SUNY Press 1975), 110; Nathan Brown, *The Rule of Law in the Arab World*, (Cambridge University Press 2006) at 132.

³⁸ Williamson, *supra* (n 10) at 41.

³⁹ Brown, *supra* (n 37) 159.

Some attention should be paid to the role of prosecutors and the prosecutorial process in Kuwait, which are influenced by the traditions of French law. Discussion of this process allows conclusions to be drawn regarding the effectiveness of the separation of powers in Kuwait, with the focus on conducting unbiased crime-control procedures. The analysis should include a discussion of the positive aspects of the criminal justice system of Kuwait; that is, the aspects that can guarantee the maintenance and protection of human rights in the country. In this thesis, this concept refers to the resources that are available to the representatives of different branches of the system for the purpose of organising an effective prosecutorial process and litigation. Finally, conclusions and recommendations need to be provided regarding the role of separation of powers in the criminal justice system in protecting Kuwaiti citizens' rights. The recommendations will be formulated referring to the analysis of the criminal justice system's mixed structure.

A certain typology of separation of powers assessment criteria is also proposed for the study. A most significant criterion is the level of the independence of the judiciary, which can be assessed by pinpointing the instances of supervision and control performed by other branches of power. In particular, in Kuwait, the procedures that are connected to the appointments of judges imply a lack of judicial independence from the executive power.⁴⁰ Thus, the procedures of the judiciary, including the appointment and removal of judges, can be reviewed to assess separation of powers. Apart from that, the management of cases, especially those related to political crimes, the protection of the rights of offenders and inmates, and the work of the appeal system, might signal independence difficulties. If miscarriages of justice can be pinpointed, they will also be analysed for external pressures. Finally, police conduct, including interrogation, is of interest for the study. The definitions

⁴⁰ Alkarama Foundation, 'Kuwait: Report submitted to the Human Rights Committee in the context of the third periodic review of Kuwait' (Alkarama Foundation, 2016) 12. Accessed 22 March 2017.

of the key terms will be discussed below where they will be identified in the context of Kuwait.

It should also be mentioned that the proposed study uses the work of Barkow as a basis for its theoretical framework. The article considers the context of the United States, and Barkow notes that although the risk of abuse and prejudice can be reduced with the separation of powers, “more stringent enforcement of the separation of powers in criminal cases” may be very helpful.⁴¹ As a result of its focus on the US, Barkow’s work will not provide the data on Kuwait, but it will offer extensive coverage of criminal-matters separation of powers. In addition, it will assist in considering the research and practice in the field of separation of powers in several countries to form the argument for Kuwait.

⁴¹ Barkow, *supra* (n 15) at 990.

1.2 Research Question and Aims

The current research will be devoted to the following research question:

- How effectively does the separation of powers between institutions in the criminal justice system of Kuwait, which is rooted in the country's Constitution and demonstrates the impacts of several law systems, contribute to protecting the rights of citizens, and what can be done to ensure this protection?

In accordance with the question, the following aims will be pursued:

1. To discuss how the separation of powers between institutions in the criminal justice system of Kuwait, as a constitutional monarchy, contributes to protecting the rights of citizens and influences fairness and effectiveness in the criminal justice system, with a focus on suspects' rights.
2. To take into account the role of French, Egyptian, and Islamic law, and/or legal principles, in the development and division of the criminal justice system in Kuwait while discussing separation of powers. Also, to take into account the role of British jurisdiction as a past influence.
3. To assess the role of Article 50 of the Constitution of Kuwait in promoting the separation of powers in the criminal justice system.
4. To consider what can be done to guarantee that the separation of powers in the criminal justice system of Kuwait leads to fulfilling the democratic principles enshrined in the Constitution.
5. To determine whether improved protection of individuals' rights (the constitutional provisions of which Barkow regards as a safeguard against discrimination and

abuse)⁴² in Kuwait can be an alternative to the separation of powers in the criminal justice system from the point of view of their effectiveness in ensuring the protection of the people of Kuwait.

1.3 The Value and Originality of the Research

The present research addresses the question of separating powers within the criminal justice system of Kuwait, examining the function of this division and the structures that are designed to protect the rights of citizens. Despite being regulated according to democratic principles, the criminal justice system of Kuwait has been described as excessively controlled by executive bodies.⁴³ In order to be able to propose solutions for the issue, it is necessary to aggregate data pertinent to it, which explains the need for the present research.

Currently, there appears to be a lack of research explaining how the numerous criminal justice bodies in Kuwait can be effective in promoting the principles of freedom, democracy, and equality before the law. The present research can provide some insights into the separation of powers between institutions and make an assessment of its effectiveness in addressing the principles stated in the Constitution of Kuwait. In addition, the current research allows a discussion about the origins of the modern Kuwaiti criminal justice system. The focus is on the past influence of the law of the United Kingdom (termed the “British jurisdiction”)⁴⁴ from the times when Kuwait was a British protectorate, as well as the impact of French, Egyptian and Islamic law (as continuing influences). As a result of its history, Kuwait is a very good example of the diffusion of law; for instance, it was described as “mixed” by Williamson, a description

⁴² Barkow, *supra* (n 15) 989, 1031.

⁴³ Brown, *supra* (n 37) at 159.

⁴⁴ Williamson, *supra* (n 10) at 35.

that reflects its many components.⁴⁵ The diffusion of law in Kuwait is a topic that has been investigated better than the separation of powers in the Kuwaiti criminal justice system, but it still attracts the attention of modern researchers.⁴⁶ Therefore, the examination of this topic is also an appropriate aim for the research. Finally, the theme of human rights and their protection through the criminal law system is also a topic of acute interest.⁴⁷ Thus, this study can be regarded as original because it aims to discuss an under-researched topic, and it is valuable because it touches upon topics of acute interest in the field.

Ultimately, the thesis will discuss the separation of powers in the Kuwaiti criminal justice system as a mixed phenomenon that originated from French, Egyptian, and Islamic law, and one that can influence the protection of Kuwaiti citizens' human rights at each stage of law enforcement and prosecution. In addition, the process of the drafting of the Constitution will be investigated. The Constitution was developed by the Constitution Committee, which included the members of the royal family and jurists, including the famous Egyptian jurist Abd al-Razzaq al-Sanhuri.⁴⁸ It aimed to reflect democratic principles as well as the reality of Kuwait in the final draft,⁴⁹ which was approved by Amir Abdullah Al-Salem Al-Sabah.⁵⁰ The contribution of these people is also an important element to consider in a study of Kuwaiti separation of powers.

⁴⁵ *Ibid.* 41.

⁴⁶ *Ibid.* 33

⁴⁷ Ashworth, *supra* (n 20) 578, 595.

⁴⁸ Alejandro Carballo, 'The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?' (2007) 21 *Arab Law Quarterly* 91, 93.

⁴⁹ The National Assembly of Kuwait, 'The Progress of Democracy in the State of Kuwait' (National Assembly, 2011), at 12. accessed 11 February 2017

⁵⁰ *Ibid.* 9.

1.4 Impact of Study

During the creation of this thesis, the review of existing literature will help to aggregate current knowledge and pinpoint research gaps, and the empirical part of the thesis will contribute some new data. Thus, the study's contribution to existing debates on the topic is the opportunity to cover gaps in the research literature on the topics associated with the separation of powers in the criminal justice system of Kuwait. Specifically, the study can contribute to the body of knowledge about the separation of powers because the current focus is on discussing separation of powers in the context of an administrative state, not a criminal justice system.⁵¹ Because of the significance of separation of powers in criminal justice, as well as the difficulties associated with ensuring it,⁵² the investigations of this topic and the results of such investigations are particularly valuable.⁵³ Apart from that, there are few sources that consider Kuwaiti criminal justice or Kuwaiti separation of powers, but said sources still point out the presence of some issues,⁵⁴ which need to be analysed and resolved. The study's contribution is significant from this perspective as well. The results of the study can be used by researchers and practitioners to analyse the functions of the criminal justice system. Moreover, the results are necessary to assess the effectiveness of the system in protecting the rights of Kuwaiti citizens as a democratic priority. The study's recommendations might be useful in addressing the complex structure of criminal justice bodies in Kuwait, and its outcomes will be relevant to the discussion of similar criminal justice systems based on the principles of different laws the way Kuwait's

⁵¹ Barkow, *supra* (n 15) 989, 1031.

⁵² Ashworth, *supra* (n 20) 578, 590; see also Barkow, *supra* (n 15) 989, 991.

⁵³ Barkow, *supra* (n 15) 989, 995.

⁵⁴ Fahad Al-Zumai, 'Kuwait's Political Impasse And Rent-Seeking Behaviour: A Call For Institutional Reform' (Kuwait Programme on Development, Governance and Globalisation in the Gulf States, 2013) at 5; see also Mohammad Toriki Bani Salameh and Mohammad Kanoush Al-sharah, 'Kuwait's Democratic Experiment: Roots, Reality, Characteristics, Challenges, and the Prospects for the Future' (2006) 5 *Journal of Middle Eastern and Islamic Studies (in Asia)* 57, 66; Alfred Stepan, Juan J. Linz and Juli F. Minoves, 'Democratic Parliamentary Monarchies' (2014) 25 *Journal of Democracy*, 35, 45-47.

hybrid law is influenced by French, Egyptian, and Islamic law. While the work focuses on Kuwait, its implications can be used in other contexts as well.

2. Literature Review

2.1. Introduction

In the present literature review, the topic of separation of powers will be considered from the point of view of criminal justice, and the Kuwaiti criminal justice will receive some attention. The article by Barkow will be analysed to demonstrate the significance of separation of powers in criminal justice and justify the article's use as the present study's framework. Political crimes and miscarriages of justice will also be defined and considered from the perspective of the Kuwaiti context. Overall, the chapter is dedicated to the coverage of the primary topics defined by the research questions through the analysis of primary and secondary sources that are available on the topic.

2.1.1. Conceptual Explanation and Justification of the Focus on the Separation of Powers

The main reasons for the focus of this thesis on the separation of powers are the significance of the concept, its implications for criminal justice, and the issues with the coverage of the latter, especially in terms of criminal justice in Kuwait. The significance of separation of powers is supported by recent⁵⁵ and older⁵⁶ literature, which demonstrates its connection to the protection of human rights,⁵⁷ prevention of power abuse,⁵⁸ as well as the establishment of the rule of law.⁵⁹ Indeed, multiple authors argue that the separation of powers prevents the concentration and abuse of power, which, in turn, facilitates the

⁵⁵ Samuels (n 1) at 706; see also Carrillo and Chou, *supra* (n 1), 657; Jacobs, *supra* (n 1), 379-381; Lenaerts, *supra* (n 1), 11-15; Merrill, *supra* (n 1), 225-230; Posner, *supra* (n 1), 1677-1679; Price, *supra* (n 1), 358, 364; Waldron, *supra* (n 3), 434-335; Hall, *supra* (n 19) at 352-353; Clark, *supra* (n 18) 971, 971-989; Al-Qudsy and Rahman, *supra* (n 11) at 620; Rehman et al., *supra* (n 11) at 68.

⁵⁶ Montesquieu, *supra* (n 6) at 224.

⁵⁷ Barkow, *supra* (n 15) 989, 1012; see also Carrillo and Chou, *supra* (n 1), 657; Jacobs, *supra* (n 1), 379-381; Lenaerts, *supra* (n 1), 11-15; Merrill, *supra* (n 1), 225-230; Posner, *supra* (n 1), 1677-1679.

⁵⁸ Montesquieu, *supra* (n 6) at 224.

⁵⁹ Radin, *supra* (n 25) at 39-40.

protection of human rights and enables universal accountability to fair and fairly applied legislation, that is, the rule of law.⁶⁰ As a result, the idea that separation of powers is valuable and potentially necessary for a democratic and lawful society is well-articulated by the literature.

Furthermore, authors like Ashworth,⁶¹ Barkow,⁶² and Cheesman⁶³ discussed the concept in terms of criminal justice, indicating that it is critical for the protection of the people who are involved in the system. All these sources demonstrate that separation of powers a requirement for a lawful society,⁶⁴ but they further suggest that the separation of powers is especially important for criminal justice. The central framework of this thesis, which is the article by Barkow, argues that the specifics of criminal justice and the interaction of powers inherent to it make separation of powers particularly crucial.⁶⁵ The people involved in criminal justice, especially the defendants, are by definition a vulnerable population, and individual rights may fail to provide sufficient protection from systemic injustice.⁶⁶ Furthermore, a judicial system requires a level of impartiality to perform its functions.⁶⁷ Therefore, criminal-matters separation of powers may indeed be critical for protecting human rights and enabling the rule of law when it comes to criminal justice matters.

⁶⁰ Frank Cross, 'The Relevance of Law in Human Rights Protection' (1999) 19 *International Review of Law and Economics* 87, 90; Abul-Ethem Fahed, 'The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective' (2002) 26 *Fordham International Law Journal* 761, 762; Peter Strauss, 'Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law?' (2018) 14-614 *Columbia Public Law Research Paper* 1, 2-3; see also Carrillo and Chou, *supra* (n 1), 657; Jacobs, *supra* (n 1), 379-381; Lenaerts, *supra* (n 1), 11-15; Merrill, *supra* (n 1), 225-230; Posner, *supra* (n 1), 1677-1679.

⁶¹ Ashworth, *supra* (n 20) 590-591.

⁶² Barkow, *supra* (n 15) 989, 1012.

⁶³ Cheesman, *supra* (n 29) at 47.

⁶⁴ Cross, *supra* (n 60) 90; Fahed, *supra* (n 60) 762; Strauss, *supra* (n 60) 2-3.

⁶⁵ Barkow, *supra* (n 15) 989, 1012.

⁶⁶ *Ibid.* 989, 1021-1032.

⁶⁷ Barkow, *supra* (n 15) 989, 1023; see also United Nations Convention Against Corruption, 'Thematic compilation of relevant information submitted by Kuwait' (United Nations Convention Against Corruption, 2003); Linda Camp Keith, 'Judicial Independence and Human Rights Protection Around the World' (2002) 85 *Judicature* 194, 214-217; Robert Stevens, 'A Loss of Innocence? Judicial Independence and the Separation of Powers' (1999) 19 *Oxford Journal of Legal Studies* 365, 368.

From this perspective, it is also apparent that the independence of the judiciary is a critical element of the separation of powers. According to Sujit Choudhry, the independence of the judiciary is the “concrete expression” of the separation of powers, which, in turn, is a critical element of democracy.⁶⁸ Indeed, the independence of the judiciary is predicated on the judiciary being impartial, unbiased, unprejudiced, independent from other political influences, and experiencing no fear.⁶⁹ Consequently, the rule of law can be enabled by removing undue influences from the branch of power that holds a “particularly important” role “in safeguarding human rights,” that is, by ensuring the independence of the judiciary.⁷⁰ The fact that the independence of the judiciary is required for a lawful society that respects human rights is covered fairly well in research, even though the latter does not focus on Kuwait.⁷¹ Still, the United Nations Convention Against Corruption demonstrates that Kuwait recognises the importance of judiciary independence and has been taking precautions aimed at strengthening it, including an extensive system of rules, monitoring and accountability for people involved in the system.⁷² Thus, it can be concluded that the reasoning for the importance of the separation of powers, the need for the independence of the judiciary, and the enabling of the rule of law are similar; they are all deemed necessary to ensure the protection of human rights.

It should also be noted that the concept of separation of powers is inextricably linked to its practical implications, the primary one of which is how to implement it.⁷³ It is a common argument that complete separation of powers is difficult to achieve;⁷⁴ in the Kuwaiti

⁶⁸ Sujit Choudhry and Richard Stacey, ‘International Standards for the Independence of the Judiciary’ (2013) 1 *The Center for Constitutional Transitions at NYU Law & Democracy Reporting International Briefing Papers* 1, 1-3.

⁶⁹ Choudhry and Stacey, *supra* (n 68), 1-3.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*; see also Keith, *supra* (n 67), 214-217; Stevens, *supra* (n 67) 368.

⁷² United Nations Convention Against Corruption *supra* (n 67).

⁷³ Barkow, *supra* (n 15) 989, 991.

⁷⁴ *Ibid.*; see also Ashworth, *supra* (n 20) 590.

Constitution, it is even pointed out that the branches are required to cooperate,⁷⁵ which may complicate the process of separating their functions. The issue is further exacerbated by the fact that there is a lack of research on criminal-matters separation of powers. Indeed, Barkow points out that it is not very common for research literature and practitioners (for example, judges) to investigate the topic of criminal-justice separation of powers.⁷⁶ Even though the article focuses on American literature and American situations, the lack of research on Kuwaiti separation of powers implies that the problem is even more acute for Kuwait.

Thus, the importance of the separation of powers is well established in the literature. Additionally, the separation of powers is often considered from the perspectives of judicial independence.⁷⁷ Therefore, it cannot be said that the separation of powers is not covered by the relevant literature. However, a few research gaps remain in it; in particular, criminal-justice separation of powers⁷⁸ and Kuwaiti separation of powers has been overlooked by researchers. Since it is established that the separation of powers is difficult to achieve, the lack of research on it implies there is little guidance for Kuwait on how to ensure it in its criminal justice system. In response to this research gap and in consistency with the significance of the chosen topics, the presented thesis was developed. It does not intend to respond fully to the stated concerns of the insufficient knowledge on criminal-matters and Kuwaiti separation of powers. However, it will introduce some primary data and review secondary research to contribute to finding a solution to the issue of establishing the context-appropriate means for promoting criminal-matters separation of powers in Kuwait.

⁷⁵ Constitution of Kuwait, 1962, art. 50.

⁷⁶ Barkow, *supra* (n 15) 989, 991.

⁷⁷ Clark, *supra* (n 18) 971, 971-989; Stevens, *supra* (n 60), 365, 368; Sam Ervin, 'Separation of Powers: Judicial Independence' (1970) 35 *Law and Contemporary Problems* 108, 108-110; Eli Salzberger, 'A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?' (1993) 13 *International Review of Law and Economics* 349, 350-352.

⁷⁸ Barkow, *supra* (n 15) 989, 1012.

2.2. The Role of Separating Powers between Institutions in the Criminal Justice

System

The concept of the separation of powers can be summarised as the idea that in order to avoid concentrating power, as well as preserving liberty and the rule of law, three different authorities or powers need to be formed and kept distinct and independent from one another.⁷⁹ The authorities were defined by Montesquieu as the legislative branch of power, which is responsible for law-making, the executive branch of power, which is responsible for administering those laws, and the judicial branch, which consists of the court system responsible for interpreting and upholding legislation.⁸⁰ Figure 1 represents this concept with a simple and commonly used diagram that also demonstrates the interrelationships between the branches of power.

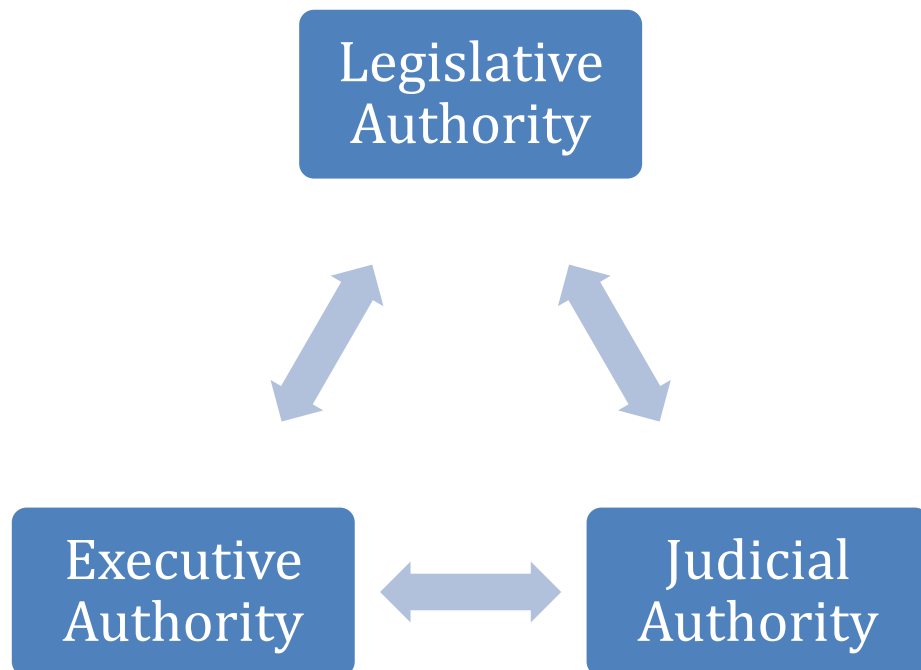


Figure 1. Theoretical separation of powers.

⁷⁹ Montesquieu, *supra* (n 6) at 151.

⁸⁰ *Ibid.*

Throughout its existence, the idea of separation of powers was adopted in a number of contexts, which allows conclusions to be drawn about its theoretical and practical value. A very early example of the use of separation of powers is the adoption of some of its elements by Umar ibn Al-Khattab (634-644 AD).⁸¹ In particular, the judiciary was at least partially separated from the executive branch because a special position of judges was developed for individual provinces and territories. This position was fully separated from the role of governors for more effective management, even though both were under caliph's supervision.⁸² There is some debate on the topic: according to Rehman, Ibrahim, and Bakar,⁸³ one of the schools of thoughts argues that at that time of Umar ibn Al-Khattab, the judiciary was merged with the executive branch (which means that neither of them was controlling the other; they were just parts of the same branch). However, Rehman, Ibrahim, and Bakar highlight the evidence⁸⁴ which indicates that the caliphs did delegate part of their power to judges. Apart from that, the authors focus on the principles of justice from the Quran,⁸⁵ suggesting that in order to achieve justice, fairness, equity, and impartiality promoted by it, the judiciary needs to be independent.⁸⁶ The authors present a clear and logical argument, which is based on historical evidence and the analysis of Quran. Therefore, the Islamic roots of separation of powers practice may be present.

As argued by Goldoni, the early English and French constitutions (which both developed their own monarchy-based separation of powers versions) both reflect the concept of the separation of powers, even though the former may be more celebrated.⁸⁷ It should be noted that the Constitution in England may be older if the Magna Carta of 1215 is taken into

⁸¹ Al-Qudsy and Rahman, *supra* (n 11) at 620; see also Rehman et al., *supra* (n 11) at 68.

⁸² Al-Qudsy and Rahman, *supra* (n 11) at 620; see also Rehman et al., *supra* (n 11) at 8.

⁸³ Rehman et al., *supra* (n 11) at 68.

⁸⁴ *Ibid.* at 69.

⁸⁵ *Ibid.* at 70-71.

⁸⁶ *Ibid.* at 72.

⁸⁷ Marco Goldoni, 'Montesquieu and the French Model of Separation of Powers' (2013) 4 *Jurisprudence* 20, 22.

account and viewed as a Constitution.⁸⁸ It was followed by other important events which produced documents that can be described as constitutional, including the Bill of Rights of 1689 and the Parliament Acts of 1911.⁸⁹ The first Constitution in France was adopted in 1791, and the current one was adopted in 1958.⁹⁰ However, it is noteworthy that, according to Goldoni, France’s legal-matters separation of powers refers back to the pre-revolutionary “parlements” that performed “regulated resistance,” which modified the relationships between the monarchy and the nobility.⁹¹ In addition, as pointed out by Socarras, separation of powers has been demonstrated to be a legitimate means of protecting democracy or, rather, limiting absolute power by making it impossible to concentrate power in one place.⁹² As a result, the principle of the separation of powers, in which the three authorities are as distinct and independent as possible, is reflected in many modern constitutions, including those of the United Kingdom, the United States and France, among other countries.

Indeed, in France, the Head of the State is the President who appoints the Prime Minister who is in charge of the executive power;⁹³ the legislative body is the Parliament, which is elected by the people, and there is a number of independent courts.⁹⁴ Thus, the idea of the separation of powers is supported here. The modern-day UK is a constitutional monarchy, which adheres to the concept of the rule of law and takes separation of powers into account in that there are separate executive (ministers), legislative (Parliament), and judicial

⁸⁸ Andrew Heywood, *Essentials of UK Politics* (Macmillan International Higher Education 2017) at 184.

⁸⁹ *Ibid.*

⁹⁰ David Marrani, *Dynamics in the French Constitution* (Routledge 2013) at 74, 129.

⁹¹ Goldoni, *supra* (n 87) 31.

⁹² Michael Socarras, ‘Judicial Modification of Statutes: A Separation of Powers Defense of Legislative Inefficiency’ (1985) 4 *Yale Law & Policy Review* 228, 228-229; see also Samuels (n 1) 1; Conway, *supra* (n 2) at 306- 307.

⁹³ Gouvernement, ‘How Government Works’ (Government of France, 2018), para. 1-2. accessed 2 August 2018.

⁹⁴ Gouvernement, ‘Other Key Bodies’ (Government of France, 2018), para. 1-7. accessed 2 August 2018.

(courts) branches.⁹⁵ Therefore, as argued by Murphy and Stoica, it would be feasible to state that the separation of powers is typical of both common law and civil law systems.⁹⁶

The aim of separation of powers, as pointed out by Montesquieu, is to “prevent the concentration of all power in the hands of a single ruler”.⁹⁷ Therefore, Samuels must be correct in stating that separation of powers in a criminal justice system is meant to prevent power abuse and ensure the protection of the vulnerable populations.⁹⁸ The population that is involved in the criminal justice system is indeed particularly vulnerable and requires effective safeguards, which is demonstrated by Barkow.⁹⁹ However, Barkow also shows that historically, separation of powers in criminal matters was largely ignored by the researchers.¹⁰⁰

In a similar way, Ashworth comments that the independence of the judiciary is of utmost importance. His paper “Responsibilities, Rights and Restorative Justice,” which focuses on the role of the state in restorative justice, comes to a conclusion that “it should remain the responsibility of the state towards its citizens to ensure that justice is administered by independent and impartial tribunals”.¹⁰¹ Ashworth does admit that state-led justice is not always successful in delivering security, but for this investigation, it is important that he acknowledges the significance of the right to independent tribunals, which implies the necessity for ensuring that the judiciary is separated from the rest of the power branches and is not influenced by them. It is noteworthy that unlike Barkow, who considers the case of the US, Ashworth appears to refer to English law. Thus, the two authors highlight the difficulty of ensuring separation of powers in criminal justice and postulate its importance

⁹⁵ Richard Benwell and Oonagh Gay, ‘The Separation of Powers’ (House of Commons, 2018), 1-5. accessed 2 August 2018.

⁹⁶ Murphy and Stoica, *supra* (n 9) at 224.

⁹⁷ Montesquieu, *supra* (n 6) at 224.

⁹⁸ Samuels (n 1) at 706; see also Hall, *supra* (n 19) at 352-353; Clark, *supra* (n 18) 971, 971-989.

⁹⁹ Barkow, *supra* (n 15) 989, 995.

¹⁰⁰ *Ibid.* 989, 991.

¹⁰¹ Ashworth, *supra* (n 20) 578, 590-591; see also Barkow, *supra* (n 15) 989, 991.

from different perspectives. As a result, the present study intends to attract attention to criminal justice separation of powers and investigating related issues.

2.3. The Concept of a Criminal Justice System and its Patterns

The term criminal justice that is employed in this thesis can be defined as “the formal social institution designed to respond to deviance defined as crime”.¹⁰² This definition is supplied by Travis and Edwards. The authors also report that the system is typically said to have three subsystems: “law enforcement, courts, and corrections”.¹⁰³ The first one is concerned with enforcing laws, which is carried out by specific agencies through the activities related to crime: its prevention, detection, and response to it (investigation and apprehension).¹⁰⁴ The second one consists of the courts that uphold laws by resolving disputes,¹⁰⁵ and the third one is concerned with punitive operations, as well as rehabilitation.¹⁰⁶ Criminal justice systems are complex and vary from country to country, and Kuwaiti criminal justice system will be discussed in the next chapter.

2.4. Barkow’s Review

The article by Rachel E. Barkow¹⁰⁷ presents a critical analysis of the classical approach to separation of powers and demonstrates the fact that criminal-matters separation of powers has the specific features that require a different approach. According to Barkow, the typical approach to separation of powers which is applied to administrative law consists of a relatively flexible “blending of powers” combined with regular checking aimed at ensuring the lack of power abuse. The flexibility can provide the opportunity to step back from full, complete separation of powers in order to enable the “government to respond more readily

¹⁰² Lawrence Travis and Bradley Edwards, *Introduction to Criminal Justice* (Routledge 2014) at 3.

¹⁰³ *Ibid.* at 20.

¹⁰⁴ *Ibid.* at 54.

¹⁰⁵ *Ibid.* 57.

¹⁰⁶ *Ibid.* 62.

¹⁰⁷ Barkow, *supra* (n 15) 989, 989.

to criminal matters”.¹⁰⁸ On the other hand, an alternative approach would consist of strict adherence to separation of powers in criminal matters to ensure the lack of power abuse which, in this context, can have disastrous consequences.¹⁰⁹ In other words, Barkow views separation of powers as a form of possible protection of the population from power abuse, which can technically be modified (be made less strict and more flexible) as long as it is combined with another safeguard (checks in the first example).

When analysing the separation of powers in the US, Barkow claims that the criminal-matters separation of powers happens to follow the flexible approach with the exception of checks, which the author defines as insufficient, claiming that only the Constitutional rights can be considered criminal-matters safeguards in the country.¹¹⁰ According to the author, they are not sufficient when structural power abuse is concerned.¹¹¹ As a result, Barkow suggests that criminal-matters separation of powers is a field that needs separate, specific attention and consideration when determining its significance and potential forms, as well as safeguards.¹¹² The author criticises the lack of attention to the topic within academic literature, offers an analysis of the separation of powers that she observed in the US and proposes a different approach, as well as the justification of the reasons for her suggestions.

While the specifics of the US separation of powers are not pertinent to the present study, the rest of the article can be viewed as the framework adopted by the current investigation.

¹⁰⁸ *Ibid.* 992.

¹⁰⁹ *Ibid.* 992; see also Barack Obama, ‘The president's role in advancing criminal justice reform’ (2016) 130 *Harvard Law Review* 811, 823-820; Daniel Epps, ‘The consequences of error in criminal justice’ (2014) 128 *Harvard Law Review* 1065, 1094-1108; Meshari Al-Eifan and Mordhi Alayash, ‘Victim restitution in the Kuwaiti legal system: a criminal or civil remedy? Comparative analysis’ (2014) 85 *Revue Internationale de Droit Pénal* 697, 698.

¹¹⁰ Barkow, *supra* (n 15) 993; see also Posner, *supra* (n 1), 1687-1688; David Sklansky, ‘The nature and function of prosecutorial power’ (2016) 106 *Journal of Criminal Law & Criminology* 473, 480-481; Carrillo and Chou, *supra* (n 1), 658-659.

¹¹¹ Barkow, *supra* (n 15), 1031.

¹¹² *Ibid.* 993.

In particular, Barkow claims that separation of powers in criminal matters is particularly important because of the potential negative outcomes (threat to human rights) of power abuse,¹¹³ that strict separation of powers in criminal matters is a working mechanism for preventing power abuse because it directly prevents power from accumulating in a specific branch,¹¹⁴ and that this approach would be functional within the criminal matters context specifically because of the features of that context.¹¹⁵ Consequently, Barkow advocates for a more vigorous enforcement of separation of powers within the criminal-matters context, indicating that given the strict use of separation of powers in administrative matters, there “is all the more reason to use it in the criminal context, where the stakes are higher and the potential for abuse is so much greater”.¹¹⁶

The argument of Barkow that there is a lack of academic discussion on the topic is supported by the present thesis; aside from a few passing notes of the topic of criminal justice that have been considered here, minimal relevant literature has been identified. The works that do mention criminal justice rarely critique the separation of powers that is applied to them.¹¹⁷ An example is the paper by Conway, which remarks on criminal matters predominantly in footnotes with almost no commentary.¹¹⁸ Overall, it appears that Barkow is correct in the statements about the need for additional research in the field. Thus, Barkow’s work can be regarded as a framework that guides the current research from the point of view of its content and methodology, which is a decision that needs to be justified.

¹¹³ *Ibid.* 1012-1013, 1028-1029; see also Obama *supra* (n 109), 823-820; Epps, *supra* (n 109), 1094-1108; Al-Eifan and Alayash, *supra* (n 109), 698.

¹¹⁴ *Ibid.* 1032-1033; see also Conway, *supra* (n 2) at 306- 307.

¹¹⁵ *Ibid.* 996.

¹¹⁶ *Ibid.* 1054.

¹¹⁷ Haljan, *supra* (n 18) at 230-231; see also Tom Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy' (2009) 53 *American Journal of Political Science* 971-989.

¹¹⁸ See also Gerard Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17 *European Law Journal* 304, 309.

2.4.1. Justification for the Focus on Barkow

The article by Rachel E. Barkow¹¹⁹ has been introduced into this discussion due to its unique focus on the different approaches to criminal-justice matters; no similar article was found that would cover this topic, especially for Kuwait. Certain criticisms of the choice of Barkow for this thesis need to be addressed. Thus, the article focuses on the US, and it specifically discusses the different views and practices of criminal justice separation of powers in terms of that context. As a result, not all of the presented information can be considered relevant for Kuwait.

However, there are many justifications for applying Barkow's review to Kuwaiti contexts. First, there is a sufficient amount of theoretical information in Barkow's work, which exists to explain the importance of criminal-justice matters or the possible approaches to it. This information is universally applicable, which makes it relevant for a thesis on Kuwait. Moreover, Barkow's review is of relevance to a study on Kuwait since certain similarities can be found in the development of the Kuwaiti separation of powers and that of other governments. For example, the process that characterises the development of the Kuwaiti separation of powers can be termed democratisation, which has been taking place in countries all over the world as shown by Stepan, Linz, and Minoves.¹²⁰ Also, Barkow provides a sound argument for the idea that criminal-matters separation of powers is strongly connected to (and even rooted in) the Constitution, which can be used to justify the approach used by the study. Similarly, works by Samuels and Al-Zumai illustrate the way the constitutions of different countries, including Kuwait, establish the separation of powers principle.¹²¹ Furthermore, since there is no similar article with Kuwait at the forefront, no suitable alternative could be found in any case. Therefore, employing

¹¹⁹ Barkow, *supra* (n 15) 989, 989.

¹²⁰ Stepan et al., *supra* (n 54) 35, 46-47.

¹²¹ Samuels, *supra* (n 1) 1-31; see also Al-Zumai, *supra* (n 54) at 5.

Barkow's review in a Kuwait-focused thesis is generally justified despite the differences in contexts.

However, another concern may also be raised; Barkow's work is not very recent, and it is almost 15 years old. Given that it makes claims about the presence and absence of the literature related to the researched topic, Barkow's literature review, which predominantly cites papers from the previous century, might be outdated. This issue was resolved within this thesis by reviewing other similar literature. The effort supported the issue reported by Barkow; even though it managed to uncover some other relevant literature, this thesis also demonstrates that criminal-matters separation of powers is not very often studied. Few sources that would even mention criminal-matters separation of powers were encountered, and none would explicitly focus on it and problematize it. For instance, Haljan describes the judicial branch of power in the UK and mentions criminal law from the point of view of the validity of international criminal legislation, but neither of the topics is paid much attention in this book.¹²² Nelson and Ringsmuth¹²³ consider the separation of powers between Court and Congress in the US with a focus on the importance of the independence of the judiciary, but they mostly cover public opinion on the topic. Conway mentions the criminal-matters decision-making in the EU. The author shows that the legislative, executive, and judicial powers in the EU cooperate in the cases of criminal offences and sanctions with the executives being able to prompt the legislative bodies to propose new legislation or veto decisions.¹²⁴ However, this topic is only mentioned in the article without any detailed analysis.

¹²² Haljan, *supra* (n 18) at 230-231.

¹²³ Kjersten Nelson and Eve Ringsmuth, 'Inter-Institutional Dynamics: Assessments of the Supreme Court in a Separation of Powers Context' (2012) 35 *Political Behavior* 357, 359-361.

¹²⁴ See also Conway, *supra* (n 2) 309.

Similarly, Ashworth highlights the importance of the independence of tribunals,¹²⁵ which can be extended to the judiciary in general, although this article does not focus on the topic. Nick Cheesman also mentions separation of powers in the judiciary, mostly describing the way the judicial system of Burma failed to achieve it throughout the British rule in the country.¹²⁶ The author does not comment extensively on the situation; mostly, the book just explains the events that resulted in the lack of separation of powers, which included the beliefs of the officials (between 1872 and 1900) and particular circumstances (for instance, the political instability in the aftermath of the World War II). In summary, the criminal-matters perspective seems to be rarely covered, and there is no live discussion on the topic to be provided in this thesis.

In addition to the current literature review that was carried out for this thesis, it can be pointed out that while Barkow's paper is treated as a framework, it has been merged together with other papers, some of which support and some of which expand Barkow's review. Some of the works that considered Barkow were also included, for example, that by Barack Obama¹²⁷ dedicated to criminal justice reforms, which further supports the idea that the criminal justice system is a rather specific context, in which there is a greater threat of power abuse. As a result, the reliance on Barkow's work does not prevent the thesis from reflecting other relevant literature, including some more recent works. To summarise, the choice of Barkow's review for this thesis is explained by its unique position as an article that very deliberately and expressly focuses on criminal-matters separation of justice with attention paid to the literature that had existed on the topic prior to the paper's publication. While its application to Kuwaiti context has its limitations, it is still justified.

¹²⁵ Andrew Ashworth, 'Responsibilities, Rights, and Restorative Justice' (2002) 42 *British Journal of Criminology* 578, *supra* (n 20) 590-591; see also Barkow, *supra* (n 15) 989, 991.

¹²⁶ Nick Cheesman, *Opposing the Rule of Law* (Cambridge University Press 2015) *supra* (n 29) at 47.

¹²⁷ Obama *supra* (n 109), 823-820.

Consequently, Barkow's work functions as a framework for this thesis, providing some structure and evidence for it.

2.5. The Criminal Justice System of Kuwait

The criminal justice system of Kuwait includes the typical elements of such a system; according to Morison and Grimshaw, such elements include the law enforcement agencies, the courts, and the correctional institutions.¹²⁸ Additionally, the executives who are involved in the system can be viewed as another element, and the criminal justice employs the legislation, which is developed by the legislative body (in Kuwait, the Amir and the National Assembly).¹²⁹ Thus, the justice system is the product of the cooperation of different branches of power: the legislation is the result of the work of the legislative power, the law is enforced by the executive branch, and the courts belong to the judicial one. As a result, separation of powers should be particularly important for criminal justice, but, as will be shown below, it is not always the case.¹³⁰

The Kuwaiti Penal Code (Law No. 16 of 1960) contains the information pertinent to crimes and penalties,¹³¹ and the criminal procedures are guided by the Kuwait Code of Criminal Procedure (Law No. 17 of 1960).¹³² Overall, however, very few recent resources are available on the topic of the criminal justice system in Kuwait, especially when research articles, official statistics, and reports are considered. For instance, the attempts at finding the statistics related to appeals were not successful.¹³³

¹²⁸ John Morison and Brian Grimshaw, *Investigation, Process and Legal Standards within the Criminal Justice System in Kuwait* (Queen's University Belfast, 2016) at 3.

¹²⁹ Constitution of Kuwait, 1962, art. 51.

¹³⁰ Morison and Grimshaw, *supra* (n 128) at 7.

¹³¹ Kuwait, Law No. 16 of 1960 (as amended): Penal Code, art. 111, 184 (Arabic version).

¹³² Kuwait, Law No. 17 of 1960: Code of Criminal Procedure, 1960, art. 1-75 (Arabic version).

¹³³ The obstacles consisted of the lack of information provided by official governmental bodies. In addition to the government websites, newspaper KUNA and other newspapers were searched, but there appears to be no official statistics that would be directly published in the mentioned sources. Similar concerns can be

When researching political crimes, which is one of the separation of powers criteria proposed within this research, a lack of resources that would consider this phenomenon in Kuwait is apparent. In fact, there is no such term as “political crime” that would appear in the country’s Penal Code. However, the National Security Law,¹³⁴ which is the Law No. 31 of 1970 (Act Amending the Provisions of the Penal Code), seems to be dedicated to this topic. Indeed, the law focuses on the crimes that can be concerned with state security, describing them and stating the related punishments. This piece of legislation can be connected to the UN Counter-Terrorism Strategy since it incorporates the crimes that can be described as terrorism.¹³⁵ Thus, the Law No. 31 of 1970 can be viewed as one of the measures intended to build the capacity of Kuwait to prevent or combat such events.

However, the law has been labelled as insufficiently detailed, which, according to specialists, might result in abuse.¹³⁶ Mousavi described an example in which a woman’s tweet was reinterpreted to imply “reproach of the Prince person,”¹³⁷ which is punishable according to Article 25 of the law.¹³⁸ While a single case study cannot be viewed as a pattern, the author uses it to uncover the elements of the legislation that can be used as loopholes for power abuse, which, at the very least, makes the effectiveness of the law questionable. Moreover, since the term “political crime” is not used by the document, it is difficult to determine if this category of crime is specifically acknowledged and regulated by the Kuwaiti government. From this perspective, the Law is not effective in combating terrorism from the viewpoint of the UN since the organisation requires ensuring the

encountered when looking for other reports on Kuwaiti legislation and human rights concerns; see Mahmoud Rudi Mousavi, ‘A Comparative Study between Kuwait and Britain Level of Understanding the Scope of Free Speech in Both Countries’ (2016) 7 *International Journal of Educational Research and Reviews* 880, 884.

¹³⁴ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 1-58.

¹³⁵ United Nations, ‘UN Global Counter-Terrorism Strategy’ (United Nations, 2019), para. 9. accessed 20 January 2019.

¹³⁶ Mousavi, *supra* (n 133) 884.

¹³⁷ *Ibid.* 883-884.

¹³⁸ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 25.

protection of human rights while implementing relevant measures.¹³⁹ Thus, both specialists and the UN view the means of addressing the issue of political crimes in Kuwait as insufficiently effective.

Secondary sources on the topic are also rather rare, which limits the ability of this study to assess the way political crimes are handled in the country. Thus, Kuwaiti criminal system can be viewed as under-researched. However, a report developed with the help of the Kuwait International Legal Research Centre and the Queen's University of Belfast has provided a short overview of the system and its problems in 2016.¹⁴⁰ The Kuwait International Legal Research Centre, which is a private educational organisation, commissioned this report. The aim of the Centre was to find out the issues that were encountered by Kuwaiti prosecution.¹⁴¹ However, the report considers a number of problems that are related to the criminal justice in general. The methods of the report included literature review, interviews with stakeholders, and scenario analysis, but as a report rather than an academic article, it does not cover the procedures in great detail. As a result, it is difficult to assess the rigour of the study. Still, it is the most recent report on the topic, and it is well-referenced, especially in terms of cited legislation, which improves its credibility.

One of the first concerns that the report considers consists of the fact that the criminal justice system of Kuwait does not exhibit a "principled" or "coherent" structure, which is why some important elements are missing.¹⁴² According to the report, this issue makes the strategic development of the system more difficult and hinders the process of policy

¹³⁹ United Nations, *supra* (n 135) para. 9.

¹⁴⁰ Morison and Grimshaw, *supra* (n 128) at 3.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* at 7.

formation.¹⁴³ Similarly, the authors mention the lack of officials' training, insufficient guidance (code of practice) for crime investigation, and resource shortages, as well as some more specific challenges.¹⁴⁴ The report focuses on problems without considering the positive elements. Still, the mentioned issues are important to review in the present research since they provide the opportunity for analysing the concerns of Kuwaiti criminal justice system, which may be pertinent to the analysis of its separation of powers. Apart from that, Morison and Grimshaw find that the Kuwaiti government and legal and academic communities have expressed the idea that the justice system of Kuwait requires some improvement.¹⁴⁵ Therefore, the analysis of the data from the report appears to be particularly important.

2.6. Political Crimes and Miscarriages of Justice: A Problem Statement

To avoid confusion, it is necessary to consider the topics that were identified as two of the criteria of separation of powers assessment: political crimes and miscarriages of justice. Since the term "political crime" is not used in Kuwait, it is virtually impossible to find relevant literature that would define this phenomenon within the country's context. Additionally, this complex term has multiple definitions, which further complicates establishing one for Kuwait. However, for the present thesis, political crimes will be defined most broadly: as the crimes which are committed against or by the state.¹⁴⁶ They can be domestic, in which the citizens of a state violate its legislation with the aim of attacking the state; the cases when the state or its officials violate the rights of its citizens are also a part of this category.¹⁴⁷ They can also be international; for instance, the attack on

¹⁴³ *Ibid.* at 7.

¹⁴⁴ *Ibid.* at 7.

¹⁴⁵ *Ibid.* at 5.

¹⁴⁶ Jeffrey Ian Ross, *An Introduction to Political Crime* (Policy Press 2012) at 4.

¹⁴⁷ *Ibid.*

the embassies of a foreign state could be considered a political crime as well.¹⁴⁸ Thus, based on the currently existing literature and for the purposes of this project, political crimes are identified predominantly by their motives (which are usually ideology-driven), perpetrators (often the state, including its officials, or its opposition), and victims (typically the state or its citizens).¹⁴⁹

In Kuwait, a law can be used to persecute political criminals as identified by the above-presented definition. In particular, the National Security Law¹⁵⁰ considers state security crimes. However, based on the literature review, which includes an academic article and the comments of international human rights organisations, the practice shows that this legislation can lead to power abuse and tends to be employed to prosecute the opposition for stating their views.¹⁵¹ This tendency can be explained by the fact that the law reportedly uses unclear phrasing and can be interpreted to prohibit the criticism of the royal family.¹⁵² As a result, it is logical to consider the topic of the miscarriages of justice.

This term is also difficult to define, but technically, miscarriage of justice consists of false conviction, which is described as the result of deficient legal procedures.¹⁵³ However, certain researchers have been including the unjust application of laws, including unlawful detention, in the definition.¹⁵⁴ The prosecutions for defamation and blasphemy in Kuwait can be viewed as an appropriate illustration for miscarriages of justice.¹⁵⁵ According to a recent periodic review carried out by the UN Human Rights Committee to examine

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.* at 5-7.

¹⁵⁰ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 1-58.

¹⁵¹ Mousavi, *supra* (n 133) 884; see also International Humanist and Ethical Union, 'Kuwait' (International Humanist and Ethical Union, 2015), 1. accessed 2 August 2018.

¹⁵² Mousavi, *supra* (n 133) 884; see also International Humanist and Ethical Union, *supra* (n 151) 1.

¹⁵³ Kathryn Campbell, *Miscarriages of Justice in Canada* (University of Toronto Press 2018) at 7.

¹⁵⁴ *Ibid.* at 6-7.

¹⁵⁵ International Humanist and Ethical Union, *supra* (n 151) 1; see also Human Rights Council, 'Compilation Prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21' (United Nations, 2015) at 9-10. accessed 12 September 2019.

Kuwait's human rights practices, the related legislation may cause issues with exercising freedoms of thought and conscience.¹⁵⁶ For instance, in 2012, a person was sentenced to 10 years in prison for blasphemy, which consisted of an apparently insulting statement in his social media account.¹⁵⁷ Similarly, in 2017, a person was sentenced to 10 years in prison for alleged defamation of the judiciary in a blog.¹⁵⁸

The main problem of such cases is that the legislation which they refer to does not state clearly what an offence constitutes,¹⁵⁹ which is why it is difficult to determine if a person has indeed committed a crime or not. For example, such legislation can use terms that are difficult to define or conditions that are difficult to prove like "the intention of eroding the state's status" or the violation of "the princedom attribute".¹⁶⁰ As a result of this situation, it is possible to prosecute people who make any kind of political commentary.¹⁶¹ Also, it is noteworthy that the mentioned blasphemy legislation seems to be employed against human rights activists.¹⁶² The situation in which the commitment of crime cannot be determined does not prove the existence of miscarriages of justice, but it implies the possibility of such an event occurring and offers loopholes for it.¹⁶³ Thus, obscure legislation and the lack of the law on political crimes are a problem in Kuwait.

Additionally, from the perspective of a broader definition of the miscarriages of justice, several issues can be noted. While there is legislation which is supposed to prevent

¹⁵⁶ Human Rights Committee, 'Concluding Observations on the Third Periodic Report of Kuwait' (United Nations, 2016) at 7. accessed 12 September 2019.

¹⁵⁷ International Humanist and Ethical Union, *supra* (n 151) at 3.

¹⁵⁸ Freedom House, 'Kuwait' (Freedom House, 2018), para. 29. accessed 2 August 2018. Freedom House is an independent organisation that was founded in 1941 for the promotion of democracy. It provides regularly updated reports on the state of human rights in freedoms in various countries. Some of the criteria that it uses include the rule of law, the accountability of governments, the freedoms of expression, and so on. It is also interested in the rights of minorities.

¹⁵⁹ Mousavi, *supra* (n 133) 884.

¹⁶⁰ *Ibid.*

¹⁶¹ Human Rights Watch, 'World Report 2014: Kuwait' (Human Rights Watch, 2014). para. 13-14. accessed 2 August 2018.

¹⁶² Centre for Civil and Political Rights, 'Kuwait: Absence of NGOs at Review Highlights Precarious Human Rights Situation' (Centre for Civil and Political Rights, 2016), para. 4-5. accessed 2 August 2018

¹⁶³ Campbell, *supra* (n 153) 6-7.

arbitrary arrest, it is still reported to occur, as well as the torture and beatings of detainees, which are outlawed in Kuwait.¹⁶⁴ There are reports of unsanitary conditions and overcrowding in prisons by human rights organisations. They may fail to specify the source of such information, but anecdotal evidence is often provided by them, which is enough to prove the existence of the issue.¹⁶⁵ However, no official reports or statistics on the matter have been discovered during this research. It is not clear if this issue is to be included in the miscarriage of justice category, but it definitely constitutes a problem with human rights and the rights of incarcerated people. Thus, a number of concerns are reported for the Kuwaiti criminal justice.

2.7. Summaries

Since the time of its early versions (like those present during the rule of Umar ibn Al-Khattab) and until modern Constitutions, separation of powers was used to prevent power abuse. Specifically, separation of powers was shown to be able to keep power distributed between several branches, enabling their independence from one another and preventing the development of absolute power. The present literature review shows that the significance of separation of powers is well established by the research on the topic. However, criminal-matters separation of powers is less extensively covered, which is a major conclusion of Barkow's work, as well as this literature review, which attempted to find the articles that would disprove this assertion. Barkow demonstrates that the significance of separation of powers in criminal justice cannot be overstated because of the potentially devastating effects of power abuse within it, including, for example, miscarriages of justice. The lack of attention to criminal-justice separation of powers in

¹⁶⁴ Freedom House, *supra* (n 158) para. 30-32.

¹⁶⁵ *Ibid.* para. 31.

modern literature implies that more research on the topic is needed. Thus, the literature review justifies the present investigation.

In a similar way, the research devoted to the criminal justice of Kuwait is limited, especially as far as peer-reviewed academic papers are considered. However, some relevant literature does document potential problems, especially those related to political crimes. The main problem of these findings is the low quality of sources, some of which do not detail their methodology or provide the source of their assertions. However, most of them are provided by academics, academic institutions, or human rights organisations, which lends some legitimacy to their conclusions and makes them impossible to ignore. Additionally, the triangulation of the sources that report the same phenomena might be improving the quality of the conclusions drawn despite the low quality of some of the sources. Thus, the presented findings are justified, even though it is important to view them through the lens of the literature's limitations.

As shown by Barkow's article, which is the framework of the present study, the development of criminal-matters separation of powers is a crucial element of Kuwaiti's democratisation, and it is an important guarantee of the protection of the freedoms and rights of Kuwaiti people, which is especially evident in the light of the issues and barriers that the recent research on the criminal justice of Kuwait uncovers. As a result, the current thesis aspired to investigate separation of powers, primarily by considering its constitutional and historical roots and discussing its effectiveness from the point of view of human rights' protection. The information gathered from the literature review was used to guide the development of some of the interview questions for this investigation, especially those related to separation of powers and the criminal justice system of Kuwait.

3. Historical and Political Context

3.1. Separation of Powers in Kuwait and Article 50 of the Constitution

3.1.1. The Roots of Democracy in Kuwait

According to Stepan et al., in Kuwait, the history of the separation of powers is related to the history of the country and its constitution, and it can be regarded as an example of the democratisation of a monarchy.¹⁶⁶ Zahlan reports that Kuwait has a rich history that, among other things, involved being a centre of trade.¹⁶⁷ In 1938, oil was discovered in the area, which, according to O'Shea, Spilling, and Cavendish, spurred on the country's economic growth after the Second World War.¹⁶⁸ Admittedly, the abundance of resources can have various outcomes, including the "resource curse"¹⁶⁹ and the issue that was especially topical for Kuwait right after the proclamation of its independence: the aggression of other countries.¹⁷⁰ However, the economic growth of Kuwait is described as a facilitator of the democratisation of the country, as exemplified by freedom of expression in the press, which, as reported by Casey, has been greater than anywhere else in the Arab world since the previous century.¹⁷¹ Apart from that, Salameh and Al-Sharah suggest that the proclamation of the country's independence in 1961 was a major step towards its democratisation.¹⁷² Thus, the specifics of the country's economic and political development might have prepared it for the introduction of an increasingly independent separation of powers.

¹⁶⁶ Stepan et al., *supra* (n 54) at 45-47; see also Salameh and Al-sharah, *supra* (n 54) 57, 57-58.

¹⁶⁷ Rosemarie Zahlan, *The Making of the Modern Gulf States* (Routledge 2016) at 24-27.

¹⁶⁸ Maria O'Shea, Michael Spilling and Marshall Cavendish, *Kuwait* (Routledge 2010) at 66-67; see also Michael Herb, *The Wages of Oil* (Cornell University Press 2014) 1-14; see also Jill Crystal, *Kuwait: The Transformation of an Oil State* (Routledge 2016) at 66-67.

¹⁶⁹ Michael Ross, 'What Have We Learned about the Resource Curse?' (2015) 18 *Annual Review of Political Science* 239, 239-240.

¹⁷⁰ Michael Casey, *The History of Kuwait* (Greenwood Publishing Group 2007) at 65-67.

¹⁷¹ *Ibid.* at 70.

¹⁷² Salameh and Al-sharah, *supra* (n 54) 57, 58.

Also, Salameh and Al-Sharah argue that the development of education and increased awareness of political concepts has contributed to the process.¹⁷³ Similarly, the integration of Western liberal attitudes into the life of the people of Kuwait must have mirrored the adoption of the separation of powers, which may have seemed premature at the time but appears to have been carried out smoothly; this idea is proposed by Hijazi.¹⁷⁴

3.1.2. Citizenship in Kuwait and Its Population

It should be pointed out that citizenship of Kuwait is a birthright in accordance with the Constitution;¹⁷⁵ it is connected to the nationality of the father of the child as stated in the Nationality Law.¹⁷⁶ In other words, a child fathered by a Kuwaiti in any country is Kuwaiti; also, foundlings found in Kuwait are considered Kuwaiti.¹⁷⁷ Furthermore, Kuwaiti citizenship can be granted for prolonged residence in the country (at least 15 consecutive years for Arab people), for various services to Kuwait, and other factors.¹⁷⁸ As a result of the long period of citizenship acquisition, there are stateless people (Bedoons) in Kuwait.¹⁷⁹ The UN Human Rights Committee points out that the status is associated with discrimination, including limited access to social services, and urges Kuwait to find the means of registering this group.¹⁸⁰

Kuwaiti population in the country accounts for around 30%, and the expatriates come from other Arab countries (about 28% of the total population), Asia (about 38%), and Africa (1.9%), as well as some other countries (slightly more than 1%).¹⁸¹ The small number of natives has been a concern for the government, which is reflected in its attempts to

¹⁷³ *Ibid.* 57, 59.

¹⁷⁴ Hijazi, *supra* (n 35) 428, 436.

¹⁷⁵ Constitution of Kuwait, 1962, art. 27-28.

¹⁷⁶ Kuwait, Nationality Law, 1959, art. 1-2 (Arabic version).

¹⁷⁷ *Ibid.* art 3.

¹⁷⁸ *Ibid.* art. 4-5.

¹⁷⁹ Salameh and Al-sharah, *supra* (n 54) 57, 74.

¹⁸⁰ Human Rights Committee, *supra* (n 156) at 2-3.

¹⁸¹ CIA, 'Kuwait' (CIA, 2018), para. 3. accessed 2 August 2018.

promote the Kuwaitization of the country's business.¹⁸² The population of Kuwait is predominantly Muslim (76%), but there are also Christians (17%), and other religions.¹⁸³ Thus, there is a notable diversity in Kuwait, which should be taken into account when considering the protection of human rights.

3.1.3. Separation of Powers in Kuwaiti Constitution

According to Barkow, in the United States, “the Constitution separates legislative, executive, and judicial power to prevent tyranny and protect liberty”, and this principle works for many countries, including Kuwait.¹⁸⁴ As reported by Salameh and Al-Sharah, the Constitution of Kuwait was adopted in 1962 after the country was proclaimed independent,¹⁸⁵ and Hijazi states that the principles of the codified law system were reflected in its articles.¹⁸⁶ According to Hijazi, the Kuwaiti Constitution reflects and determines the approach to dividing powers in the country's criminal justice system.¹⁸⁷ Articles 6 and 7 state that Kuwait has a democratic government and its justice system is based on the principles of democracy and equality.¹⁸⁸ In addition, Article 8 of the Constitution notes that the state guarantees the security and protection of its citizens.¹⁸⁹

Article 50 of the Constitution declares the principle of the separation of powers for the state, which is reflected in the criminal justice system.¹⁹⁰ Alhajeri demonstrates that the Constitution creates a threefold separation of powers and entrusts specific powers in its elements, whilst also requiring that they are independent of each other. In her article, Barkow also answers the question about the role of the Constitution in determining the

¹⁸² KUNA, “‘Kuwaitization’ Forum to Begin Monday’ (KUNA, 2007), para. 3. accessed 2 August 2018.

¹⁸³ *Ibid.*

¹⁸⁴ Barkow, *supra* (n 15) 989, 990. See Constitution of Kuwait, 1962, art. 50

¹⁸⁵ Salameh and Al-sharah, *supra* (n 54) 57, 58.

¹⁸⁶ Hijazi, *supra* (n 35) 428, 437.

¹⁸⁷ *Ibid* 437.

¹⁸⁸ Constitution of Kuwait, 1962, art. 6, 7.

¹⁸⁹ *Ibid.* art. 8.

¹⁹⁰ Mashael Alhajeri, ‘Judiciary and the Administration of Justice in Building and Construction Disputes Under Kuwaiti Law’ (2008) 22 *Arab Law Quarterly* 199, 199-200.

separation of powers for the criminal justice system. She states that “each branch must agree before criminal power can be exercised against an individual. Congress must criminalise the conduct, the executive must decide to prosecute, and the judiciary (judges and juries) must convict”.¹⁹¹ The same approach is also followed in Kuwait because Parliament criminalises the conduct, guidelines for prosecutors are written according to the Constitution, and the judiciary is responsible for convicting, employing the principles of law adopted from the French and Egyptian systems.¹⁹²

3.1.4. The Amir and the Three Branches of Power

An analysis of the Constitution of Kuwait reveals an important element of its articles: the figure of the Amir. The legislative power is “vested in the Amir and the National Assembly”;¹⁹³ the executive power “shall be vested in the Amir, the Cabinet and the Ministers,”¹⁹⁴ and the judicial power “shall be vested in the Courts in the Amir's name”.¹⁹⁵ Article 56 also states that Ministers are appointed by the Amir, but the number of Ministers cannot be greater than one-third of the National Assembly, which is formed through “general direct secret ballot”.¹⁹⁶ Both males and females are allowed to vote after they reach the age of 21, which is reported by the Freedom House.¹⁹⁷ Thus, the people’s will is generally expressed by the National Assembly, and the suffrage of Kuwait is considered to be “near universal” and fair as suggested by Stepan et al.¹⁹⁸

¹⁹¹ Barkow, *supra* (n 15) 989, 1017; see also John Manning, ‘Separation of Powers as Ordinary Interpretation’ (2011) 2 *Harvard Law Review* 1939, 1945.

¹⁹² Abdul Reda, ‘A Summary of the Legal and Judicial System in the State of Kuwait’ (1991) 6 *Arab Law Quarterly* 267, 270.

¹⁹³ Constitution of Kuwait, 1962, art. 51.

¹⁹⁴ *Ibid.* art. 52.

¹⁹⁵ *Ibid.* art. 53.

¹⁹⁶ *Ibid.* art. 56, 80.

¹⁹⁷ Freedom House, *supra* (n 158) para. 3.

¹⁹⁸ Stepan et al., *supra* (n 54) at 45.

With respect to legislation, the Amir has the right to propose, sanction, and promulgate laws, and laws can be submitted by the National Assembly to the Amir. Also, the Amir can produce a variety of decrees that can be used to enforce laws, regulations, and “other necessary rules” in accordance with the Constitution.¹⁹⁹ Thus, the legislative and executive powers are closely connected to the Amir, even though his power is balanced out by the Cabinet (chosen by himself, preferably from the National Assembly)²⁰⁰ and the National Assembly (chosen by the people).²⁰¹ This balance can be compared, for example, to the relationship of the US President with the country’s Congress or even its political parties. The President of the US has notable power, including the ability to veto legislation, but the power and influence of the Congress and the civil society, both direct and indirect is aimed at keeping this power from becoming absolute.²⁰² The candidates for the Kuwaiti National Assembly must be Kuwaiti, at least thirty years old, and fluent in Arabic; also, they have to correspond to the current requirements of the Electoral Law.²⁰³ According to Salameh and Al-Sharah, the Amir possesses great power, but the Constitution limits it notably.²⁰⁴ These claims will be investigated further in the thesis.

It is acknowledged by modern researchers, for example, Al-Zumai, that the Assembly “plays an active and substantive role in governance, both in legislating and in monitoring the government,” especially when compared to the activities of parliaments in other constitutional monarchies of the region.²⁰⁵ In particular, Freedom House highlights the fact that the Amir’s decrees and the appointment of the Prime Minister can be controlled by the

¹⁹⁹ Constitution of Kuwait, 1962, art. 71-73.

²⁰⁰ *Ibid.* 56.

²⁰¹ *Ibid.* art. 80.

²⁰² Douglas Kriner, ‘Congress, Public Opinion, and an Informal Constraint on the Commander-in-Chief’ (2018) 20 *The British Journal of Politics and International Relations*, 52, 52-53.

²⁰³ *Ibid.* art. 82.

²⁰⁴ Salameh and Al-sharah, *supra* (n 54) 57, 65.

²⁰⁵ Al-Zumai, *supra* (n 54) at 2.

body to an extent.²⁰⁶ More than that, in 2006 the National Assembly set forward the appointment of Amir Sheikh Sabah Al-Ahmad Al-Sabah, instead of the then-ailing Amir Sheikh Sa'ed Al-Abdulah Al-Sabah. As pointed out by Al-Zumai, this was considered an empowering step that signified a strengthening of democratic tendencies in Kuwait.²⁰⁷ As a result, Nader states that through the Assembly, the people became the source of sovereignty for the country.²⁰⁸ According to Selvik and Alnajjar, the people of Kuwait can be characterised as politically active.²⁰⁹

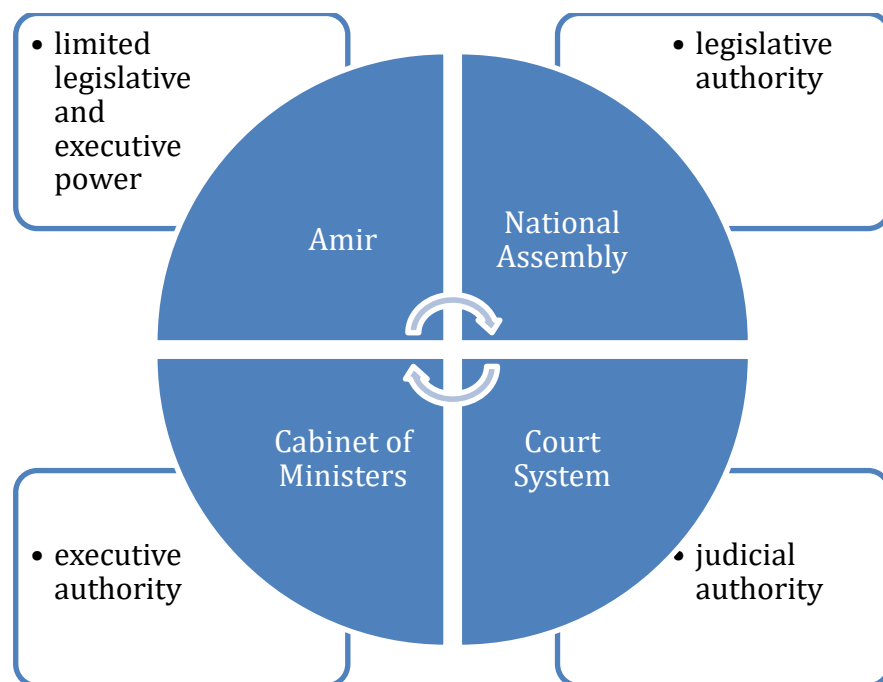


Figure 2. The separation of powers in Kuwait.

The Kuwaiti judiciary is supposed to be completely separated from the Amir since the Constitution states that “no Authority may wield any dominion over a Judge”.²¹⁰ But the judges are expected to perform their duties in the name of the Amir. Also, Hall suggests

²⁰⁶ Freedom House, *supra* (n 158) para. 3.

²⁰⁷ Al-Zumai, *supra* (n 54) at 3; see also Kjetil Selvik and Ghanim Alnajjar, ‘Kuwait: The Politics of Crisis’ in Kjetil Selvik and Bjørn Olav Utvik (eds), *Oil States in the New Middle East: Uprisings and stability* (Routledge 2015) at 100.

²⁰⁸ Fadi Nader, ‘Kuwait: Human Rights Under the Constitution’ (2000) 7 *YB Islamic & Middle EL* 267, 267.

²⁰⁹ Selvik and Alnajjar, *supra* (n 207) at 98.

²¹⁰ Constitution of Kuwait, 1962, art. 163.

that it is apparent that a country’s judicial system is unlikely to be completely immune to varied external forces.²¹¹ Still, the Alkarama Foundation insists that the Constitution of Kuwait postulates and demands the independence of the system from the direct influence of external forces, including the executive power.²¹² An approximate representation of the separation of powers in Kuwait appears in Figures 2 and 3. Figure 2 presents the key powers of the country, which include the four elements of the Amir, National Assembly, Court system, and Cabinet of Ministers. Figure 3 presents a slightly more detailed description of the bodies that are involved in each branch of the political life of Kuwait, including the police, judges, and prosecutors, who are also one of the foci of this thesis. Thus, the figures demonstrate a summary of the above-presented information and imply that in Kuwait, the authorities are not fully distinct or separate, which may be a cause for concern.

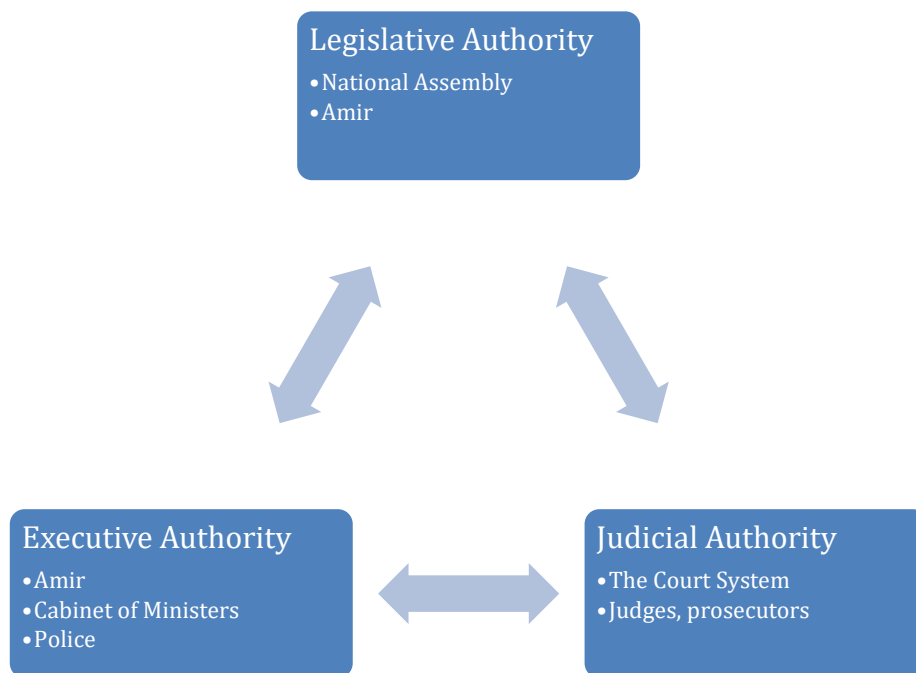


Figure 3. The separation of powers in Kuwait using the three authorities model.

²¹¹ Hall, *supra* (n 19) at 364.

²¹² Alkarama Foundation, *supra* (n 40) at 12.

3.1.5. Issues and Obstacles

Certain boundaries and obstacles to the continued development of Kuwaiti democracy have been identified, including political challenges (for example, power imbalances and a lack of unity in the opposition) and economic issues – the liberalisation of the economy is considered unfinished,²¹³ which means that the government is not ready to relinquish its control over a number of economic aspects. An example is the ceilings of lending rates and amounts, which are restricted depending on the specifics of loans.²¹⁴ As a result, lending cannot exceed particular amounts, and the total loans made by a bank are also limited to specific numbers. According to Al-Zumai, both economic and political problems tend to weaken the development of democracy, including the empowerment of Kuwaiti parliament and voters,²¹⁵ which eventually hinders effective separation of powers. It has been established by Stepan et al. that the Amir still holds impressive power, which is enhanced by the extensive involvement of the country's princes in political matters as Ministers.²¹⁶ Also, Al-Zumai and Salameh and Al-Sharah report that a number of setbacks before 1992 involved unconstitutional dissolutions of the Assembly.²¹⁷ Fortunately, Al-Zumai states that the new century has seen only constitutional dissolutions.²¹⁸ As a result, the democratisation of the country is incomplete.

The analysis of key governmental bodies also indicates that majoritarianism appears to be present in the Kuwaiti political system. As reported by Schleiter and Belu, majoritarianism can be defined as an approach to politics that favours a particular majority, resulting in that

²¹³ Al-Zumai, *supra* (n 54) at 1, 3.

²¹⁴ International Monetary Fund, *Kuwait: Selected Issues and Statistical Appendix* (International Monetary Fund 2012) at 51.

²¹⁵ Al-Zumai, *supra* (n 54) at 1, 3.

²¹⁶ Stepan et al., *supra* (n 54) 35, 46-47.

²¹⁷ Al-Zumai, *supra* (n 54) at 5; see also Salameh and Al-sharah, *supra* (n 54) 57, 66.

²¹⁸ Al-Zumai, *supra* (n 54) at 2.

majority being able to influence a country's politics to a greater extent.²¹⁹ Majoritarianism should not be confused with populism, which unites a range of ideas that are typically concerned with the division of the population into two groups. They are most often referred to "the people" and "the elite".²²⁰ Populism is characterised with the tendency to propose the need for popular sovereignty, but unlike majoritarianism, populism views one group (the people) as morally better than the other group (the elite), which becomes the basis for the proposed social changes and prioritisation of the interests of the first group.²²¹

Given the fact that judges are not immune to the influences of the powerful majority, majoritarianism is clearly an issue for separation of powers in criminal law. It is especially true for Egyptian judges in Kuwait, who are particularly unwilling to disturb the powerful groups of the country because the salary of a judge is greater in Kuwait than in Egypt; this problem is reported by Brown.²²² As pointed out by Ashworth and Horder, the "individuals whose preferences are at odds with those of the majority" are bound to "lose out" in the case of democratic or participatory decision-making.²²³ Thus, the main problem with majoritarianism is the neglect of minorities, which attracts criticism and calls for an approach that is more representative.²²⁴ It is noteworthy that, as pointed out by Ashworth, offenders are a minority, which is why their protection from majoritarian prejudices is a significant concern. In addition, it can be pointed out that prisoners and perpetrators are considered morally inferior to the people who have not committed any crimes. This factor can be used to connect the issues of prisoners' rights to populist ideas. From the perspective of the criticism of majoritarianism, a balance between the protection of the

²¹⁹ Petra Schleiter and Valerie Belu, 'The Decline of Majoritarianism in the UK and the Fixed-term Parliaments Act' (2016) 69 *Parliamentary Affairs* 36, 36-38.

²²⁰ Ben Stanley, 'Populism, nationalism, or national populism? An analysis of Slovak voting behaviour at the 2010 parliamentary election' (2011) 44 *Communist and Post-Communist Studies* 257, 258-259.

²²¹ *Ibid.*

²²² Brown, *supra* (n 37) at 159-160.

²²³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (OUP 2013), 26.

²²⁴ Matthew Hall and Joseph Ura, 'Judicial Majoritarianism' (2015) 77 *The Journal of Politics* 818, 823.

majority and the human rights of both groups needs to be found.²²⁵ In general, Dajani reports that majoritarianism is relatively typical for Asian countries, and Kuwait does not appear to be an exception.²²⁶

To sum up, the existing state of affairs in Kuwait (as reported by recent literature) might not be regarded as an illustration of the theoretically ideal separation of powers, even though Ulrichsen emphasises the fact that it has travelled a long way from the archetypical monarchy.²²⁷ Nowadays, as shown by Hatina Christoph Schumann, liberal tendencies in Kuwait remain strong²²⁸ despite the difficulties in establishing them, which are reported by Brown,²²⁹ and the fact that the United Nations insist on the further development of democratic governance in the country,²³⁰ which is its policy in the Asian region in general.²³¹ Kuwait seems to respond favourably to such comments as His Highness Sheikh Naser Al-Mohammad Al-Ahmad Al-Sabah tends to highlight the importance of freedoms²³² and equality²³³ for its population, while also emphasising its agreement with the UN.²³⁴

It is important to note that, according to Conway, no currently existing system has managed to achieve the pure threefold separation of powers that, according to the author,

²²⁵ Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (OUP Oxford 2013), 89.

²²⁶ Omar Dajani, 'The Middle East's Majority Problems: Minoritarian Regimes and the Threat of Democracy' (2015) 38 *Ethnic and Racial Studies* 2516, 2527.

²²⁷ Kristian Ulrichsen, 'Politics and Opposition in Kuwait: Continuity and Change' (2014) 4 *Journal of Arabian Studies* 214, 214-217.

²²⁸ Meir Hatina and Christoph Schumann, *Arab Liberal Thought after 1967* (Springer 2015) at 4-8, 102-103

²²⁹ Brown, *supra* (n 37) at 158.

²³⁰ Executive Board of the United Nations Development Programme, the United Nations Population Fund and the United Nations Office for Project Services, 'Draft Country Programme Document for the State of Kuwait (2015-2017)' (United Nations, 2014) at 23 accessed 18 January 2017

²³¹ Saikal A, 'Authoritarianism, Revolution and Democracy: Egypt and Beyond' (2011) 65 *Australian Journal of International Affairs* 530-544. See also, UNDEF, 'Doers of Democracy - Asia & Pacific' (UNDEF, n.d.) accessed 17 February 2017

²³² His Highness Sheikh Naser Al-Mohammad Al-Ahmad Al-Sabah, Prime Minister, 'Statement Before The Sixty-Fifth Regular Session Of The United Nations General Assembly' (United Nations, 2010) at 3 accessed 12 February 2017.

²³³ *Ibid.* 2.

²³⁴ *Ibid.* 1.

exists only theoretically,²³⁵ and this results in both risks and benefits for citizens. Similarly, Daugherty points out that separating the judicial branch from the executive one is a necessity, but one that is not always possible, providing an example of a politically-influenced case of criminal prosecution.²³⁶ Therefore, the issues that are experienced by Kuwait do not indicate the impossibility of change and, in fact, signify a room for improvement.

3.1.6. A History of the Kuwaiti Constitution

A closer consideration of the history of Kuwait and its Constitution can provide more insights on the development of democracy in the country. In turn, the development of democracy is also connected to the creation of Constitution; according to research on the topic, it was the democratic developments that enabled the drafting of the Constitution in the form in which it was eventually presented.²³⁷ Thus, the present section will consider the historical events that preceded and framed the drafting of Kuwaiti's Constitutions with special remarks about the factors that affected the process and its outcome.

Tetreault highlights the fact that based on the historical records, as well as myths surrounding the early development of Kuwait, democracy has never been a foreign concept for it.²³⁸ Rather, it can be suggested that relative equality could be found in the country since the very beginning; at the very least, the wealthy families of Kuwait were equal, which implies the presence of oligarchy in the early days of Kuwait.²³⁹ The first steps toward democracy in the country were taken in 1752; according to the National Assembly

²³⁵ Conway, *supra* (n 2) at 322.

²³⁶ Donald Daugherty, 'Separation of Powers and Abuses in Prosecutorial Discretion' (1988) 79 *Journal of Criminal Law and Criminology* 953, 994.

²³⁷ The National Assembly of Kuwait, *supra* (n 49) at 21.

²³⁸ Mary Ann Tetreault, 'Patterns of Culture and Democratization in Kuwait' (1995) 30 *Studies in Comparative International Development* 26, 31

²³⁹ *Ibid.*

of Kuwait, that was when the Al-Sabah Family were elected to rule the State of Kuwait.²⁴⁰ Again, the action did not involve all the people of the country, but a number of wealthy families were involved. Furthermore, the ruling family amassed power, the elite of Kuwait resisted the development of authoritarianism.²⁴¹ Thus, the balance between the rulers of Kuwait and its oligarchs demonstrates the way the country has been resisting the idea of absolute power since the very beginning.

Moreover, Tetreault insists that the Amirs' "royalist tendencies" were "minimal" until the 1860s.²⁴² Therefore, for at least a hundred years, the Amirs did not make significant attempts at achieving absolute monarchy. In addition, local parliaments of Kuwait need to be mentioned. According to the National Assembly, the "consultation principle" is deeply rooted in Kuwaiti culture. This principle describes the fact that the people of Kuwait tend to consult with each other when considering various matters of importance, and since the early years of Kuwait, it was done with the help of Dawaween.²⁴³ Dawaween has been defined by the National Assembly as "small local parliaments".²⁴⁴ Thus, the idea of engaging the people in resolving major issues has also been present in Kuwait for centuries.

To summarise, there exists sufficient evidence to indicate that certain limitations of the absolute power can be found in Kuwaiti history. Similarly, information can be discovered about the involvement of Kuwaiti people in significant decisions since the early days of the country. As a result, the National Assembly of Kuwait argues that democracy in Kuwait has been developing more or less since the establishment of the State of Kuwait.²⁴⁵

²⁴⁰ The National Assembly of Kuwait, *supra* (n 49) at 21.

²⁴¹ Tetreault, *supra* (n 238), 26, 31

²⁴² *Ibid.*

²⁴³ The National Assembly of Kuwait, *supra* (n 49) at 27-28.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.* at 30.

However, the Assembly does admit that various political events had an adverse impact on the rulers' willingness to confer with their people and that the presented evidence points toward oligarchy rather than proper democracy.²⁴⁶

The first relatively successful attempt at creating an independent legislative power in Kuwait dates back to 1921, when the first Shura Council, which can be described as the Consultative Council, was established.²⁴⁷ By the time, Kuwait had already entered the treaty with Britain,²⁴⁸ which occurred during the reign of Mubarak the Great in 1899.²⁴⁹ The treaty was somewhat endangered during the First World War when Mubarak, who was initially acting in support of Britain, started assisting the Ottoman Empire, which was mostly connected to trade with the latter. However, Britain threatened to withdraw the treaty which led Shaikh Salem, who was the next Shaikh to govern Kuwait after Mubarak, to comply with British requirements. Britain then proceeded to assist Kuwait in protecting itself from the claims of other former Ottoman territories, notably Saudi Arabia and Iraq.²⁵⁰

The Shura Council was developed under the influence of a reformist movement in Kuwait, which was supported by the power of wealthy merchants²⁵¹ and reflected the perspectives of the population of the country. Therefore, it can be suggested that the Council was a democratic element. However, it was not successful in ensuring the promotion of

²⁴⁶ *Ibid.*

²⁴⁷ Adel Altabatabaie, *The Constitutional Order in Kuwait* (Dar Aleloum Publisher, 2001) at 270; translated from Arabic.

²⁴⁸ Zahlan, *supra* (n 167) at 26.

²⁴⁹ Altabatabaie, *supra* (n 247) at 263; see also Unknown, 'The British Position in the Persian Gulf, 1919' (Qatar National Library, n.d.), at 2. accessed 5 May 2018.

²⁵⁰ Casey, *supra* (n 170) at 52-55.

²⁵¹ Zahlan, *supra* (n 167) at 26.

democracy in Kuwait because the Shaikh ignored its existence.²⁵² Eventually, the council was dismissed.²⁵³

In its place, a new Legislative Council (Majlis) was developed, which, as stated by Adel Altabatabaie, was the first independent legislative authority in the entire Gulf region.²⁵⁴ Moreover, it was also the first elected legislative body in it as well; the National Assembly of Kuwait suggests that this development was a major step toward establishing the separation of powers in Kuwait.²⁵⁵ This Council was initiated in response to the dissident movement in Kuwait²⁵⁶ and was essentially aimed at protecting the rights of Kuwaiti people.²⁵⁷ Once again, the movement was led by powerful merchants,²⁵⁸ and they succeeded in pushing the ruler to establish the National Legislative Council in 1938.²⁵⁹ According to the law which governed its power, the Council performed all the three power functions (executive, legislative, and judicial), and the Amir could be described as the “chief executive power” of Kuwait.²⁶⁰ The National Assembly highlights the fact that the council was elected, but it should be pointed out that the number of voters was very limited and the election required the approval of the Amir.²⁶¹ Furthermore, the Council established a number of committees in order to efficiently monitor and address various aspects of the development of Kuwait.²⁶²

The work of the Council was significantly slowed down and complicated by what could be described as a legislative vacuum: there was no constitution which would become the basis

²⁵² *Ibid.* 27.

²⁵³ Salameh and Al-sharah, *supra* (n 54) 57, 62.

²⁵⁴ Altabatabaie, *supra* (n 247) at 289.

²⁵⁵ The National Assembly of Kuwait, *supra* (n 49) at 21. accessed 11 February 2017.

²⁵⁶ *Ibid.*

²⁵⁷ John Hayhurst, ‘Kuwait’s Majlis Movement: National and Regional Developments Brought into Focus’ (Qatar National Library, n.d.), para 8 accessed 5 May 2018

²⁵⁸ *Ibid.* para 3.

²⁵⁹ Zahlan, *supra* (n 167) at 28.

²⁶⁰ *Ibid.*

²⁶¹ The National Assembly of Kuwait, *supra* (n 49) at 32.

²⁶² *Ibid.*

for the protection of human rights.²⁶³ Technically, it was because of this problem that the first Council was dissolved, and, as a result, the members of the second one received the task of rectifying the issue.²⁶⁴ The task of developing a document that would resolve the problem was given high priority, and the Council was required to create the Basic Law of the State.²⁶⁵ As pointed out by the National Assembly, the Council was busy with preparing what was essentially a Constitution, although it can be considered an early version of the document.²⁶⁶ Sheikh Ahmed Al Jaber who was ruling the country back then was initially opposed to the project but was eventually persuaded to agree by the Council.²⁶⁷

Thus, the Basic Law of Kuwait was developed in 1938.²⁶⁸ It included a wide range of documents that ensured the coordination of the work of the three branches of power while also describing the legislation pertinent to various aspects of a country's life, including education, economy, security, and so on. It did focus on particular groups within the population of Kuwait (in particular, merchants), which means that it probably was not capable of enabling full equality of Kuwaiti people.²⁶⁹ However, the fact that it still presupposed involving the people of Kuwait in important decisions implies that it was a step toward democracy. Furthermore, while not very extensive, the Law incorporated crucial democratic principles, including the sovereignty of the people of Kuwait.²⁷⁰ The National Assembly of Kuwait assesses the experience as highly important for the progress of democracy in the country.²⁷¹

²⁶³ Altabatabaie, *supra* (n 247) at 290.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.* at 292.

²⁶⁶ The National Assembly of Kuwait, *supra* (n 49) at 32.

²⁶⁷ Altabatabaie, *supra* (n 247) at 292.

²⁶⁸ The National Assembly of Kuwait, *supra* (n 49) at 32.

²⁶⁹ Tetreault, *supra* (n 238), 26, 32.

²⁷⁰ *Ibid.*

²⁷¹ The National Assembly of Kuwait, *supra* (n 49) at 32.

The document became prioritised and referred to for any external and internal matters; it was decided that it could only be changed with the Council's approval.²⁷² Due to this development, Kuwait proceeded to engage in the separation of powers, which resulted in the establishment of the country's executive, legislative, and judiciary powers between 1938 and 1961.²⁷³

However, before proceeding to the 1961 Constitution, it is important to consider the economic developments in the country that occurred prior to the event. When considering democracy in Kuwait after 1938, the National Assembly highlights the impact of the discovery of oil in 1938.²⁷⁴ The Assembly reports that a notable percentage of the funds was directed toward education, as well as the cultural development of Kuwait. In tandem, these investments resulted in the development of constitutional thought and Kuwaiti understanding of democracy. On the other hand, Tetreault and Salih note that the powerful ruling family had particular access to the oil and funds resulting from its sales, which vested them with increased power.²⁷⁵ From this perspective, the previously powerful oligarchs that used to constrain absolute monarchy became weaker. Still, Salih also points out that oil revenue was also actively invested into businesses, and this fact might have tipped the scales back: the funding of businesses promoted the wealth of businesspeople, thus creating a new oligarchy.²⁷⁶ In summary, the discovery of oil definitely had an impact on the development of the Constitution, but its effects might have been complex and diverse. This side note demonstrates that the development of democracy is connected to multiple factors, some of which are connected to the economy of the country.

²⁷² Altabatabaie, *supra* (n 247) at 292-295.

²⁷³ *Ibid.* at 302.

²⁷⁴ *Ibid.* at 33.

²⁷⁵ Tetreault, *supra* (n 238), 26, 32; see also Kamal Osman Salih, 'Kuwait: Political Consequences of Modernization, 1750-1986' (1991) 27 *Middle Eastern Studies* 46, 48

²⁷⁶ Salih, *supra* (n 275), 48

In 1961, Kuwait became officially independent, and just two months later (in August 1961), the elections for the Constitutional Council started with the Amiri Decree No. 12.²⁷⁷ They resulted in the creation of the Constituent Assembly, the members of which were protected through Law No. 8 of 1962, which established the parliamentary immunity necessary for the task.²⁷⁸ Since March 1962 and until November 1962, the Assembly would work seven days a week on drafting the Constitution, and on November 11, 1962, the final version of the Constitution was approved by its members.²⁷⁹ The Assembly regulated its work based on the Article 23 of the Statute in the transitional period,²⁸⁰ and the document that it produced was eventually based on the principle of separation of powers, as well as the cooperation of powers.²⁸¹ The entire Part IV of the Constitution (Articles 50-173) is dedicated to the topic and covers the general provisions, the head of the state (Amir), and the legislative, executive, and judicial powers in that order. The National Assembly of Kuwait highlights the Constitution's focus on the separation of power, indicating that this feature, along with the institution of the National Assembly in accordance with it, allowed it to guarantee democracy.²⁸²

Regarding the independence of the country, the process of acquiring it was mostly peaceful, but it involved issues with Iraq.²⁸³ The Kuwaiti ruler decided to make Kuwait independent, and Great Britain was similarly ready for the change, which can be attributed to the country's resources being exhausted after the Second World War.²⁸⁴ As a result, when both countries announced Kuwait's independence, other countries were quick to

²⁷⁷ *Ibid.* at 317; see also Othman Abdul Malek Al-Saleh, *Constitutional Regime and Political Institution in Kuwait* (Kuwait University 2003) at 13, 14 (Arabic source).

²⁷⁸ Al-Saleh, *supra* (n 277) at 155.

²⁷⁹ *Ibid.* at 179.

²⁸⁰ *Ibid.* Regarding the Constituent Assembly Regulations, see the official Kuwait's newspaper (Kuwait Today) number (369) issued in 18 Feb 1962, page at 7. Regarding the Statute in the transitional period, See the same newspaper, number (360) issued in 7 Jan 1962.

²⁸¹ Constitution of Kuwait, 1962, art. 50; see also Hijazi, *supra* (n 35) 428, 437.

²⁸² The National Assembly of Kuwait, *supra* (n 49) at 21.

²⁸³ Casey, *supra* (n 170) at 65-67.

²⁸⁴ *Ibid.* at 67.

acknowledge the event and recognise the sovereignty of Kuwait. Great Britain also assisted Kuwait in developing its defences. One of the primary dangers for the newly independent country was the potential claim of the countries associated with the former Ottoman Empire, especially Iraq, which protested Kuwait's sovereignty and threatened invasion. For example, in 1961 and 1962, the British Cabinet of Ministers still anticipated the possibility of Iraq attacking Kuwait.²⁸⁵ In the same year, the Amir of Kuwait requested Britain's support formally.²⁸⁶ With Kuwait joining the Arab League²⁸⁷ and the United Nations showing interest in Kuwait, more protection was lent to the country.²⁸⁸ With British assistance and that of other Arab countries (those making up the Arab League), Iraq was mostly deterred from attacking, although an incident with Iraq seizing a reportedly "small" portion of Kuwaiti land was reported as late as in 1973.²⁸⁹

Still, when the United Nations acknowledged Kuwait, Iraq officially surrendered its claims. In 1963, a diplomatic meeting in Baghdad involved Iraq abandoning any claims to the country and supporting its inclusion in the Arab League and United Nations.²⁹⁰ Britain proceeded to cooperate with Kuwait after that,²⁹¹ among other things, through establishing the Kuwait Liaison Team and its embassy in Kuwait.²⁹² The Kuwait Liaison Team, as

²⁸⁵ TNA, 'Conclusions of a Meeting of the Cabinet held at Admiralty House S. W. 1, on Thursday, 13th July, 1961, at 11 a.m.' (TNA CAB 128/35/40, 1961), at 3; see also 'C.C. 61(59)' (TNA CAB 195/18/48, 1959), at 1. 'C.C. 49(61)' (TNA CAB 195/20/126891, 1961), at 4; Secretary of the Cabinet, 'Kuwait: Note by the Acting Secretary of the Cabinet' (TNA CAB 129/106/45, 1961), at 2.

²⁸⁶ TNA, 'Conclusions of a Meeting of the Cabinet held in the Prime Minister's Room, House of Commons, S.W.1, on Friday, 30th June, 1961, at 10.45 a.m.' (TNA CAB 128/35/37, 1961), at 6; see also Minister of Defence, 'Intervention in Kuwait' (TNA CAB 129/109/13, 1962), at 1-2.

²⁸⁷ TNA, 'Conclusions of a Meeting of the Cabinet held at Admiralty House S. W. 1, on Tuesday, 5th September, 1961, at 11 a.m.' (TNA CAB 128/35/49, 1961), at 6.

²⁸⁸ 'Conclusions of a Meeting of the Cabinet held at Admiralty House S. W. 1, on Tuesday, 17th April, 1962, at 11 a.m.' (TNA CAB 128/36/28, 1962), at 7-8.

²⁸⁹ TNA, 'Conclusions of a Meeting of the Cabinet held at 10 Downing Street, on Thursday, 22th March, 1973, at 11 a.m.' (TNA CAB 128/51/19, 1973), at 3.

²⁹⁰ Casey, *supra* (n 170) at 86.

²⁹¹ Lord Privy Seal, 'Kuwait: Future Relations with the United Kingdom: Memorandum by the Lord Privy Seal' (TNA CAB 129/105/27, 1961), at 1-2.

²⁹² Ministry of Defence Chiefs of Staff Committee, 'Directive to the Officer Commanding Kuwait Liaison Team' (TNA CAB 5/191/31, 1971), at 2; see also Ministry of Defence Chiefs of Staff Committee, 'Directive to the Officer Commanding Kuwait Liaison Team' (TNA CAB 5/193/2, 1972), at 2.

demonstrated through the responsibilities of its Head, existed predominantly for the fostering of military cooperation between the countries.²⁹³ However, the reduction of the influence of Britain on Kuwait, as well as the fortification of Kuwait's own national identity and international relations, helped the progress of democracy in the country as suggested by the National Assembly of Kuwait.²⁹⁴

Thus, at the time of the development of the Constitution, it was understood that there are three branches of power, which needed to be separated, but the Constitution also implied that they were expected to cooperate.²⁹⁵ The literature that was produced shortly after the introduction of the Constitution indicates that at the time, its values were respected and promoted, including the interest in human rights, freedoms, and separation of powers, as well as the opposition to absolute power.²⁹⁶ More recent studies seem to share the same perspective, but they are particularly likely to be critical of the hindrances to democracy, which are still present in Kuwait.²⁹⁷ For example, the National Assembly of Kuwait has praised the Constitution for introducing the separation of powers and democratic principles. The body has emphasised the significance of the fact that the Constitution focused on engaging the people of Kuwait in politics and required establishing an equilibrium between the three branches of power.²⁹⁸ However, the Assembly also commented on the crises of democratic practices, highlighting the significance of upholding democracy with the help of the Constitution.²⁹⁹ Thus, the values of separation of powers and democracy appear to have been preserved.

²⁹³ *Ibid.*

²⁹⁴ The National Assembly of Kuwait, *supra* (n 49) at 34.

²⁹⁵ Hijazi, *supra* (n 35) 428, 437.

²⁹⁶ Hijazi, *supra* (n 35) 428, 437; see also Saba Habachy, 'A Study in Comparative Constitutional Law' (1965) 3 *Columbia Journal of Transnational Law*, 116, 116-117, and Fakhri Shehab, 'A Super-Affluent Society' (1964) 42 *Foreign Affairs*, 461, 474.

²⁹⁷ Salameh and Al-sharah, *supra* (n 54) 57, 58.

²⁹⁸ The National Assembly of Kuwait, *supra* (n 49) at 21.

²⁹⁹ *Ibid.* at 41.

At the time of its adoption, the Constitution appeared to be revolutionary for Kuwait because, despite the previous attempts to limit the Amir's power, no success in this respect was achieved for a sufficiently prolonged time.³⁰⁰ However, the Constitution effectively transformed the country into a constitutional monarchy, significantly limiting the power of the Ruler in a legal way.³⁰¹ The Constitution, which was ratified by in 1962, came into force in January 1963,³⁰² as was required by its Article 182 that established the time limits for the procedure.³⁰³ The ratification was carried out by Sheikh Abdullah Al-Salem on November 11, 1962.³⁰⁴

There have been attempts at modifying the Constitution. For example, as pointed out by Al-Moqatei, Article 2 became controversial. In it, the Constitution states that the "religion of the State is Islam and Islamic Law shall be a main source of legislation".³⁰⁵ The phrasing led to prolonged discussions,³⁰⁶ in which the people of Kuwait considered the implications of using the Islamic Law as "a main source of legislation".³⁰⁷ It has been proposed to change the article to state that the Islamic Law was supposed to be the "only source of legislation"; Al-Moqatei states that a large part of the population of Kuwait supported the idea at the time of its proposal.³⁰⁸ However, the author also reports the alternative opinion, according to which such an amendment would prevent Kuwait from using any other sources of the law, which could be detrimental in the long run. In the end, the article was not amended. The Constitution of 1963 remains valid to this day. The history of its development demonstrates the way in which the political, economic, and

³⁰⁰ Hijazi, *supra* (n 35) 428, 436.

³⁰¹ *Ibid.* 437.

³⁰² *Ibid.* 437.

³⁰³ Constitution of Kuwait, 1962, art. 182.

³⁰⁴ Altabatabaie, *supra* (n 247) at 336; see also The National Assembly of Kuwait, *supra* (n 49) at 9. accessed 11 February 2017

³⁰⁵ Constitution of Kuwait, 1962, art. 2.

³⁰⁶ Mohammad Al-Moqatei, 'Introducing Islamic Law in the Arab Gulf States: A Case Study of Kuwait' (1989) 4 *Arab Law Quarterly* 138, 138-139.

³⁰⁷ Constitution of Kuwait, 1962, art. 2.

³⁰⁸ Al-Moqatei, *supra* (n 306) 142-143.

sociocultural factors that were at play in Kuwait prior to, during, and after its creation resulted in this outcome.

3.1.7. An analysis of the literature reviewed in this section

This section is based on very credible sources, which were relatively easy to find. Most of them are books³⁰⁹ or academic papers that are typically peer-reviewed.³¹⁰ Additionally, an examination of the Constitution was facilitated by the free access to the primary source,³¹¹ and the literature that analyses the Kuwaiti Constitution is not too scarce either.³¹² A few of the sources were also created at the time when the Constitution was only recently approved, which makes them especially valuable; they can report on the then-present questions and concerns related to the topic.³¹³ There are also no direct contradictions in the literature due to it being predominantly dedicated to historical accounts. However, the triangulation of sources, which typically report similar conclusions, implies that the likelihood of this literature review reporting high-quality findings is increased. Thus, unlike the previous section, this one does not experience the issue of being based on scarce sources.

3.2. Recent Political History

Regarding the more recent events in Kuwaiti history, several important milestones should be noted. The National Assembly was suspended in 1976, recalled again in 1981, and suspended again in 1981; according to Casey, this “turmoil” was “a direct reflection of the ability of the political opposition to get elected and thereby influence Kuwait’s internal

³⁰⁹ Altabatabaie, *supra* (n 247) at 336; see also Zahlan, *supra* (n 167).

³¹⁰ Al-Moqatei, *supra* (n 306) 142-143; see also Hijazi, *supra* (n 35); Salameh and Al-sharah, *supra* (n 54).

³¹¹ Constitution of Kuwait, 1962, art. 2.

³¹² Altabatabaie, *supra* (n 247); Hijazi, *supra* (n 35).

³¹³ Al-Moqatei, *supra* (n 306) 142-14; see also Altabatabaie, *supra* (n 247); Hijazi, *supra* (n 35); Zahlan, *supra* (n 167), and so on.

affairs”.³¹⁴ Additionally, the ruling family experienced the pressure of other Arab countries, especially Saudi Arabia, the ruler of which was worried about the progress of democracy in Kuwait because it could instil similar ideas in Saudis.³¹⁵ However, the growth of threat from Iran had the opposite effect and prompted the Amir to legitimise his rule by focusing on human rights once again.³¹⁶

In 1990, Iraq invaded and occupied Kuwait with the claims that the territory, which once belonged to the Ottoman Empire, was to be transferred to Iraq. To be more specific, Iraq claimed that while being a part of the Ottoman Empire, Kuwait belonged to the same authority as Iraq. From the perspective of Iraq, the agreement between Kuwait and Great Britain in 1899 was invalid because the Sheikh of Kuwait did not have the authority to enter it. Kuwait’s status as a subordinate unit was also mentioned in the Anglo-Ottoman Convention of 1913. However, the same Convention also determined the fact that Kuwait was separate from Iraq and established the borders between the two countries, and in addition to that, it was never actually formally ratified. The 1932 acknowledgement of Kuwait by Iraq’s Prime Minister was dismissed by Iraq with the claim that said minister was a British “puppet”. Casey also notes that no such claims were made about the 1963 meeting, which involved Iraq abandoning any claims to Kuwait or its territory. Overall, Casey points out that the invasion was justified by the aspects of Kuwait’s and Iraq’s history that served Iraq, and the country neglected the facts that could diminish its claims.³¹⁷

³¹⁴ Casey, *supra* (n 170) at 72.

³¹⁵ Salameh and Al-sharah, *supra* (n 54) 57, 58; see also Casey, *supra* (n 170) at 73.

³¹⁶ Casey, *supra* (n 170) at 73.

³¹⁷ *Ibid.* at 86.

Additionally, Iraqi leaders insisted that they acted in support of a Kuwaiti uprising against the Ruler, even though no actual uprising was present at the time.³¹⁸ Casey suggests that the reason for the invasion was the Kuwaiti oil.³¹⁹ The aggression prompted an international response, especially after the petition of the Kuwaiti government to the United Nations.³²⁰ In 1991, a US-led bombing forced Iraqi out of Kuwait, but in the process, it caused massive destruction.³²¹ The post-war devastation led the Amir to introduce Martial Law and work to ensure the national security.³²² In general, the war did not have a positive effect on democracy in Kuwait.³²³ However, the pressure from the population and international organisations pushed the Amir to re-elect the National Assembly in 1992.³²⁴ Since then, the National Assembly was suspended once more in 1999, and dissolved in 2009, 2011, 2012, and 2013.³²⁵ Other than that, no major adverse events in the field were noted. Positive developments included the expansion of human rights, especially women's rights.³²⁶

Apart from that, the topic of the Arab Spring appears to be of importance. The term "Arab Spring" has been used to describe a series of protests and revolutions that occurred in Arab countries.³²⁷ It started in 2010 with the rebellion in Tunisia and proceeded to concern multiple countries of the Middle East and North Africa region.³²⁸ According to recent research, the conflicts were predominantly motivated by governance issues (especially by

³¹⁸ *Ibid.* at 85.

³¹⁹ *Ibid.* at 86.

³²⁰ *Ibid.* at 91.

³²¹ *Ibid.* at 107.

³²² *Ibid.* at 112-113.

³²³ The National Assembly of Kuwait, *supra* (n 49) at 42.

³²⁴ BBC News, 'Kuwait Profile – Timeline' (BBC, 2018), para. 17. accessed 2 August 2018.

³²⁵ *Ibid.* para. 20, 35, 39, 46.

³²⁶ *Ibid.* para. 30-45.

³²⁷ John Davis, 'Introduction' in J Davis (ed), *The Arab Spring and Arab Thaw* (Routledge 2016) at 1.

³²⁸ *Ibid.* at 1-2.

the demands for democracy), as well as some economic concerns (like unemployment).³²⁹ The results varied for different countries, and they were not always positive.³³⁰ For instance, in Syria, the situation devolved in chaos and humanitarian catastrophe because of the lack of compromise between the fighting parties, but in Yemen, it resulted in the ousting of its President.³³¹

While no revolutions occurred in Kuwait, it would appear that the events caused Kuwaiti people to protest in demand for reforms.³³² In particular, “youth movements and grassroots opposition” were inspired by the Arab Spring, and the push for reforms appeared to have increased and expressed itself in demonstrations and protests, including licenced and unlicensed ones.³³³ Apart from that, in 2011, Kuwait experienced a “political upheaval” which was connected to “the Prime Minister’s abuse of public funds” and him being supported by the Amir.³³⁴ The information about this corruption was disseminated through mass media, which resulted in demonstrations aimed at the Minister’s resignation, as well as Twitter posts, which openly criticised the Prime Minister and the Amir.³³⁵

Such posts became the reason for prosecution in Kuwait; for instance, after a 2011 post, Fatima Al Matar was prosecuted in 2012.³³⁶ The post involved a discussion of corruption, and it became very popular. The specific offences that the woman was prosecuted for included that described by Article 15 of Law 31/1970 and Article 25 of Law 31/1971. The first of them states that publishing “news, information, statistics or rumours about the

³²⁹ Simplice Asongu and Jacinta Nwachukwu, ‘Revolution Empirics: Predicting the Arab Spring’ (2015) 51 *Empirical Economics*, 439, 440.

³³⁰ Bibliotheca Alexandrina, ‘Ismail Serageldin Offers a Cultural Vision to Fight Extremism in The Challenge’ (Bibliotheca Alexandrina, 2016), para. 3. accessed 2 August 2018.

³³¹ Asongu and Nwachukwu *supra* (n 329) 439-440.

³³² BBC News, *supra* (n 324) para. 45.

³³³ Shafeeq Ghabra, ‘Kuwait: At the Crossroads of Change or Political Stagnation’ (Middle East Institute, 2014), 14. accessed 2 August 2018.

³³⁴ Mousavi, *supra* (n 133) 883.

³³⁵ *Ibid.* 883.

³³⁶ *Ibid.* 883-884.

political, economic, financial or social situation with the intention of eroding the state's status and prominence”³³⁷ outside of Kuwait is a crime. The second specifies the punishment for “shouting or writing or drawing or picturing or any other means of thought expression, the rights and authority of the Prince, or reproach the Prince person or violate the principedom attribute”.³³⁸ Thus, while the prosecution did not use the term “political crime” since the category does not exist in Kuwait, the content of the Articles appears to imply that the crime would be political in nature as it would be concerned with the government and its security. Fatima Al Matar's post was perceived as disrespectful by many witnesses, which may explain the application of the cited legislation.³³⁹ However, this fact indicates that the laws are open to interpretation, that the political movement for change in Kuwait received some resistance and that the freedom of speech in the country may encounter some obstacles.

Some other troubling tendencies have been noted. In particular, human rights activists state that after the Arab Spring, the freedom of expression in Kuwait appears to have been decreasing. The specific examples of such tendencies include the increase in the prosecution for “blasphemy”³⁴⁰ and defamation of the ruling family.³⁴¹ Such approaches have been particularly damaging for online media freedom.³⁴² Also, while protests are not prohibited by the law and are, in fact, guaranteed by the Constitution, there have been reports of at least 600 people prosecuted for participating in such events with charges related to defamation and other crimes similar to the ones described above.³⁴³ The Human Rights Council cites materials which suggest that Kuwaiti legislation allows prohibiting

³³⁷ *Ibid.* 883.

³³⁸ *Ibid.*

³³⁹ *Ibid.* 883.

³⁴⁰ International Humanist and Ethical Union, *supra* (n 151) 1.

³⁴¹ Centre for Civil and Political Rights, *supra* (n 162) para. 4-5.

³⁴² International Humanist and Ethical Union, *supra* (n 151) 3.

³⁴³ *Ibid.* 3.

peaceful demonstrations and protests, as well as using force to disperse them, which is classified as a threat to the freedoms of expression and assembly.³⁴⁴ This section consists of high-quality sources that predominantly record historical events, and their mutual triangulation implies that the presented information is most likely factual and correct.

3.3. The Past Influence of British Jurisdiction and the Continuing Impact of French, Egyptian, and Islamic Law on the Criminal Justice System of Kuwait in Terms of Separation of Powers

The current criminal justice system of Kuwait is based on contrasting principles of British jurisdiction (as a past influence) as well as French, Egyptian and Islamic law (that can be described as continuing influences). As pointed out by Liebesny, this feature makes the criminal justice system in Kuwait rather unique in its diffusion and dependence on several different patterns, including the reference to civil codes and Islamic views.³⁴⁵ Farran, Gallen, and Rautenbach³⁴⁶ offer a collection of chapters that are devoted to different cases of law diffusion. One of them is Williamson's work,³⁴⁷ which refers to Kuwait and considers the way that a variety of legal concepts are diffused within its legal system. The author also points out that scholars do not tend to have a unanimous opinion concerning the classification of the Kuwaiti legal system, which is common for the subject³⁴⁸ but which results in very different appraisals of the share and influence of different sources of Kuwaiti law. The author mentions that some scholars, for example, Palmer, choose to highlight civil and Islamic law while, for example, the Central Intelligence Agency, which

³⁴⁴ Human Rights Council, *supra* (n 156) at 9-10.

³⁴⁵ Liebesny, *supra* (n 37) 110.

³⁴⁶ Sue Farran, James Gallen, and Christa Rautenbach, *The Diffusion of Law: The Movement of Laws and Norms around the World* (Routledge 2016), 1-235.

³⁴⁷ Williamson, *supra* (n 10) 25-41

³⁴⁸ *Ibid.* at 41. More discussion in the subject see Esin Örucü, 'What is a Mixed Legal System: Exclusion or Expansion' (2008) 12 *Electronic Journal of Comparative Law* 1, 3.

also devotes reports to the topic, emphasises common and French civil law.³⁴⁹ According to Williamson, the country's history (in particular since colonisation and the restoration of independence) is responsible for the process of diffusion, and this process may explain "the discrepancies between these classifications".³⁵⁰ The present section will consider all the pertinent influences that have had a major impact on Kuwaiti law.

3.3.1. The Concept of Hybrid Law

Hybrid is a phenomenon that is in-between two other phenomena or can be characterised as both of them, and in the case of law, hybridisation is described as the process of law gaining hybridity.³⁵¹ In the present thesis, this hybridity is considered from the perspective of legislation adopting features, elements, and ideas from other legislation. This concept incorporates both international and internal hybridisation. An illustration of the former is the way international documents can affect a country's legislation: prompt a country to prohibit torture, for instance.³⁵² The examples of the latter can include the way the naturalisation decree in 1959 in Kuwait redefined the concept of Kuwaiti citizenship, immigration legislation, and, by extension, the future Constitution.³⁵³

As pointed out by Sand, the "law is producing and stabilizing legal norms in an increasingly highly specialized, complex and continuously changing society," which naturally requires changes in the law or causes them.³⁵⁴ For instance, according to Choudhry, law hybridisation tends to enhance human rights protection, but the author also

³⁴⁹ Williamson, *supra* (n 10) 34. See also V.V. Palmer, 'Mixed legal system' in Bussani and Matei (eds), *The Cambridge Companion to Comparative Law* (Oxford University Press, 2012) at 381.

³⁵⁰ Williamson, *supra* (n 10) 34-35

³⁵¹ Inger-Johanne Sand, 'Hybridization, Change and the Expansion of Law' in N Andersen and I Sand (eds), *Hybrid Forms of Governance* (Palgrave Macmillan 2012) at 189-190; see also Jasper Finke, 'Concepts, Hybridization, Principles, and the Rule of Law: New Literature on International Monetary and Financial Law' (2015) 12 *International Journal of Constitutional Law*, 1054, 1056-1057.

³⁵² Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 53, 56.

³⁵³ Salameh and Al-sharah, *supra* (n 54) 57, 74.

³⁵⁴ Sand, *supra* (351) at 186.

suggests that the increased attention to terrorism, especially after the 9/11, may have pushed the law towards emphasising security rather than human rights.³⁵⁵ The processes which are associated with hybridisation are multiple. For example, legislation can acquire the features of a soft law (de-formalisation), which is particularly likely to occur in the areas that are significant from the international perspective.³⁵⁶ In general, international legislation is especially prone to hybridisation.³⁵⁷ Finke provides the example of financial regulation, which, when considered at the global level, is more likely to be popular with states when it is soft (not actually legally binding).³⁵⁸ The author states that international soft laws can also affect states,³⁵⁹ and he focuses on the way the international monetary law is hybridised under the demand for softer laws, as well as the changes in international agreements.³⁶⁰

Other terms have also been employed in the field to communicate similar meanings. For instance, Choudhry considers the term “migration,” indicating that various ideas (the author focuses on Constitutional ones) tend to migrate from one legal system to another one.³⁶¹ Other versions are “transplantation” and “borrowing,” which are less neutral since they make inferences about the intent of the people performing the operation.³⁶² Furthermore, the term “diffusion” can be used to describe the process of spreading ideas.³⁶³ As for hybridisation, according to Sand, the primary value of the concept is that it helps to describe and explain the “highly differentiated yet closely linked” legal phenomena” and allows an observer to note particular elements, features, and the specifics of development

³⁵⁵ Sujit Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) at 33.

³⁵⁶ Finke, *supra* (n 351) 1056-1057.

³⁵⁷ Choudhry, *supra* (n 355) at 13-14.

³⁵⁸ Finke, *supra* (n 351) 1059.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.* 1056-1057.

³⁶¹ Choudhry, *supra* (n 355) at 14.

³⁶² *Ibid.* at 22.

³⁶³ Williamson, *supra* (n 10) at 32.

of a law.³⁶⁴ As a result, the present thesis predominantly uses the term “hybridisation” because it is capable of attracting the attention to the origins of the different features of the unique Kuwaiti system.

3.3.2. British Jurisdiction (Past Influence)

Williamson reports that Kuwait used to be under the influence of the British jurisdiction since 1925 and until the country became independent in 1961.³⁶⁵ Technically, however, Kuwait was not colonised by Great Britain. The history of the relationships between the two countries is long and complex; for example, Hakima and Al-Saleh report that their first contact dates back to 1775 when the British mail route was altered to accommodate the problem of the Persian attack on Basra and started to involve Kuwait.³⁶⁶ As a result, the East India Company moved to Kuwait.³⁶⁷ Furthermore, in 1899, the two countries entered an Anglo-Kuwaiti Treaty.³⁶⁸ The primary feature of this treaty was that it was a protection treaty; in it, it was specified that Great Britain would provide protection but would not interfere with the internal affairs of Kuwait.³⁶⁹

That still meant that the foreign affairs of Kuwait were impacted very much by Britain, however. Basically, according to the Cabinet of Ministers, “the United Kingdom Government was responsible for the external affairs of Kuwait” at the time, and the situation did not change much until Kuwait proclaimed its independence.³⁷⁰ In the 1904 agreement between Mubarak and Britain, it was determined that only the British

³⁶⁴ Sand, *supra* (351) at 188.

³⁶⁵ *Ibid.* 27-28.

³⁶⁶ Mustafa Abu Hakma, *The Modern History of Kuwait* (Luzac & Company, 1983) at 171; see also Al-Saleh, *supra* (n 277) at 13-14.

³⁶⁷ Al-Saleh, *supra* (n 274) at 13-14.

³⁶⁸ Altabatabaie, *supra* (n 247) at 263; see also Unknown, *supra* (n 218) 2; see also Al-Saleh, *supra* (n 2774) at 13-14.

³⁶⁹ Williamson, *supra* (n 10) 34.

³⁷⁰ Her Britannic Majesty’s Government, ‘Conclusions of a Meeting of the Cabinet held at 10 Downing Street, S. W. 1, on Tuesday, 17th May, 1960, at 11 a.m.’ (TNA CAB 128/34/31, 1960), at 6.

government would be allowed to establish offices in Kuwait.³⁷¹ In June of that year, the first political attaché was appointed by the British government in Kuwait; it was Captain A. S. G. Knox.³⁷² These documents determined the nature of the relations between Kuwait and Britain for decades to come.

As seen from the materials that described the events at the time, the decision to enter the treaty with Britain was made by Mubarak mostly to avoid the threat of the Ottoman Empire which was continually working to undermine Kuwaiti independence.³⁷³ Effectively, Kuwait was a part of the Ottoman Empire, but it made an effort to maintain factual independence.³⁷⁴ In general, according to Adel Altabatabaie, Sheikh Mubarak who was the Amir at the time used the treaty to protect his power.³⁷⁵

Furthermore, Altabatabaie suggests that Britain was interested in the treaty because the region, which experienced rather significant conflicts at the time, was crucial for its trade with India.³⁷⁶ This idea is also supported by Hakima.³⁷⁷ In other words, Britain attempted to improve its control over the region and prevent other countries from taking it. As shown by Altabatabaie, other countries were indeed interested in Kuwait for different reasons; for example, Germany was attempting to establish a port in Kuwait, and Russia tried to gain access to the Gulf and build a coal port in the country.³⁷⁸ Furthermore, Russia was interested in building a railroad from Tripoli to Kuwait, and France was willing to take part

³⁷¹ Al-Saleh, *supra* (n 277) at 13-14.

³⁷² *Ibid.*

³⁷³ John Field, 'British Political Relations with Koweit, 1922' (Qatar National Library, n.d.), at 1. accessed 5 May 2018

³⁷⁴ Casey, *supra* (n 170) at 65-67.

³⁷⁵ Altabatabaie, *supra* (n 247) at 264.

³⁷⁶ *Ibid.* at 265.

³⁷⁷ Mustafa Abu Hakima, *The Modern History of Kuwait* (Luzac & Company, 1983) at 171.

³⁷⁸ Altabatabaie, *supra* (n 247) at 265.

in the project and finance it.³⁷⁹ The Anglo-Kuwaiti Treaty enabled Sheikh Mubarak to refuse Germany's requests.³⁸⁰

The Treaty specified that Britain could not interfere with the internal affairs of Kuwait, even though certain attempts to do so were present. For instance, Trenchard Fowle, who was a Political Resident in the Persian Gulf, advised Shaikh Aḥmad al-Jābir Āl Ṣabāḥ to yield to the demands of the Kuwaiti dissident movement who wanted to form a council (majlis) aimed at the protection of the rights of Kuwaiti people.³⁸¹ However, when the council was formed in 1938, it proved to be too dangerous for British interests, and Britain supported the Shaikh's decision to dissolve it.³⁸² Furthermore, British Ministers reported that Britain tried to discourage the Amir from joining the Arab League; this attempt was not successful.³⁸³ In general, advice and support should not be viewed as direct intervention.

Therefore, the treaty did not turn Kuwait into a colony; Altabatabaie compares the relationships between Kuwait and Britain to those of Tunisia and France as the results of similar protection agreements.³⁸⁴ Great Britain had entered such treaties with multiple other countries,³⁸⁵ including, for example, Bahrain.³⁸⁶ As pointed out by Gillespie, such alliances affected the external politics of the Gulf states,³⁸⁷ but they were intended to have no consequences for their internal affairs, including positive ones.³⁸⁸ This approach can be contrasted to the way British colonies were typically affected by the British rule. For

³⁷⁹ Altabatabaie, *supra* (n 247) at 266; see also Hakma, *supra* (n 363) at 171.

³⁸⁰ Altabatabaie, *supra* (n 247) at 265.

³⁸¹ Hayhurst, *supra* (n 257) para 8

³⁸² *Ibid.* para 9.

³⁸³ Her Britannic Majesty's Government, 'Conclusions of a Meeting of the Cabinet held at 10 Downing Street, S. W. 1, on Tuesday, 29th January, 1959, at 11 a.m.' (TNA CAB 128/33/3, 1959), at 6.

³⁸⁴ Altabatabaie, *supra* (n 247) at 270.

³⁸⁵ Louis Allday, 'The British in the Gulf: An Overview' (Qatar National Library, n.d.), para 1-12 accessed 5 May 2018

³⁸⁶ Anthony Cordesman, *Bahrain, Oman, Qatar, And The UAE: Challenges of Security* (Routledge 2018) at 34.

³⁸⁷ Carol Gillespie, *Bahrain* (Infobase Publishing 2009) at 35-36.

³⁸⁸ *Ibid.* at 37-38.

instance, in Burma, the British influence was more notable in different aspects of its life, including the judiciary, which was predominantly comprised of European or Anglo-Burmese officials until Burma's independence.³⁸⁹ The differences between British colonies and the countries that entered a treaty with Britain imply that it would be helpful to compare Kuwait to the latter. For instance, the similarities and differences in the history of Bahrain and Kuwait can be used to consider and contrast their progress towards democracy. The primary reason for the choice of Bahrain and Kuwait is the similarities in their past and present history, as well as the fact that both are constitutional monarchies, which is important since it allows reviewing the countries with comparable outcomes of their development.

It is noteworthy that the level of democracy in Bahrain³⁹⁰ is considered to be lower than that in Kuwait based on the data of the Freedom House.³⁹¹ For instance, in both countries, there is a constitution, a king (Bahrain) or Amir (Kuwait), a cabinet of ministers appointed by the king or Amir, and a National Assembly elected by the people. However, in Bahrain, the ministers constitute half of the government,³⁹² and in Kuwait, ministers can only take up one-third of it,³⁹³ providing more power for the representatives of the people. Thus, the two countries that share similar history have moved in the same direction (towards complete independence and democracy), but Kuwait has moved further. It has been suggested by authors, including Elliot and Atanassow, that the activities of colonising countries could have been either beneficial or harmful for the development of democracy

³⁸⁹ Cheesman, *supra* (n 29) at 47.

³⁹⁰ Freedom House, 'Bahrain' (Freedom House, 2018), para. 1. accessed 18 March 2018.

³⁹¹ Freedom House, *supra* (n 158) para. 3.

³⁹² Freedom House, *supra* (n 390) para. 5.

³⁹³ Constitution of Kuwait, 1962, art. 56, 80.

in a country.³⁹⁴ Possibly, the lack of direct colonisation and the presence of only treaties reduced the potential negative impacts of outside influence on Kuwaiti democratic growth.

Between 1925 and 1961, in Kuwait, the British jurisdiction operated separately from the National one; Britain achieved similar outcomes throughout the Gulf with the help of its Foreign Jurisdiction Acts.³⁹⁵ In other words, between 1925 and 1961, the country had two separate and very different Jurisdictions,³⁹⁶ the latter of which applied to predominantly to Kuwaiti citizens while the former was applicable to other groups, mostly British, Americans, Greeks, and some others.³⁹⁷ According to the literature of the time, the National Jurisdiction was “relatively semitribal”³⁹⁸ and had “no written laws, no procedure and no defined courts”³⁹⁹ with the exception of the “personal status matters, which were and still are governed by Islamic law”.⁴⁰⁰ Hijazi reports that the British jurisdiction was based on English legal principles and mirrored the procedures and court functions of England.⁴⁰¹

The two systems worked together for mixed cases, which referred to the events when the people involved in one case belonged to different jurisdictions. Specific rules existed for such occurrences.⁴⁰² Despite the established procedures, the existence of two different jurisdictions led to problems and confusion.⁴⁰³ According to Allday,⁴⁰⁴ the British jurisdiction was also the dominant one, which was illustrated by the case of the Cat Meat

³⁹⁴ Cathy Elliot, *Democracy Promotion as Foreign Policy* (Routledge 2017) at 18-19; see also Ewa Atanassow, ‘Colonization and Democracy: Tocqueville Reconsidered’ (2017) 111 *American Political Science Review* 83, 83-96.

³⁹⁵ Martin Woodward, ‘Legal Business: The Judicial Aspects of British Rule in the Gulf’ (Qatar National Library, n.d.), para 5 accessed 5 May 2018

³⁹⁶ Hijazi, *supra* (n 35) 428, 429.

³⁹⁷ Williamson, *supra* (n 10) 35.

³⁹⁸ Hijazi, *supra* (n 35) 428, 429.

³⁹⁹ *Ibid.* 429.

⁴⁰⁰ *Ibid.* 429.

⁴⁰¹ *Ibid.* 429.

⁴⁰² *Ibid.* 430.

⁴⁰³ *Ibid.* 429-431.

⁴⁰⁴ Louis Allday, ‘The Kuwait Cat’s Meat Crisis’ (Qatar National Library, n.d.), para 1-12 accessed 5 May 2018

Crisis of 1937. The latter involved a non-Kuwaiti restaurant owner who was accused of selling cat meat. He was initially detained by the local authorities, but as a foreigner, he was transferred to the British Agency. The evidence of the alleged crime was dismissed, and the charges were dropped almost immediately, which, according to Allday, demonstrates the way the British jurisdiction “infringed on the country’s sovereignty” and proves “Britain’s dominant position in Kuwait” at the time.⁴⁰⁵ However, Woodward also points out that the British Government worked to consider the power balance in the region with respect to the judicial aspects of its presence in the Gulf.⁴⁰⁶

Joyce reports that given the advantages of a system with written laws and defined procedures, the British jurisdiction became popular in Kuwait, but consequently, it was also attacked by the nationalists because it was symbolic of potentially colonialist issues.⁴⁰⁷ Again, Kuwait was not a colony; it was a party in a treaty with Great Britain, but at the time, the presence of the British jurisdiction in Kuwait caused unease, especially among the nationalists.⁴⁰⁸ It is noteworthy that Britain did not attempt to stifle the nationalist movement in Kuwait until it felt that its interests were threatened.⁴⁰⁹ Eventually, in 1959, it was established that the British jurisdiction in Kuwait would be repealed after a new working system would have been implemented,⁴¹⁰ and in 1961, the British Parliament officially fulfilled that promise.⁴¹¹

The British jurisprudence legacy is multidimensional. According to Professor Abdullah Alnafisi, who is a former Parliament member of Kuwait, the influence of British specialists

⁴⁰⁵ *Ibid.* para 13.

⁴⁰⁶ Woodward, *supra* (n 395) para 12.

⁴⁰⁷ Miriam Joyce, *Kuwait* (Cass 1998) at 57.

⁴⁰⁸ Williamson, *supra* (n 10) 36.

⁴⁰⁹ Hayhurst, *supra* (n 257) para 8.

⁴¹⁰ Joyce, *supra* (n 407) 57.

⁴¹¹ Hijazi, *supra* (n 35) 428, 434-435.

like John Richmond,⁴¹² George Middleton,⁴¹³ and Edward Heath⁴¹⁴ illustrates that legacy.⁴¹⁵ In particular, the named figures prompted the Amir to pursue democratic principles and freedom of the press.⁴¹⁶ On the other hand, Salameh and Al-Sharah point out that there have been cases in which Britain hindered the development of separation of powers and democracy, for example, by ensuring the dissolution of the first Shura Council in Kuwait.⁴¹⁷ The Jurisdiction that was developed for Kuwait in the years following the decision to repeal British jurisdiction was not based on the principles of the latter, which limits its impact on Kuwaiti legislation. However, as pointed out by Joyce, it can be argued that the reason for choosing non-British legislation for Kuwaiti laws might be connected to colonialism and subsequent rejection of British jurisdiction.⁴¹⁸ Thus, the choice of non-British legislation for Kuwait may have been the result of its presence in the country, which indicates that British jurisdiction is an important influence on Kuwaiti laws. It is noteworthy that a similar event occurred in Bahrain: it had to adopt the British approach to legislation (specifically, its common law) until the country's independence in 1973. After its independence, the country proceeded to "Arabize" its law, which involved using the legislation employed by the Arab League. The latter was influenced by the Egyptian and

⁴¹² Sir John Christopher Blake Richmond (1909-1990) – a British diplomat who performed the role of the British Ambassador to Kuwait between 1961 and 1963. He was a specialist in the matters of the Middle East countries and wrote a number of works on the politics of the region; see also Roy Gazzard, 'Sir John Richmond, KCMG 1909–1990' (2007) *British Society for Middle Eastern Studies* 255, 255-256.

⁴¹³ Sir George Middleton – a British diplomat who performed the role of the British Chief Political Resident in the Gulf at the time when Kuwait became independent. He was the one to sign Kuwait independence treaty in 1961; see also KUNA, 'Kuwait celebrates 55th Independence Day' (KUNA, 2016) accessed 12 November 2018.

⁴¹⁴ Sir Edward Richard George Heath (1916-2005) – a prominent British politician who, among other things, served as the Prime Minister of the UK. He was involved in the negotiations during the Iraq invasion in Kuwait; see also Edward Heath, *The Course of My Life* (A&C Black 2011).

⁴¹⁵ Aljazeera Chanel, Program name is; the "Interview" published by Aljazeera on Mar 9, 2017. <https://www.youtube.com/watch?v=GknsmbRss7o>

⁴¹⁶ *Ibid.*

⁴¹⁷ Salameh and Al-sharah, *supra* (n 59) 57, 62.

⁴¹⁸ Joyce, *supra* (n 407) at 57.

French civil law.⁴¹⁹ Thus, both Kuwait and Bahrain ended up rejecting the British common law after proclaiming their independence.

3.3.3. French Civil Law in Kuwait (Latin Civil Law)

There are some general differences between English and French law from the perspective of criminal justice. As a common law system, England uses the adversarial system of legal procedure, and France, being a civil law country, uses the inquisitorial one.⁴²⁰ Also, the countries have different penal codes and related procedures. In France, the penal code focuses on the seriousness of the crimes, and they are termed accordingly “from serious felonies, to less serious felonies and misdemeanours,” to violations.⁴²¹ In England, there is no “unified penal code; rather, the criminal law is a combination of statutes and Common Law practice”.⁴²² Also, the classification of the English law crimes is typically concerned with arrestability: there are arrestable and non-arrestable (or summary) offences.⁴²³ Arrestable and “serious” non-arrestable offences are brought to higher courts with a jury; non-arrestable offences that are not considered serious do not require a jury trial.⁴²⁴ All these differences are of interest in Kuwait studies because the Kuwaiti legal system was under the influence of the British jurisdiction but eventually based its law on the French one.

Indeed, the French law has served as an inspiration for the codified law of Kuwait in the majority of areas that do not cover personal status or financial matters (in particular, banking and tax legislation), which are governed by Islamic law.⁴²⁵ However, this outcome was achieved indirectly: the legal system of Kuwait that was developed to supplant the

⁴¹⁹ Hassan Radhi, *Judiciary and Arbitration in Bahrain* (BRILL 2013) at 76-77.

⁴²⁰ Harry Dammer and Jay Albanese, *Comparative Criminal Justice Systems* (Cengage Learning 2013) at 128.

⁴²¹ *Ibid.* at 76.

⁴²² *Ibid.* at 71.

⁴²³ *Ibid.* at 71.

⁴²⁴ *Ibid.* at 71.

⁴²⁵ Williamson, *supra* (n 10) 34.

British system was based on the Egyptian law, and the latter, as reported by Williamson, is noticeably inspired by the French law.⁴²⁶ Therefore, some effect of the French law on Kuwaiti legislation can be noted, but due to its secondary nature, the influence of the Egyptian legislation can be considered more pronounced. Other influences have also been noted; for example, Huneidi states that the Kuwaiti Law of Commerce was created with the help of Iraqi law, which is also based on French legal principles.⁴²⁷ In turn, a major source of the French law is the Roman law, which is associated with the prioritisation of functional codification.⁴²⁸ Thus, the French law has influenced the Kuwaiti law indirectly through multiple sources while also bringing its own sources to have an impact as well.

According to Williamson, French law tends to be viewed as relatively less flexible than the British jurisdiction. For example, the author notes certain French law-related drawbacks that can affect economic development. In particular, the British jurisdiction is considered to be more business-friendly (providing “more adequate institutions for financial markets”) and implies less governmental interventions than the French law.⁴²⁹ Williamson concedes that this idea is supported by limited evidence and can be contested, but the author also suggests that the Kuwaiti legal system might have inherited the issues related to the French law.⁴³⁰ The author exemplifies this statement using the comments of the Oxford Business Group regarding the restrictive legislation in Kuwait that may result in challenges for the economic development of the country. Admittedly, the report mentions some information about restrictive legislation, for example, that pertinent to insurance.⁴³¹ However, it also highlights some achievements in the field, including the movement of the tax legislation

⁴²⁶ *Ibid.* at 36.

⁴²⁷ Isa Huneidi, ‘Twenty-Five Years of Civil Law System in Kuwait’ (1986) 2 *Arab Law Quarterly* 216, 217.

⁴²⁸ Eva Steiner, *French Law* (OUP 2018) at 28-30.

⁴²⁹ Williamson, *supra* (n 10) 38.

⁴³⁰ *Ibid.*

⁴³¹ Oxford Business Group, *Kuwait, 2013* (Oxford Business Group 2013) at 93.

towards a more liberal one.⁴³² Therefore, it is difficult to assess the impact of French law on Kuwaiti legislation, but it is clearly present.

3.3.4. Egyptian Law and the Kuwaiti Civil Code Used by Judges

Egyptian law was particularly important for the development of the Kuwaiti legislation because the working system that was meant to supplant the British jurisdiction in Kuwait was based on it. Indeed, Williamson reports that Dr Abdel-Razzaq al-Sanhouri (a famous and accomplished⁴³³ specialist from Egypt) was invited to develop the new Kuwaiti legislation, and since he was Egyptian, he used the Egyptian legal system for inspiration.⁴³⁴

Thus, according to Williamson, the Egyptian Law assisted in the development of the codified Kuwaiti law in the non-personal status matters along with the French Law.⁴³⁵ The Kuwaiti Civil Code was enacted in 1980.⁴³⁶ It incorporates the general rules of Kuwaiti law; the more specific cases (for example, commercial transactions) are regulated by specific laws (for example, Commercial Code).

According to Hijazi, the new system developed by Dr al-Sanhouri was based on non-Kuwaiti legislation rather heavily and was also implemented in a very short time,⁴³⁷ which is why it was not assimilated easily and is sometimes described as unnecessarily complicated and cumbersome, as well as inflexible.⁴³⁸ Williamson suggests that such a conclusion is largely warranted and uses the example of the ease of conducting business in the country to demonstrate that the process is more complicated in Kuwait than in New

⁴³² *Ibid.* at 206.

⁴³³ Huneidi, *supra* (n 427) at 216.

⁴³⁴ Williamson, *supra* (n 10) 36.

⁴³⁵ *Ibid.* 34.

⁴³⁶ Kuwait, Decree Law No. 67 of 1980, 1980, art. 1-3 (Arabic version).

⁴³⁷ Hijazi, *supra* (n 35) 428, 434.

⁴³⁸ Williamson, *supra* (n 10) 36, 39.

Zealand.⁴³⁹ The lack of judges and lawyers in Kuwait, which, at the time, was related to the dominance of the British jurisdiction and the changes in the legal system of the country, was resolved by attracting Egyptian specialists, which is a decision that must have been necessary at the time, but which also required a different long-term solution.⁴⁴⁰ In 1976, for example, over 68% of civil service workers were expatriates, and for the Ministry of Justice, the figure was 53%; the judges were predominantly non-Kuwaiti, and this reliance on the immigrant workforce was viewed as a problem.⁴⁴¹ The picture has changed; for instance, in 2015, only 13% of the workers of the Ministry of Justice were expatriates,⁴⁴² even though the expatriate population in Kuwait still accounts for almost 70%.⁴⁴³ Thus, the development of the new system was not very smooth, but relevant solutions can be offered.

3.3.5. Muslim Jurisprudence in Kuwait

As mentioned by Al-Moqatei, Islamic law (Shari'a) dominated Kuwait until the middle of the previous century.⁴⁴⁴ In fact, according to the author, in the 1930s, the people of Kuwait petitioned for the introduction of a Shari'a-based political system.⁴⁴⁵ Williamson suggests that the influence of the Muslim jurisprudence on modern Kuwait is notable;⁴⁴⁶ in fact, it is explicitly stated in Article 2 of the Constitution that the Islamic Shari'a is supposed to be a primary source of Kuwaiti legislation.⁴⁴⁷ However, according to Williamson, Islamic Shari'a is a major but not the main source of Kuwaiti legislation; the author points out that

⁴³⁹ *Ibid.* 36-37.

⁴⁴⁰ Hijazi, *supra* (n 35) 428, 434.

⁴⁴¹ T Farah, F al-Salem and MK al-Salem, 'Arab Labour Migration: Arab Migrants in Kuwait' in T Asad and R Owen (eds), *Middle East* (Higher Education 1983) at 45, 48.

⁴⁴² Central Statistical Bureau, 'Employment in Government Sector' (Central Statistical Bureau, 2015), 15. accessed 2 August 2018.

⁴⁴³ The Public Authority for Civil Information, 'Population by Nationality' (The Public Authority for Civil Information, 2018), para. 1. accessed 2 August 2018.

⁴⁴⁴ Al-Moqatei, *supra* (n 306) 138-139.

⁴⁴⁵ *Ibid.* 140.

⁴⁴⁶ Williamson, *supra* (n 10) 25-41.

⁴⁴⁷ Constitution of Kuwait, 1962, art. 2.

it is used predominantly for personal-status matters and financial services (Islamic banking is very well-developed in the country).⁴⁴⁸ In the end, Williamson states that the result of the law diffusion in Kuwait is a combination of Muslim law and French-Egyptian-based civil law.⁴⁴⁹ In summary, the diffusion of law in Kuwait is the result of its history, the investigation of which can help to pinpoint and comprehend some of the challenges faced by the system nowadays.

3.3.6. The International Obligations of Kuwait

Kuwait is a part of multiple international treaties and organisations, which have affected its criminal justice system. For example, it is a member of the United Nations, and it is also a member of a variety of affiliated entities, including, for instance, the United Nations Educational, Scientific and Cultural Organization or the United Nations Development Programme, which is reported to have particular influence in the country.⁴⁵⁰ Regarding the relevant treaties, Kuwait has signed a number of them, including those that are related to security concerns (the Nuclear Terrorism Convention,⁴⁵¹ Terrorist Financing Convention,⁴⁵² and United Nations Convention against Transnational Organized Crime).⁴⁵³ Furthermore, many international documents that were ratified by Kuwait are directly focused on human rights or incorporate related considerations; they include the Charter of the United Nations,⁴⁵⁴ the International Covenant on Civil and Political Rights,⁴⁵⁵ the Convention on the Elimination of All Forms of Discrimination against Women, the

⁴⁴⁸ Williamson, *supra* (n 10) 34.

⁴⁴⁹ *Ibid.* 34.

⁴⁵⁰ United Nations, 'The UN System in Kuwait' (United Nations, 2018), para. 1. accessed 18 March 2018.

⁴⁵¹ United Nations, 'International Convention for the Suppression of Acts of Nuclear Terrorism' (United Nations, 2018), para. 1. accessed 2 August 2018

⁴⁵² United Nations, 'International Convention for the Suppression of the Financing of Terrorism' (United Nations, 2018), para. 1. accessed 2 August 2018

⁴⁵³ United Nations, 'United Nations Convention against Transnational Organized Crime' (United Nations, 2018), para. 1. accessed 2 August 2018.

⁴⁵⁴ United Nations, 'Charter of the United Nations and Statute of the International Court of Justice' (United Nations, 2018), para. 1. accessed 18 March 2018

⁴⁵⁵ United Nations, 'International Covenant on Civil and Political Rights' (United Nations, 1966), para. 1. accessed 12 September 2019.

International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and Convention against Torture.⁴⁵⁶ Additionally, Kuwait is also subject to the resolutions by certain bodies of the UN, but not all of such documents are as binding as treaties, which means that some of them can be soft law obligations.⁴⁵⁷ It should be noted that Kuwait has also ratified optional protocols on children in armed conflicts and child prostitution and pornography in 2004, although other optional protocols were not ratified.⁴⁵⁸ In addition, no data about accepted individual complaints or inquiry procedures are available.⁴⁵⁹

Regarding the more regional obligations, Kuwait is a member of the Gulf Cooperation Council,⁴⁶⁰ the League of Arab States, and the Organization of Islamic Cooperation.⁴⁶¹ These organisations have their own treaties; for instance, there is an anti-terrorism treaty in the Gulf Cooperation Council, as well as related resolutions.⁴⁶² Also, Kuwait actively works with the League of Arab States to combat terrorism; for instance, in 2014, the Summit of the League was hosted in the country, and it was aimed at developing an anti-terrorist strategy for the Arab world.⁴⁶³ Finally, there are bilateral treaties and agreements. For example, Egypt and Kuwait signed several agreements recently, including two implementation programs for cooperation in the fields of culture, technology, and

⁴⁵⁶ United Nations, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (United Nations, 2018), para. 1. accessed 18 March 2018; see also United Nations Human Rights Office of the High Commissioner, 'Ratification Status for Kuwait' (United Nations, 2019), para. 1. accessed 27 September 2019.

⁴⁵⁷ Lorenzo Cotula, 'International Soft-Law Instruments and Global Resource Governance: Reflections on the Voluntary Guidelines on the Responsible Governance of Tenure' (2017) 13 *Law, Environment and Development Journal*, 115, 124.

⁴⁵⁸ United Nations Human Rights Office of the High Commissioner, *supra* (n 453).

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Gulf Cooperation Council, 'Member States' (Gulf Cooperation Council, 2018), para. 6. accessed 18 March 2018.

⁴⁶¹ International Humanist and Ethical Union, *supra* (n 151) 1.

⁴⁶² KUNA, 'GCC leaders will address GCC anti-terrorism treaty' (KUNA, 2016) accessed 2 August 2018.

⁴⁶³ Bibliotheca Alexandrina, 'Arab Strategy Against Extremism Conference at BA' (Bibliotheca Alexandrina, 2014), para. 6. accessed 2 August 2018.

tourism.⁴⁶⁴ In summary, Kuwait is subject to multiple binding and non-binding international obligations.

The mentioned treaties have affected (hybridised) the country's law because Kuwaiti treaties, as stated by the Constitution (Article 70), gain the "force of law" after their "ratification, sanction and publication in the Official Gazette".⁴⁶⁵ For instance, the Convention against Torture is connected to the National Security Law No. 31/1970, which criminalises torture.⁴⁶⁶ The legal education in Kuwait also incorporates international law courses.⁴⁶⁷ The Kuwaiti human rights institution (Diwan Huquq al-Insan) is being brought to a state in which it will correspond to international principles, especially in terms of independence.⁴⁶⁸ Thus, Kuwait's criminal justice system has been impacted by the international influences.

3.3.7. The International Principles of the Independence of the Judiciary

A detailed discussion of the independence of the judiciary and related international standards has been introduced by Sujit Choudhry,⁴⁶⁹ and their basic description is provided by the UN Office of the High Commissioner for Human Rights.⁴⁷⁰ They include the following requirements. First, judicial appointments must not be controlled by the executive power, and it is preferable that the process involves multiple actors, including, for example, opposition parties and civil society. Secondly, it is preferable to keep the

⁴⁶⁴ KUNA, 'Kuwait, Egypt Sign Four Cooperation Agreements' (KUNA, 2016), para. 2. accessed 2 August 2018.

⁴⁶⁵ Constitution of Kuwait, 1962, art. 70.

⁴⁶⁶ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 53, 56.

⁴⁶⁷ Williamson, *supra* (n 10) 43.

⁴⁶⁸ Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-first to twenty-fourth periodic reports of Kuwait' (United Nations, 2017) accessed 12 January 2020; see also Committee on Economic, Social and Cultural Rights, 'Concluding observations on the second periodic report of Kuwait' (United Nations, 2013) accessed 12 January 2020.

⁴⁶⁹ Choudhry and Stacey, *supra* (n 68), 1-3.

⁴⁷⁰ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Independence of the Judiciary' (United Nations Office of the High Commissioner for Human Rights, 1985) accessed 27 January 2020.

tenure, as well as other terms of service, especially remuneration, for judicial appointees as secure as possible (in the best-case scenario, they need to be legislated and set with no unfavourable reductions). Thirdly, accountability is important; misconduct and incompetence should still be punishable for judges. Moreover, any sort of allocation, transfers and reassignments for judicial appointees should be resolved internally, and any sort of administrative management within the judiciary should also remain internal. In terms of courts, they must all be established by the law and well-funded, preferably with the judiciary being responsible for the funding. Overall, the standards imply the need to remove any sort of potential external influences on the judiciary, which, indeed, should create an independent judiciary.⁴⁷¹

According to the UN, there are concerns regarding some of these criteria in Kuwait, including the independence of the judiciary in terms of appointment, promotion, and disciplinary action, as well as the problem of the security of tenure for non-Kuwaiti judges.⁴⁷² Similarly, the International Association of Democratic Lawyers highlights the need for advancing the fairness of trials by ensuring the independence of judges and prosecutors through a revision of the current approaches to their appointment and disciplining and a reduction of the power of the executive branch over the judiciary.⁴⁷³ Additionally, the association reported the problems of bribery and issues with irregular remuneration.⁴⁷⁴ The UN calls for the improvement of the situation as well.⁴⁷⁵ Thus, the current state of the independence of the judiciary in Kuwait might not be fully in line with the international standards, which is why the latter can serve as a guide for improvement.

⁴⁷¹ *Ibid.*

⁴⁷² Human Rights Committee, *supra* (n 156) at 2-3.

⁴⁷³ International Association of Democratic Lawyers, 'Submission for the 35 th Session of the Universal Period Review: The State of Kuwait' (International Association of Democratic Lawyers, 2015) accessed 21 February 2020.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ Human Rights Committee, *supra* (n 156) at 2-3.

3.3.8. An analysis of the literature reviewed in this section

The section provided an account of predominantly historical events with some analysis of their impact, as well as a consideration of the factually existing elements of Kuwaiti legislation, which facilitated the choice of the relevant literature. The research involved mostly books⁴⁷⁶ and academic articles;⁴⁷⁷ additionally, some justified introductions of the reports of human rights organizations were performed. Thus, the United Nations, including the Office of the High Commissioner for Human Rights, is viewed as a very credible organization, which is why its conclusions were incorporated without much criticism. Furthermore, since a section on the international obligations of Kuwait was added, it made sense to include the primary sources of international organisations that documented such obligations.⁴⁷⁸ Overall, the usage of primary sources also assisted with the search for information. The similarities in the reported information can be considered a significant proof of the quality of the presented data. As a result, this section did not have problems with involving credible research, and the analysis is based on predominantly academic sources, primary sources, as well as the accounts of human rights organisations, which lends legitimacy to the resulting findings.

3.4. The Kuwaiti Constitution as the Guarantor of Democracy and Citizens' Equality before the Law

The Kuwaiti Constitution is the guarantor of democracy in the country, which can be proven with the help of Article 6, which states that the country's governmental system is democratic.⁴⁷⁹ In other words, the primary source proves the statement. The rights of the population of Kuwait are proclaimed by Articles 27-46, which includes rights to

⁴⁷⁶ Williamson, *supra* (n 10); Steiner *supra* (n 428), and so on.

⁴⁷⁷ Al-Moqatei, *supra* (n 306); Huneidi, *supra* (n 427), and so on.

⁴⁷⁸ United Nations Human Rights Office of the High Commissioner, *supra* (n 453).

⁴⁷⁹ Constitution of Kuwait, 1962, art. 6.

privacy,⁴⁸⁰ freedom,⁴⁸¹ trade unions,⁴⁸² freedom of religion,⁴⁸³ expression,⁴⁸⁴ opinion and press,⁴⁸⁵ and so on. Also, the freedom from torture and the principle of no “punishment without law” are included in the Constitution.⁴⁸⁶ Apart from that, the citizen’s equality is directly stated in the Constitution’s preamble and supported by Article 8,⁴⁸⁷ which is concerned with equal opportunities, and Article 29,⁴⁸⁸ which specifically points out the equality of the people of Kuwait “in the eyes of the Law”. In summary, the Kuwaiti Constitution guarantees human rights, democracy, and citizen equality at least formally.

3.5. Constitution Amendment

The primary source of the Kuwaiti Constitution does not leave room for doubt that Constitutional Amendments can and should be made as necessary. The Constitution Amendment procedures were defined within the Constitution itself. Article 174 specifies that amendments, which include the alteration, deletion, and introduction of the constitutional provisions, can be proposed by the “Amir and one third of the National Assembly”.⁴⁸⁹ The proposed change is termed “Bill,” and if it is agreed upon by the majority of the Assembly, it is to be debated by the Assembly.⁴⁹⁰ After the debates, if it is agreed upon by two-thirds of the Assembly and the Amir sanctions and promulgates it, the Bill comes into force.⁴⁹¹ A rejected Bill can be reintroduced after one year since its rejection.⁴⁹² Also, there are certain exceptions. For instance, Articles 65 and 66, which are dedicated to the procedures of approving, initiating, and vetoing general legislation, can

⁴⁸⁰ *Ibid.* art. 36.

⁴⁸¹ *Ibid.* art. 42.

⁴⁸² *Ibid.* art. 43.

⁴⁸³ *Ibid.* art. 35.

⁴⁸⁴ *Ibid.* art. 36.

⁴⁸⁵ *Ibid.* art. 37.

⁴⁸⁶ *Ibid.* art. 32.

⁴⁸⁷ *Ibid.* art. 8.

⁴⁸⁸ *Ibid.* art. 29.

⁴⁸⁹ *Ibid.* art. 174.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

never be amended.⁴⁹³ Similarly, Article 175 also states that “the principles of liberty and equality” cannot be amended unless the proposed Bill intends to improve the country’s “guarantees of liberty and equality”.⁴⁹⁴

Recent sources, including academic ones and those related to human rights organisations, demonstrate that nowadays, there is a pressure for constitutional reforms. With the spread of education and mass media, the people of Kuwait are becoming more politically aware and have an advanced understanding of “the concepts of democracy, citizenship, and human rights,”⁴⁹⁵ becoming a political power that can press the government to reforms. The educated population of Kuwait has a history of affecting reforms, which implies that it is a major power for change.⁴⁹⁶ Additionally, Salameh and Al-sharah recognise the importance of the Assembly for reforms, although they also note that it has been reluctant to promote certain changes, including, for instance, those related to women’s rights.⁴⁹⁷ Gender equality is established by the Constitution, and, nowadays, a number of achievements in the field of protecting women’s rights can be noted, but there are still areas that require improvements. For example, the laws that regulate inheritance, marriage, and divorce are discriminatory, and there is no legislation that would specifically focus on domestic abuse.⁴⁹⁸ Moreover, women’s testimony in courts is treated in a discriminatory fashion, and nationality is not passed to children from their mothers.⁴⁹⁹ The issue may be connected to the underrepresentation of women in the three branches of power, including

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.* art. 175.

⁴⁹⁵ Salameh and Al-sharah, *supra* (n 54) 57, 59.

⁴⁹⁶ Ghabra, *supra* (n 333) 4.

⁴⁹⁷ Salameh and Al-sharah, *supra* (n 54) 57, 66.

⁴⁹⁸ Human Rights Committee, *supra* (n 156) at 3; see also Committee on the Elimination of Discrimination against Women, ‘Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women’ (United Nations, 2016) at 30-32. accessed 12 September 2019. Freedom House, *supra* (n 158) para. 38-39.

⁴⁹⁹ Human Rights Committee, *supra* (n 156) at 3.

the judiciary.⁵⁰⁰ Thus, it is apparent that from this perspective, an improved protection of human rights in Kuwait is required; the Human Rights Committee is calling for legislative changes that would reduce gender-based discrimination in the country and enhance women's representation in politics, as well as public life.⁵⁰¹

When considering the civil society and its potential, it should be mentioned that there are no official political parties in the country because there is no legislation on political parties.⁵⁰² There are some political groups, especially liberal ones, as well as Islamic and tribal ones,⁵⁰³ but the absence of appropriate legislation weakens the civil society.⁵⁰⁴ Apart from that, the role of non-governmental organisations (NGOs) in pushing for reforms should be considered.⁵⁰⁵

3.6. The Role of NGOs in Kuwait

NGOs are a crucial tool for the mobilisation of civil efforts in the promotion of human rights.⁵⁰⁶ However, in Kuwait, their activity is complicated by certain issues. The licencing and registration of such organisations is under the governmental control;⁵⁰⁷ without appropriate licensing, they will be unable to operate legally.⁵⁰⁸ There are additional restrictions that prevent organisations from being actively engaged in political or religious advocacy; some limitations related to fundraising may also be applied.⁵⁰⁹ Furthermore, licencing is required for demonstrations, and foreigners are not allowed to participate in the

⁵⁰⁰ Human Rights Committee, *supra* (n 156) at 3; Freedom House, *supra* (n 158) para. 14.

⁵⁰¹ Human Rights Committee, *supra* (n 156) at 3-4.

⁵⁰² Human Rights Committee, *supra* (n 156) at 8; see also Ghabra, *supra* (n 333) 8.

⁵⁰³ Ghabra, *supra* (n 333) 4-5, 8.

⁵⁰⁴ Salameh and Al-sharah, *supra* (n 54) 57, 73-74.

⁵⁰⁵ KUNA, 'Kuwait Gov't Officials, NGOs Ponder Avenues for Reforms' (KUNA, 2012), para. 1. accessed 2 August 2018.

⁵⁰⁶ Lubna Al-Kazi, 'Women and Non-Governmental Organizations in Kuwait: a Platform for Human Resource Development and Social Change' (2011) 14 *Human Resource Development International*, 167, 167-168.

⁵⁰⁷ Bureau of Democracy, Human Rights and Labor, 'Country Reports on Human Rights Practices for 2011: Kuwait' (Bureau of Democracy, Human Rights and Labor, 2011), 13-14. accessed 2 August 2018

⁵⁰⁸ Freedom House, *supra* (n 158) para. 28.

⁵⁰⁹ Human Rights Committee, *supra* (n 156) at 8.

latter.⁵¹⁰ The government of Kuwait does cooperate with international and local human rights NGOs,⁵¹¹ but this cooperation is limited.⁵¹² Additionally, the government issues specific permissions for NGO representatives to enable them to attend international conferences.⁵¹³ This position of the government may be problematic from the perspective of the human right to peaceful assembly,⁵¹⁴ even though the government explains it by the need to protect the public order.⁵¹⁵ However, the Constitution establishes that public assemblies “are permitted in accordance with the conditions and the stipulations defined by Law,”⁵¹⁶ which implies that the government’s actions are not unconstitutional.

The situation allows power abuse, and some adverse events have already occurred. For instance, it has been reported that the chapter of Transparency International in Kuwait was effectively dismantled in 2015 through the governmental decision to replace its board of directors with the new directors who decided to eliminate the organisation’s assets.⁵¹⁷ There are reports of certain types of NGOs not being registered or being prosecuted; it is typically related to the organisations that are atheist or secularist.⁵¹⁸ Also, human rights activists state that they are being harassed, arrested, and detained, which has apparently been justified by the defamation of the judiciary or the ruling family.⁵¹⁹ The legislation against blasphemy⁵²⁰ may have been employed to a similar end.⁵²¹ The use of excessive governmental violence was also reported to be applied to multiple demonstrations,

⁵¹⁰ Human Rights Committee, *supra* (n 156) at 8; see also Human Rights Council, *supra* (n 155) at 9-10; Centre for Civil and Political Rights, *supra* (n 162) para. 5.

⁵¹¹ KUNA, *supra* (n 505) para. 1.

⁵¹² Bureau of Democracy, Human Rights and Labor, *supra* (n 507) 13-14.

⁵¹³ Freedom House, *supra* (n 158) para. 28.

⁵¹⁴ Human Rights Committee, *supra* (n 156) at 8.

⁵¹⁵ Centre for Civil and Political Rights, *supra* (n 162) para. 5.

⁵¹⁶ Constitution of Kuwait, 1962, art. 43-44.

⁵¹⁷ Freedom House, *supra* (n 158) para. 27.

⁵¹⁸ International Humanist and Ethical Union, *supra* (n 151) 1.

⁵¹⁹ Centre for Civil and Political Rights, *supra* (n 162) para. 4-5.

⁵²⁰ Kuwait, Penal Code 16/1960 (as amended), article 111.

⁵²¹ International Humanist and Ethical Union, *supra* (n 151) 1.

including the one in April 2013.⁵²² Finally, it should be noted that there is also no provision in the Constitution that would stipulate the development of political parties.⁵²³ According to Salameh and Al-sharah, in their absence, it is difficult to claim that the civil society of Kuwait can be strong. The Human Rights Committee calls for legislative changes that would facilitate freedom of association and expression.⁵²⁴

This problem can be used to expand on this paper's comparison between Bahrain and Kuwait because the two countries are similar in this regard. For instance, the governments of both Bahrain and Kuwait choose to control NGOs, as well as demonstrations, through the requirement to obtain permissions. However, the Freedom House reports that in Bahrain, the rules are notably more complex than in Kuwait, which provides the government of the country with more options for denying NGOs the opportunity to operate.⁵²⁵ In addition, while the freedom of media is somewhat limited in Kuwait (mostly through the above-mentioned legislation related to insults),⁵²⁶ in Bahrain, the media are technically controlled by the government since the latter owns them.⁵²⁷ In other words, the freedom of NGOs in both countries is rather limited, but in Kuwait, they are awarded greater freedom.

Indeed, despite the mentioned issues, there are some major NGOs in the country, and their role is notable. The Kuwait Society for Human Rights intends to promote and protect human rights in the country and apply international standards to its context.⁵²⁸ The Women's Cultural and Social Society is the first Kuwaiti organisation that targeted

⁵²² Human Rights Watch, *supra* (161) para. 10.

⁵²³ Salameh and Al-sharah, *supra* (n 54) 57, 73.

⁵²⁴ Human Rights Committee, *supra* (n 156) at 8.

⁵²⁵ Freedom House, *supra* (n 390) para. 5.

⁵²⁶ Freedom House, *supra* (n 158) para. 3.

⁵²⁷ Freedom House, *supra* (n 390) para. 5.

⁵²⁸ Human Rights Connected, 'Kuwait Society for Human Rights' (Human Rights Connected, n.d.), para.1. accessed 2 August 2018.

women's rights, and since its establishment in 1963, it has been promoting them.⁵²⁹ Organisations like the Human Rights Watch are allowed to visit Kuwait and conduct their research there.⁵³⁰ It may also be important to mention the National Assembly's Human Rights Committee; reportedly, it operates independently from the government, but since it is a committee of the National Assembly, it cannot be viewed as an NGO.⁵³¹

Regarding the NGOs that are specifically related to criminal justice, the following examples can be offered. The Penal Reform International is developing projects relevant to the protection of human rights for imprisoned people and other stakeholders of the criminal justice system in coordination with Kuwaiti government,⁵³² as well as with those of the Middle East in general.⁵³³ Also, the Kuwait Bar Association is an organisation of Kuwaiti legal specialists,⁵³⁴ which the government currently intends to engage in reform development.⁵³⁵ Thus, criminal justice NGOs are also present in Kuwait.

The activity of the mentioned societies has yielded some positive outcomes. For instance, they have contributed to the promotion and protection of women's rights,⁵³⁶ including the advocacy of their employment as judges.⁵³⁷ Recently, women received the right to become prosecutors in Kuwait, which means that they will have the chance to become judges as well.⁵³⁸ Therefore, NGOs are one of the powers in Kuwait that can promote change and reforms despite the difficulties that they encounter.

⁵²⁹ Al-Kazi, *supra* (n 506) 175-176.

⁵³⁰ Bureau of Democracy, Human Rights and Labor, *supra* (n 507) 14.

⁵³¹ *Ibid.*

⁵³² Penal Reform International and the Office of the High Commissioner for Human Rights, 'Criminal Justice Reform and Human Rights: Recent Trends' (Penal Reform International, 2014), 2. accessed 2 August 2018.

⁵³³ *Ibid.*

⁵³⁴ KUNA, 'Kuwait Bar Association Hold Women's Rights Seminar' (KUNA, 2005), para.1. accessed 2 August 2018.

⁵³⁵ KUNA, *supra* (n 505) para. 1.

⁵³⁶ KUNA, *supra* (n 534) para. 1.

⁵³⁷ Al-Kazi, *supra* (n 506) 175-176.

⁵³⁸ Human Rights Watch, *supra* (161) para. 12.

It should also be mentioned that there are trade unions in Kuwait, even though they are limited in number.⁵³⁹ An example is the Lawyer's Union.⁵⁴⁰ It is also important that noncitizen migrants cannot enter such unions, which leaves them under-protected.⁵⁴¹ At the same time, there are some reports of migrant workers being mistreated and underpaid by employers, which is illegal.⁵⁴² Currently, expatriates constitute about 70% of the population of the country as reported by the Public Authority for Civil Information. Also, their number amounts to at least 2 million people.

The situation with large numbers of expatriates is not a new one for Kuwait. The country has been experiencing it since the middle of the previous century, and the government viewed it as an issue; relevant solutions have been introduced since 1959.⁵⁴³ Nowadays, "Kuwaitization" is the key solution that is used. The term refers to the political agenda of supporting and increasing the percentage of Kuwaiti workers in various positions in Kuwait.⁵⁴⁴ The outcome is achieved by investing in the development of native human resources;⁵⁴⁵ after all, one of the reasons for the employment of expatriates is the lack of trained Kuwaiti workforce.⁵⁴⁶ A little fewer than 21000 Kuwaiti students study abroad; mostly, they favour the US, UK, and Jordan, as well as Australia and the countries of the Gulf.⁵⁴⁷ Also, the number of Kuwaiti students who are willing to study abroad has been

⁵³⁹ Freedom House, *supra* (n 158) para. 28.

⁵⁴⁰ Al-Kazi, *supra* (n 506) 175-176.

⁵⁴¹ Freedom House, *supra* (n 158) para. 28.

⁵⁴² *Ibid.* para. 36, 41.

⁵⁴³ Shehab, *supra* (n 296) 468.

⁵⁴⁴ KUNA, *supra* (n 182); see also KUNA, 'Government Bent on Job Kuwaitization -- Minister' (KUNA, 2007), para. 1-4. accessed 2 August 2018.

⁵⁴⁵ KUNA, '62% Kuwaitization at Kuwait Finance House' (KUNA, 2013), para. 2. accessed 2 August 2018.

⁵⁴⁶ KUNA, 'Kuwaitization of Government Jobs to be 7 Percent for New Fiscal Year' (KUNA, 2004), para. 1. accessed 2 August 2018.

⁵⁴⁷ UNESCO Institute of Statistics, 'Global Flow of Tertiary-Level Students' (UNESCO Institute of Statistics, 2018), para. 1. accessed 2 August 2018.

growing; for instance, between 2009 and 2011, the number of Kuwaiti students in the US has increased by almost 23%.⁵⁴⁸

The Kuwaitization efforts yield some results. For instance, in 1976, the civil service employees were predominantly expatriates with only 32% of Kuwaiti people working in the field.⁵⁴⁹ However, in 2007, at least 11 governmental departments had over 90% of Kuwaiti employees.⁵⁵⁰ However, for the private sector, the employment of Kuwaiti remains rather low.⁵⁵¹ In any case, the number of expatriates in Kuwait indicates a need for their extensive protection, but the above-presented information indicates that this need is not satisfied.

A note should be made on the sources employed in this section of the paper. A few academic sources have been employed,⁵⁵² as well as the primary source of the Constitution, but predominantly, the section relied on the reports of human rights organisations⁵⁵³ and news reports.⁵⁵⁴ They can be considered a form of reliable sources, but they tend to produce materials that have little to no explanation of methodology. Much of the cited literature is sourced, but some of it is not. As a result, the question of the quality of the existing evidence can be raised. However, the triangulation of sources demonstrates that they do not contradict each other, which implies that the presented findings are not unlikely to be accurate. Given the specifics of the discussed topic, the employment of the reports of human rights organisations, which are often NGOs, appears appropriate.

⁵⁴⁸ Kaylee Hackney, David Boggs, Yunus Kathawala and John Hayes, 'Willingness to Study Abroad: An Examination of Kuwaiti Students' (2014) 4 *Journal of International Education and Leadership*, 1, 2.

⁵⁴⁹ Farah, al-Salem and al-Salem, *supra* (n 441) at 45, 48.

⁵⁵⁰ KUNA, *supra* (n 544) para. 8.

⁵⁵¹ Ghabra, *supra* (n 333) 8.

⁵⁵² Shehab, *supra* (n 296) 468; Salameh and Al-sharah, *supra* (n 54); Al-Kazi, *supra* (n 506).

⁵⁵³ Centre for Civil and Political Rights, *supra* (n 162); International Humanist and Ethical Union, *supra* (n 151); Bureau of Democracy, Human Rights and Labor, *supra* (n 507); Freedom House, *supra* (n 158); Human Rights Watch, *supra* (161).

⁵⁵⁴ KUNA, *supra* (n 544) para. 8.

3.7. The Three Divisions of the Criminal Justice System in Kuwait

3.7.1. The Police as the Law Enforcement Body and Divisions within the Ministry of Interior

Within the Ministry of Interior, which is responsible for enforcing the law, the Directorate of Police and Public Security⁵⁵⁵ represents the law enforcement body, as stated by Burdett and Crystal.⁵⁵⁶ Its divisions include those working with criminal investigation, civil defence, traffic, immigration, and so on, which corresponds to the typical activities performed by a law enforcement agency described by Travis and Edwards.⁵⁵⁷ Two of these sources are rather outdated, but they are trustworthy, and the similarities between them assist with developing reliable findings on their basis.

There are some problems related to Kuwaiti police that can be found in the literature. The recent report on Kuwaiti criminal justice suggests that there is no effective separation of powers with respect to investigative power when police and prosecutors are concerned.⁵⁵⁸ Apart from that, Crystal states that the Ministry of Interior demonstrates a lack of control over the national police, its sub-divisions, and the National Guard in relation to investigations and guaranteeing public security.⁵⁵⁹ This is the result of the existence of a rather complicated net of agencies that are responsible for internal security, which leads to their responsibilities overlapping.⁵⁶⁰ Consequently, citizens' rights can be violated when individuals are unfairly imprisoned or held in police offices for more than four days without prosecution. As pointed out by Ashworth and Horder and other authors, a criminal

⁵⁵⁵ Anita Burdett, *Records of Kuwait* (Archive Editions 2003) at 394.

⁵⁵⁶ Jill Crystal, 'Criminal Justice in the Middle East' (2001) 29 *Journal of Criminal Justice* 469, 471.

⁵⁵⁷ Travis and Edwards, *supra* (n 102) at 54.

⁵⁵⁸ Morison and Grimshaw, *supra* (n 128) at 7.

⁵⁵⁹ Crystal, *supra* (n 556) 469, 471.

⁵⁶⁰ *Ibid.* 474.

justice system must respect human rights and freedoms,⁵⁶¹ but the inefficiency of the system can pose a threat to them.

Naturally, the Penal Code of Kuwait contains Article 184, which states that imprisoning or arresting a person “without observing the procedures” must be punished.⁵⁶² Moreover, the Constitution also contains Article 31, which establishes that people cannot be “arrested, detained, searched, or compelled to reside in a specified place” unlawfully.⁵⁶³ Finally, the Prison Regulation Act 26/1962 establishes the need for a legal authorisation for imprisonment.⁵⁶⁴ Thus, there are multiple legal safeguards, but they might not be entirely successful in achieving the desired level of protection of human rights based on the above-presented reports and literature. Overall, however, there are very little data that directly concern the Kuwaiti police, especially in academic sources. The topic of the Kuwaiti police is a clearly understudied area of knowledge, which limits the conclusions that can be drawn from the presented information.

3.7.2. Prosecutors as Part of the Criminal Justice System and Details of the Prosecutorial Process

Prosecutors are a part of the judicial system of Kuwait, appearing in the courts of different levels, and they represent the prosecution.⁵⁶⁵ Public Prosecution⁵⁶⁶ members as defined by the Constitution defend the interests of the community of Kuwait. The role of the prosecution is to conduct “penal charges on behalf of society,” as well as supervise “the affairs of judicial police, the enforcement of penal laws, the pursuit of offenders, and the

⁵⁶¹ Ashworth and Horder, *supra* (n 223) at 48; see also Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (Sweet & Maxwell 2012), 1-5.

⁵⁶² Kuwait, Penal Code 16/1960 (as amended), article 184.

⁵⁶³ Constitution of Kuwait, 1962, art. 31.

⁵⁶⁴ Kuwait, Prison Regulation Act 26/1962, art. 17-18.

⁵⁶⁵ Travis and Edwards, *supra* (n 102) at 60.

⁵⁶⁶ Constitution of Kuwait, 1962, art. 167.

execution of judgments.”⁵⁶⁷ The only exception is the “prosecution of misdemeanours,” which can be carried out by the police.⁵⁶⁸

In accordance with the Decree Law No. 67 of 1980, the decision regarding the appointment of the candidates is made by a body called the Supreme Judicial Council.⁵⁶⁹ The latter is comprised of the Heads and Deputies of Kuwaiti Courts (including Court of Cassation, Court of First Instance, Court of Appeal, and Supreme Court of Appeal), as well as the Public Prosecutor.⁵⁷⁰ A representative of the Ministry of Justice is also present in the Council, but they are prohibited from voting.⁵⁷¹ The activities of the Council are governed by the law in accordance with the Constitution.⁵⁷² The appointment decision is carried out by the Minister of Justice through decrees as specified by the Decree Law No. 67 of 1980.⁵⁷³ Thus, since the decision is made by the Council, which consists of the representatives of the judiciary, it can be suggested that the appointment of prosecutors does not depend on the Minister.

The topic of guaranteeing prosecutorial independence is documented in some detail by the United Nations Convention Against Corruption.⁵⁷⁴ According to the documents that were collected both in Arabic and English, the independence of prosecution is ensured through the same means as the independence of the judiciary, which includes a lack of “decorations, medals, honours” to be awarded during service, a prohibition of any “work pursuit... incompatible with the duties and performance of office,” prohibition for public statements of political opinions, as well as running for office, prohibition for blood relatives to work on the same case, as well as the introduction of inspections, a system of

⁵⁶⁷ Constitution of Kuwait, 1962, art. 166.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ Kuwait, Decree Law No. 67 of 1980, 1980, art. 61.

⁵⁷⁰ Kuwait, Decree Law No. 23 of 1990 (Arabic version).

⁵⁷¹ Kuwait, Decree Law No. 23 of 1990; see also Alkarama Foundation, *supra* (n 40) at 12.

⁵⁷² Constitution of Kuwait, 1962, art. 164.

⁵⁷³ Kuwait, Decree Law No. 67 of 1980, 1980, art. 61.

⁵⁷⁴ United Nations Convention Against Corruption, *supra* (n 67).

warnings and misdemeanour management.⁵⁷⁵ In other words, prosecutors are monitored to make sure that they avoid misconduct, especially in the form of bribery or nepotism.

Liability to prosecution is governed by the Kuwait Penal Code.⁵⁷⁶ Prosecutors also play a key part of just proceedings, and their independence is critical.⁵⁷⁷ However, according to a recent report by Morison and Grimshaw, the prosecutors that were interviewed for it “appeared not to fully understand their role during the trial process”.⁵⁷⁸ Apart from that, the authors report that the problem of insufficient separation of powers between police and prosecutors seems to be problematic.⁵⁷⁹ Specifically, their investigative powers were found to be ineffectively distributed between these two groups, resulting in the above-specified confusion, and there was little coordination between them, especially as related to authorisation.⁵⁸⁰ Furthermore, the International Association of Democratic Lawyers points out that there is “no specific code of conduct” meant for prosecutors,⁵⁸¹ and the report by Morison and Grimshaw supports the idea.⁵⁸² These issues make it difficult to define prosecutorial duties in Kuwait related to their roles and responsibilities, especially during the different stages of the prosecutorial process. Thus, the literature on the topic identifies some pertinent procedures and concerns, but in general, Kuwaiti prosecution does not receive sufficient coverage in modern research, which makes describing this topic very difficult. As a result, no reliable source was found that would critique the details of the prosecution processes in Kuwait.

⁵⁷⁵ United Nations Convention Against Corruption, *supra* (n 67).

⁵⁷⁶ Kuwait, Law No. 16 of 1960 (as amended).

⁵⁷⁷ International Association of Democratic Lawyers, *supra* (n 473).

⁵⁷⁸ Morison and Grimshaw, *supra* (n 128) at 7.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid* at 42.

⁵⁸¹ International Association of Democratic Lawyers, *supra* (n 473).

⁵⁸² Morison and Grimshaw, *supra* (n 128) at 7.

3.7.3. The Kuwaiti Judicial System and the Responsibilities of Judges

The Judicial system of Kuwait consists of the Courts of First Instance, the Courts of Appeal, the Supreme Court or Court of Cassation, and the Constitutional Court.⁵⁸³ The courts of the first two degrees are comprised of three judges, and the Supreme Court consists of the court's heads, deputies, and Consultants. The Constitutional Court is comprised of five Consultants.⁵⁸⁴ The first- and second-degree courts and the Supreme Court also incorporate multiple circuits dedicated to particular law branches.⁵⁸⁵ The Constitution points out that the Military courts are "restricted to deal with military offenses committed by members of the Armed and Public Security Forces within the limits prescribed by Law".⁵⁸⁶ This information is based on primary sources, as well as the recent report by Morison and Grimshaw, which, in turn, also cites primary sources. As a result, the presented information is likely to be reliable. The information below, on the other hand, is more reliant on secondary sources, but their high quality and similarities in the reported issues are also a solution for improving the quality of the findings of this literature review.

Multiple concerns have been raised regarding the Kuwaiti justice system. According to the recent report by Morison and Grimshaw, the judicial supervision is crucial for Kuwaiti criminal justice, but no direct guidelines on this process exist.⁵⁸⁷ Furthermore, the independence of the judiciary is established Articles 50, 53, and 163 of the Constitution. The Kuwaiti judiciary is supposed to be completely separated from the Amir, since "no

⁵⁸³ Kuwait, Decree Law No. 23 of 1990, art. 1-4; see also United Nations, 'Conference of the States Parties to the United Nations Convention against Corruption: Executive Summary' (United Nations, 2013) at 1-2. accessed 12 September 2019.

⁵⁸⁴ Kuwait, Law No. 14 of 1973, 1973, art. 2.

⁵⁸⁵ Kuwait, Decree Law No. 23 of 1990, art. 1-4.

⁵⁸⁶ Constitution of Kuwait, 1962, art. 168.

⁵⁸⁷ Morison and Grimshaw, *supra* (n 128) at 7.

Authority may wield any dominion over a Judge".⁵⁸⁸ But the judges are expected to perform their duties in the name of the Amir. Also, it is apparent that a country's judicial system is unlikely to be completely immune to varied external forces.⁵⁸⁹ Still, Alkarama Foundation, which is a non-governmental organisation, insists that the Constitution of Kuwait postulates and demands the independence of the system from the direct influence of external forces, including the executive power.⁵⁹⁰

The effectiveness of Articles may be undermined by the fact that senior judicial officials are appointed by the Minister of Justice (who belongs to the administrative branch of power) through decrees.⁵⁹¹ However, the Minister has to consult the Supreme Judicial Council before the appointment, and Decree Law No. 67 of 1980 specifies that the decision should belong to the Supreme Judicial Council,⁵⁹² which is comprised predominantly of the representatives of the judicial branch of power. The rest of the officials are appointed by the Supreme Judicial Council. However, as pointed out by Brown, the Council includes the mentioned senior officials and is not independent in its funding.⁵⁹³ Moreover, foreign judges are appointed after requests by the Ministry of Justice, without any discussions with the Council.⁵⁹⁴ Apart from that, the Minister is lawfully vested with the power to supervise the judiciary system in accordance with the Decree 23 of 1990.⁵⁹⁵ Thus, certain aspects of judiciary-related procedures appear to undermine the independence of the judiciary.

Some of the historical developments in the field of judicial independence can be regarded as adversely affecting the separation of powers. According to Brown, there was a notable attempt to make the justice system more independent in the 1980s, which was curbed as a

⁵⁸⁸ Constitution of Kuwait, 1962, art. 163.

⁵⁸⁹ Hall, *supra* (n 19) at 364.

⁵⁹⁰ Alkarama Foundation, *supra* (n 40) at 12.

⁵⁹¹ Kuwait, Decree Law No. 23 of 1990.

⁵⁹² Kuwait, Decree Law No. 67 of 1980, 1980, art. 61.

⁵⁹³ Brown, *supra* (n 37) at 158.

⁵⁹⁴ Alkarama Foundation, *supra* (n 40) at 13.

⁵⁹⁵ Kuwait, Decree 23/1990, article 35, 1990.

result of the suspension of Parliament in 1986 and reintroduced in the 1990s in the form of new proposals.⁵⁹⁶ In particular, the 1990s saw a decree limiting the independence of the judiciary;⁵⁹⁷ it prevented the Courts from considering acts of sovereignty.⁵⁹⁸ The decree was not repealed to this day. Thus, there is a need for continuous development of separation of powers to ensure the independence of Kuwaiti judges.

Other problems pertinent to the judges of Kuwait may also pose a threat to human rights. According to Williamson, they may include transparency issues.⁵⁹⁹ Moreover, the author reports that although judgements are usually declared to be in line with the principle of equality of all citizens before the law, they tend to take a lot of time to “move their way through the court system,”⁶⁰⁰ which implies the existence of red tape.

According to Liebesny, challenges in the Kuwaiti legal system “arose initially since the courts, staffed by lawyers from Arab countries whose systems had been modernised many years ago, were not familiar with the background of the Kuwaiti system,” and moreover, “the Kuwaiti court clerks and police officers on their part found the precipitous introduction of a largely alien system hard to cope with”.⁶⁰¹ Williamson also agrees that “the strong presence of foreign (mainly Egyptian) judges working in the Kuwait judiciary,” which was the result of the legal system of Kuwait being developed with the help of Egyptian specialists, especially Dr Abdel-Razzaq al-Sanhouri, in the 1960s, creates a challenge for the system.⁶⁰² The numbers of expatriates in various sectors of Kuwaiti government used to be greater in the 1960s,⁶⁰³ but their susceptibility toward the influence

⁵⁹⁶ Brown, *supra* (n 37) at 158-159.

⁵⁹⁷ *Ibid.* at 159; see also Kuwait, Decree 23/1990, art. 32 and 35, 1990.

⁵⁹⁸ Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁵⁹⁹ Williamson, *supra* (n 10) at 36.

⁶⁰⁰ *Ibid.*

⁶⁰¹ Liebesny, *supra* (n 37) at 110.

⁶⁰² Williamson, *supra* (n 10) at 36

⁶⁰³ Farah, al-Salem and al-Salem, *supra* (n 441) at 45, 48; see also KUNA, *supra* (n 544) para. 8.

of the Ministry of Justice is still a concern.⁶⁰⁴ In particular, the fact that judges in Kuwait are often non-citizens can undermine a sense of their legitimacy when they need to be regarded as the highest authority in determining punishments. Brown points out that the need for foreign judges is typical for some Arab countries due to their shorter legal history, which may result in less-established law schools.⁶⁰⁵ He emphasises, however, that Kuwait's legal history is sufficient to avoid employing foreign lawyers and that Egyptian lawyers can only take overseas contracts (through which they are recruited in Kuwait) for a limited number of years, which, in his view, makes the problem less acute but still present.⁶⁰⁶

Currently, Egyptian judges are appointed for four years (with a possible two-year extension) through an Egypt-approved request from the Kuwaiti Ministry of Justice; the Alkarama Foundation reports that as of 2011, there were 300 Egyptian judges working in Kuwait.⁶⁰⁷ The source also suggests that the appointment of foreign judges would be expected to reduce the problem of the elitism of the judiciary, but it should be pointed out that Kuwaiti judges hold their posts for a lifetime, even though they can be removed from this position in the case of misconduct.⁶⁰⁸ Thus, it can be implied that, as stated by Williamson, Kuwait suffers “from unnecessarily complicated, inflexible and sometimes outdated laws and procedures, not to mention frustrating bureaucracy”.⁶⁰⁹ As a result, the authority of the courts becomes questionable. In this context, there is the possibility of the introduction of the jury system in Kuwait to increase the potential for fair trials, but

⁶⁰⁴ Williamson, *supra* (n 10) at 36

⁶⁰⁵ Brown, *supra* (n 37) at 159-160.

⁶⁰⁶ *Ibid.* 160; see also Human Rights Council, ‘Summary Prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21’ (United Nations, 2015) at 5-6. accessed 12 September 2019.

⁶⁰⁷ Alkarama Foundation, *supra* (n 40) at 12.

⁶⁰⁸ *Ibid.* 12-13.

⁶⁰⁹ Williamson, *supra* (n 10) at 36.

researchers state that the criminal justice system of the state may be not prepared for this pattern.⁶¹⁰

It should be pointed out that, as emphasised by Rosiny and many others, judicial independence and transparency appear to be commonly challenging to achieve, while corruption is difficult to avoid in a variety of countries, indicating that the problems are not unique to Kuwait and its separation of powers.⁶¹¹ For example, Ashworth considers the topic of the separation of powers and responsibilities in the field of restorative justice, highlighting the role of government in ensuring the independence of justice, and pointing out that state-led justice tends to have flaws and can result in failures.⁶¹² In particular, Ashworth states that “the list of failures of state justice is a lengthy one”.⁶¹³ Still, Brown asserts that since the 1990s the process of increasing judicial independence in Kuwait has been in motion.⁶¹⁴ This process illustrates the fact that the government tends to develop and evolve together with the evolution of the separation of powers.⁶¹⁵

3.8. Resources Available for the System’s Functioning

The criminal justice system requires resources for functioning just like any other system. In particular, funding, human resources, equipment (for instance, police cars or computers) are necessary as stated by Travis and Edwards.⁶¹⁶ However, according to the recent report on Kuwaiti criminal justice system by Morison and Grimshaw, resources in it are not

⁶¹⁰ *Ibid* 54.

⁶¹¹ Stephan Rosiny, ‘Power Sharing in Syria: Lessons from Lebanon’s Taif Experience’ (2013) 20 *Middle East Policy* 41, 43; see also Ashworth, *supra* (n 20) 590-592; see also Omar Azfar and William Robert Nelson, ‘Transparency, Wages, and the Separation of Powers: An Experimental Analysis of Corruption’ (2007) 130 *Public Choice* 471, 471-490.

⁶¹² Ashworth, *supra* (n 20) 578-579, 595.

⁶¹³ *Ibid.* at 590.

⁶¹⁴ Brown, *supra* (n 35) 8.

⁶¹⁵ Jon Michaels, ‘An Enduring, Evolving Separation of Powers’ (2015) 115 *Columbia Law Review* 515, 515-597.

⁶¹⁶ Travis and Edwards, *supra* (n 102) at 22.

distributed adequately.⁶¹⁷ Therefore, at least one issue pertinent to the topic can be encountered in relevant literature. However, the topic of resources within the criminal justice system of Kuwait appears to be otherwise uncovered by recent and less recent literature, which limits the ability of the current study to draw conclusions on it. At the same time, data is another resource, and the criminal justice system, as well as the people outside of it who try to improve it (for instance, the representatives of the executive branch), lack the information that can help them in their attempts. The Kuwait International Legal Research Centre seems to recognise the problem and commission relevant investigations,⁶¹⁸ but more studies like the recent report and this research are required.

3.9. The Role of Article 50 in the System

Article 50 of the Constitution which requires separation of powers, as well as the cooperation of powers, states that “No Authority shall be allowed to waive all or part of its jurisdiction”.⁶¹⁹ Therefore, the Article guarantees separation of powers and implies that each of the components of criminal justice of Kuwait must act in accordance with their authority. The significance of establishing separation of powers has already been mentioned by Samuels and others,⁶²⁰ which suggests that the implications of Article 50 for the functioning of the criminal justice system should be notable and beneficial. However, as it was mentioned above, the cases when the authority of the elements of the criminal justice system was underdefined⁶²¹ or waived (for instance, in the case of the Decree Law No. 23 of 1990) do occur.⁶²² Consequently, the literature indicates that Article 50 is not

⁶¹⁷ Morison and Grimshaw, *supra* (n 128) at 7.

⁶¹⁸ *Ibid.* at 3.

⁶¹⁹ Constitution of Kuwait, 1962, art. 50.

⁶²⁰ Samuels (n 1) at 706; see also Clark, *supra* (n 18) 971, 971-989.

⁶²¹ Morison and Grimshaw, *supra* (n 128) at 7.

⁶²² Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

always followed, but following it is crucial for ensuring separation of powers and the lack of power abuse.

3.10. Summaries

As a result of the present review of literature, no studies that would comprehensively consider the criminal justice separation of powers in Kuwait were found, but the research and reports on the aspects that can be included in the discussion were encountered. In particular, the majority of the significant aspects of the criminal justice system can be described relatively well, which offers the opportunity for analysis. Similarly, the diffusion of law has been discussed relatively extensively. Also, the problems experienced by the criminal justice system in Kuwait appear to have received some coverage. The fact that the topic is understudied, as well as the limitations in the quality of some of the sources, restricts the ability of this thesis to respond to the research questions, but still, the following information can be presented.

The history of the development of Kuwaiti legal system has defined its features and some of its problems. Kuwait had experienced the impact of British jurisdiction for a long period, but when the country gained independence from the United Kingdom in 1961, the civil law system, based on the Egyptian law, which, in turn, is developed in accordance with the French law, was established in the country in addition to traditional Islamic law. However, the hasty introduction of the new legislation, as well as some of its inefficiencies, and the introduction of Egyptian lawyers into the Kuwaiti legal system have caused some long-lasting issues. The Constitution of Kuwait requires separation of powers and independence of the judiciary while also granting the citizens all the necessary rights and proclaiming them equal in the eyes of the law. Still, the mentioned problems, especially those related to transparency and red tape, might endanger those rights.

Moreover, there is some evidence indicating that the independence of judiciary being limited legislatively. Apart from that, the literature on the topic indicates other inefficiencies in various elements of the criminal justice system of Kuwait.

Given the fact that the literature on the topic is generally rather scarce, it seemed apparent that other methods of data collection could be useful. As a result, the current investigation was launched, and the details of its methodology can be found in the following chapter. The issues that were found with the help of the literature were used to develop the interview questions that would enable the researcher to gather more data on the positive and negative aspects of the criminal justice system in Kuwait with attention paid to separation of powers and its ability to protect the rights of Kuwaiti citizens. The resulting interview protocol can be found in Appendix B.

4. Methodology and Research Design

The research was conducted with a focus on the review of primary sources and laws that provide the basis for the development of the criminal justice system in Kuwait. The main sources include the Constitution of Kuwait and the series of laws determining the principles of the country's judiciary system. In addition to the overview and analysis of primary sources, it was also necessary to work with secondary sources, such as journal articles and studies that have been conducted by researchers in the field of world criminal justice and in the area of the criminal justice and legal systems of Kuwait. Qualitative interviews were employed to complement the missing data from the primary and secondary sources; they became the core of the present work. This section will consider the key elements of the methodology, justifying the chosen methods and offering definitions for them.

4.1. Research Philosophy

The present investigation is guided by the postpositivist perspective. As suggested by Frane, it is an approach to research philosophy that aims to upgrade positivism (which can be described as the “philosophy of science”) by incorporating some of its ideas and rejecting other ones.⁶²³ Cunliffe reports that from the postpositivist perspective, knowledge is perceived as replicable, sharable, and capable of being accumulated, which is reminiscent of positivism.⁶²⁴ Similarly, Cunliffe states that in post-positivism, objective reality is believed to exist,⁶²⁵ and Frane highlights that people are expected to be capable of constructing knowledge based on high-quality evidence.⁶²⁶ However, the evaluation of the quality of evidence is not limited by its quantification, which is characteristic of

⁶²³ Adam Frane, *Measuring National Innovation Performance* (Springer 2014) at 5.

⁶²⁴ Ann Cunliffe, ‘Crafting Qualitative Research’ (2011) 14 *Organizational Research Methods* 647, 655.

⁶²⁵ *Ibid.* 660.

⁶²⁶ Frane, *supra* (n 623) at 6.

positivism, and the contexts of studied phenomena are taken into account in post-positivism the way they would be considered in non-positivist approaches.⁶²⁷ Thus, the postpositivist perspective upgrades positivism in a way that would help it acknowledge and effectively frame qualitative research studies.

4.2. Qualitative Research

According to May, qualitative research refers to an approach to investigation that works with qualitative data: words and meanings;⁶²⁸ it seeks to investigate and explore phenomena.⁶²⁹ The choice of the qualitative approach for the present study can be justified through multiple factors. First, as shown by Dobinson and Johns, this approach has been employed in legal research with success, which implies that it can be selected for the present study as well.⁶³⁰ Second, qualitative methodology is supported by the postpositivist philosophy, which is demonstrated by Frane.⁶³¹ Third, the phenomenon that is being studied can benefit from qualitative research since the evidence to the existence of separation of powers and its guarantees, as well as their contribution to the protection of human rights, is most likely to be qualitative. Similarly, the determination of the ways to ensure human rights protection, which needs to be explored, is also going to require the collection and analysis of qualitative information (expert opinions). Some of the phenomena that the present study is going to consider can only be traced through qualitative means, including, for example, the diffusion of law in Kuwait. This idea can also be supported by the separation of powers criteria discussed above.

⁶²⁷ *Ibid.*

⁶²⁸ Tim May, *Social Research: Issues, Methods and Research* (Open University Press 2011) at 132; see also Paivi Eriksson and Anne Kovalainen, *Qualitative Methods in Business Research* (SAGE 2015) at 4.

⁶²⁹ Sharlene Nagy Hesse-Biber and Patricia L. Leavy, *The Practice of Qualitative Research* (SAGE 2011) at 4.

⁶³⁰ Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in M McConville and W H Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) at 16.

⁶³¹ Frane, *supra* (n 623) at 6.

Indeed, the separation of powers criteria, which have been developed based on the literature review, predominantly focus on the analysis of procedures related to appointment and supervision of the judiciary, case management details, specifics of police conduct, and so on. All these criteria would require qualitative evidence. Consequently, the criteria can only be applied within a methodology that incorporates qualitative methods.

The nature of the research questions is also noteworthy: most of them are exploratory and require the in-depth investigation of phenomena, which, as stated by May, is typically done through qualitative research.⁶³² Therefore, in order to answer the research questions of the study, it would be necessary to employ qualitative methods. Thus, qualitative research can generate and analyse the required evidence for the study while also being capable of responding to the research question and being in line with the work's philosophy.

In the present study, qualitative research is carried out in two forms. First of all, a literature review is carried out to determine the already existing knowledge on the topic. Then, interviews are conducted to cover some of the gaps in the current knowledge. Both approaches can be viewed as types of qualitative research in legislation as shown by Dobinson and Johns.⁶³³ For example, the report of the Kuwait International Legal Research Centre on criminal justice in Kuwait employed a similar combination of methods.⁶³⁴ As pointed out by Hair, Celsi, Money and Page, the use of several methods is one of the approaches to triangulation,⁶³⁵ which improves the rigour of the study. Apart from that, given the scarcity of literature on the topic, the use of interviews with specialists allows expanding data sources. Thus, the chosen approaches complement each other and help to investigate the phenomena of interest in greater detail.

⁶³² May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

⁶³³ Dobinson and Johns, *supra* (n 630) at 22-23.

⁶³⁴ Morison and Grimshaw, *supra* (n 128) at 6.

⁶³⁵ Joseph Hair, Mary Celsi, Arthur Money and Michael Page, *Essentials of Business Research Methods* (Routledge 2015) at 289.

4.3. Semi-Structured Interviews

According to Edwards and Holland, interviews are a particularly popular, commonly-used, well-established, and well-described qualitative method.⁶³⁶ The present study chooses them for their ability to contribute the data that would provide insights into phenomena and connections between them.⁶³⁷ Interviews are also an appropriate method from the postpositivist perspective as shown by Cunliffe.⁶³⁸ Interviews can assist in employing the knowledge of experts in studies, which the present study intends to do in order to complement the literature review results.

There are several approaches to interviews. On the one hand, as shown by May, there are individual and group interviews.⁶³⁹ The former type is more effective in bringing out personal perspectives while the latter is usually used to discuss shared experiences.⁶⁴⁰ Since the study does not focus on group experiences and is mostly interested in individual expertise, individual interviews were chosen for it.

Furthermore, as pointed out by Edwards and Holland and Eriksson and Kovalainen, interviews vary in the level of their flexibility.⁶⁴¹ Structured interviews are the least flexible,⁶⁴² and unstructured interviews technically have no structure.⁶⁴³ However, semi-structured interviews have a structure (typically, a set of questions) but also offer flexibility and allow the interviewee to deviate from the planned discussion with the aim of gaining more insights on the topic.⁶⁴⁴ As suggested by Hair et al., the latter interview version offers

⁶³⁶ Rosalind Edwards and Janet Holland, *What Is Qualitative Interviewing?* (2013) *Bloomsbury Academic* 1, 1.

⁶³⁷ *Ibid.* 91.

⁶³⁸ Cunliffe, *supra* (n 624) 647, 655.

⁶³⁹ May, *supra* (n 628) at 137.

⁶⁴⁰ Hair et al., *supra* (n 635) at 191.

⁶⁴¹ Edwards and Holland, *supra* (n 636) 1, 29-30; see also Eriksson and Kovalainen, *supra* (n 625) at 94.

⁶⁴² Hair et al., *supra* (n 635) at 191.

⁶⁴³ May, *supra* (n 628) at 136-137; see also Eriksson and Kovalainen, *supra* (n 628) at 94.

⁶⁴⁴ May, *supra* (n 628) at 134-135; see also Eriksson and Kovalainen, *supra* (n 628) at 94.

a balance,⁶⁴⁵ which seems to be beneficial to the current research; as a result, the semi-structured option was chosen.

Certain limitations of semi-structured interviews should be mentioned. First, Edwards and Holland report that like the majority of qualitative research methods, they produce the evidence that cannot be replicated and that can be viewed as “subjective” (biased).⁶⁴⁶ However, these limitations can be disputed: Edwards and Holland specify that replicability issues can be resolved through the rigorous planning of the procedures,⁶⁴⁷ and bias is a problem that is not interview-specific. In fact, Alshenqeeti points out that no research is actually free from bias since the results are interpreted by the researcher.⁶⁴⁸ Consequently, it is necessary to acknowledge the problem and review the findings while taking into account this limitation.

The interviews took between 45 and 60 minutes with the average time amounting to a little over 50 minutes (see Appendix A). The development of the interview tool is also a noteworthy topic. The questions for it were created in order to provide all the information that is necessary for the study, including the data that would help to respond to the research questions and that which would assist in identifying the interviewees’ ability to perform the task. The separation of powers criteria considered above were also used to guide the tool development, and an extended question is devoted specifically to their analysis. Triangulation⁶⁴⁹ was used to improve the tool as suggested by Hair et al.: five independent people with researcher backgrounds (University educators) were involved in the process to ensure that the final product is understandable, focused, well-structured, and lacks

⁶⁴⁵ Hair et al., *supra* (n 635) at 191.

⁶⁴⁶ Edwards and Holland, *supra* (n 636) 1, 92-93.

⁶⁴⁷ *Ibid.* 92.

⁶⁴⁸ Hamza Alshenqeeti, ‘Interviewing as a Data Collection Method: A Critical Review’ (2014) 3 *English Linguistics Research* 39, 43.

⁶⁴⁹ Hair et al., *supra* (n 635) at 289.

redundant questions. As a result, 13 questions were chosen for the final tool, which is attached in Appendix B.

The tool was developed in English, but it was translated into Arabic and checked by five experts to ensure that nothing could be lost in translation. The choice to use Arabic was made because although the interviewees speak English, their native language is Arabic. This decision was made predominantly to make the interviewees comfortable and capable of expressing their ideas without any language barriers. In summary, the convenience considerations were a significant element of the development of the tool.

4.4. Sampling

Dobinson and Johns state that the justification of its sample is crucial for the quality of a qualitative study.⁶⁵⁰ The sampling process was guided by the quota approach, which, as pointed out by May, refers to a non-probability method that consists of choosing a specific number (quota) of people from particular subgroups within the sampled population.⁶⁵¹ As a non-probability method, quota sampling is not appropriate for generalisation purposes, but since the study does not intend to provide generalisable results, this fact does not appear to be a major hindrance.⁶⁵²

The method was chosen because the sample attempted to ensure the equal representation of the subgroups of the participants. The participants included the people who are familiar with Kuwaiti legislation: judges, lawyers, parliament members, legal professionals, and academic legal specialists (university academics). It is noteworthy that parliament members with law degrees were approached under the assumption that they are more likely to be familiar with Kuwaiti legislation, which was an important aspect of the research.

⁶⁵⁰ Dobinson and Johns, *supra* (n 630) at 34.

⁶⁵¹ May, *supra* (n 628) at 100; see also Hair et al., *supra* (n 635) at 176.

⁶⁵² May, *supra* (n 628) at 100.

Police members were approached, but they refused to participate, which is why this area of the executive branch could not be represented. The reason for their refusal was that the process of approving research participation for them would take a long time and could lead to rejection for security reasons. As a result, the sample was designed to include other members of executive power. Additionally, prosecutors were considered, but since judges in Kuwait operate as prosecutors before being appointed,⁶⁵³ it was assumed that judges could contribute prosecutor experiences to the study. This decision may have become a limitation since the literature on Kuwaiti prosecution is very scarce, but future research may further fill that gap. Furthermore, the judicial branch was deemed already represented in the sample. It is apparent that the first three groups represent the three authorities; as for the latter, they are particularly well-familiar with the topic of interest.

Another inclusion criterion was based on the need to recruit specialists: only people between 35 and 55 were recruited. The information was collected by directly asking the participants about their age before the interviews. The minimum age criterion was aimed at ensuring that the participants have some experience with Kuwaiti law. As for the maximum age criterion, it was necessary to avoid recruiting the elderly population, which might result in the ethical concerns of involving a vulnerable population in research since, as pointed out by Lahman, the elderly can be viewed as a vulnerable group.⁶⁵⁴ Even though there is no universal definition of the elderly population, it was assumed that the people nearing the retirement age might be considered vulnerable. In Kuwait, 60 years is the retirement age for both genders in most cases,⁶⁵⁵ and even though there have been some

⁶⁵³ Myra Williamson, 'Women as Prosecutors and Judges in Kuwait: Aspirations and Obstacles' in M Nakashidze (ed), *Third International Academic Conference on Social Sciences* (Istanbul 2015) at 197.

⁶⁵⁴ Maria Lahman, *Ethics in social science research* (Sage 2017) at 228.

⁶⁵⁵ KUNA, 'Kuwaiti Population to Reach 5.5 Million By 2050, Government in Race to Face' (KUNA, 2005), para. 1. accessed 2 August 2018.

attempts to change it,⁶⁵⁶ this age was used to determine the elderly group for this thesis. It should also be noted that 55 is a common age of retirement in Kuwait, and the judges who are older than 55 but are still working are likely to be members of the Supreme Court, which could not be accessed during this research. In summary, participant selection was geared by the ability of the participants to respond to the research questions, which would be based on their expertise and experience with Kuwaiti criminal justice system, as well as some ethical considerations.

The checklist that summarises the information about the participants can be found in Appendix A. It demonstrates that all the quotas required recruiting 5 representatives of each position that was targeted by the study. Apart from that, it indicates that seven of the participants were female (28%) and only five of the participants (20%) were younger than 40. The checklist presents the basic information about the participants that may be of consequence for the study.

It should be noted that the demographic features of the sample were determined during the first part of every interview and that all the ethical considerations which are connected to their exposure in Appendix A were considered. It can be suggested that the disclosure of important information may be problematic, but it is not the case for these data. The participants agreed to provide the information about their ages and gender. Moreover, it is not possible to identify the participants based on the provided information because it is not sufficient: all the participants come from rather large and diverse groups, which prevents their identification. It is also noteworthy that age and gender are important characteristics which are often of use in research and can be employed to describe a sample, especially

⁶⁵⁶ KUNA, 'Parliament Cmte Oks Retirement Age Cut Bill' (KUNA, 2017), para. 1-2. accessed 2 August 2018.

when they can affect its representativeness or responses in any way.⁶⁵⁷ In the case of this work, the inclusion of people of different gender diversifies the sample and introduces new perspectives. The age and position, on the other hand, can be viewed as the factors that can indicate the experience and expertise of the people involved in research. Thus, their introduction and mentioning in this work are justified.

The sampling quotas were also connected to the fact that qualitative data requires more time to analyse than quantitative; consequently, as pointed out by Dobinson and Johns, the researcher needed to take into account the resources, especially time constraints of the research, to make sure that the sample is feasible.⁶⁵⁸ May warns that smaller samples have the problem of not being very representative or generalisable,⁶⁵⁹ but for the present study, it need not be a problem. Indeed, the study does not intend to make generalisable conclusions about the population it samples; in fact, it does not study the population. Rather, the participants are employed to gather expert knowledge and opinions.

The procedures that were completed to ensure the protection of the rights of the participants should also be mentioned due to their utmost significance for any research, which is highlighted by May.⁶⁶⁰ The participation is fully anonymous and confidential; while the study requires the collection of the data that can demonstrate the expertise of the interviewees, no identifying information was obtained. The participants were anonymised with the help of codes (Participant Identification Numbers). The audio-recordings of the interviews are only available to the researcher and kept in a secure location (the researcher's home) on an electronic device under password protection. Other researchers might be granted access to the transcripts, and the final report will contain some

⁶⁵⁷ Hesse-Biber and Leavy, *supra* (n 629) at 59, 189; see also May, *supra* (n 628) at 98, 123.

⁶⁵⁸ Dobinson and Johns, *supra* (n 630) at 35.

⁶⁵⁹ May, *supra* (n 628) at 102.

⁶⁶⁰ *Ibid.* at 61.

quotations, but no personal or identifying information will be present in either transcripts or quotations.

The participants were informed about all the study procedures in their participant information sheets (see Appendix C), along with the risks and benefits of participating. The sheet expressly stated that the participation had to be voluntary and highlighted the fact that withdrawal could occur at any moment. Having read the participant information sheet, the participants were presented with the informed consent forms (see Appendix D), which repeated some of the crucial details from the information sheet, including the need to tape the interview, the use of anonymised information and quotes in the report, and the fact that the anonymised transcript might be reviewed by people other than the researcher. The participants were only interviewed if and after they had signed the consent form. Copies of the information sheet and informed consent forms were provided to the participants.

The participants were contacted with the help of e-mails or through a visit to their office with the aim of scheduling an interview. The latter option was a requirement for judges and parliament members due to their workload; they were also exceedingly difficult to schedule for the same reason. However, the enthusiasm of the participants helped in getting interviews with them.

4.5. Data Analysis

The present study is going to employ thematic analysis for its data. The choice of the type of analysis is defined by the needs and specifics of the study, as well as the features of the approach to analysis. According to Braun and Clarke, as well as Eriksson and Kovalainen and others, thematic analysis can be defined as an approach to data analyses that focuses

on determining and investigating “patterns (themes) within data”.⁶⁶¹ A theme, in turn, is a pattern that appears in the data and that is pertinent to the research question; its size or frequency of appearance can vary since, as pointed out by Braun and Clarke and Vaismoradi, Jones, Turunen, and Snelgrove, a flexible approach to the term can benefit the study.⁶⁶² Themes are associated with codes, which are the basic elements of data that might be pertinent to the research question; themes unite the multiple codes.⁶⁶³ If a study aims for a rich description of the data set, Braun and Clarke insist that the prevalence of themes is going to need to be considered as well.⁶⁶⁴

Thematic analysis is a particularly widely used approach, which might be viewed as the “foundational method” of qualitative analysis because the identification of themes in qualitative data is a core component of many qualitative analyses as reported by Braun and Clarke.⁶⁶⁵ The authors also state that the approach is relatively accessible, flexible and compatible with a wide variety of philosophies and epistemological stances.⁶⁶⁶ Therefore, it is applicable to the present study.

In the present study, which combines literature review methodology with the interview analysis, the thematic analysis is likely to be classified as “theoretical”: in other words, it employs the existing coding frames and focuses on a specific, well-developed research question. However, the flexibility for a more inductive approach is also present.⁶⁶⁷ Apart from that, the present study focuses on explicit themes that appear at the semantic level.⁶⁶⁸

⁶⁶¹ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77, 86; see also Eriksson and Kovalainen, *supra* (n 628) 222-223; Mojtaba Vaismoradi, Jacqueline Jones, Hannele Turunen and Sherrill Snelgrove, ‘Theme Development in Qualitative Content Analysis and Thematic Analysis’ (2016) 6 *Journal of Nursing Education and Practice* 100, 100-101.

⁶⁶² Braun and Clarke, *supra* (n 661) 77, 87; Vaismoradi et al., *supra* (n 661) 100, 100-101.

⁶⁶³ Braun and Clarke, *supra* (n 661) 77, 95-96; Vaismoradi et al., *supra* (n 661) 100, 104.

⁶⁶⁴ Braun and Clarke, *supra* (n 661) 77, 88.

⁶⁶⁵ *Ibid.* 78.

⁶⁶⁶ *Ibid.* 78-79.

⁶⁶⁷ *Ibid.* 89.

⁶⁶⁸ *Ibid.* 90.

This choice is guided by the postpositivist approach and aims at limiting the possibility of the misinterpretation of the gathered data, which is described as a relatively common concern for thematic analysis by Edwards and Holland.⁶⁶⁹ Since the study provides the participants with direct questions in order to draw upon their expert opinions, it appears more reasonable to focus on the semantic level.

According to Braun and Clarke, the key stages of thematic analysis include the processes of familiarising with the data, initial code generation, theme search, theme review, theme definition and naming, and the organisation of the report of the themes.⁶⁷⁰ Additional activities may also be singled out by other authors, but the key actions are defined as presented.⁶⁷¹ Braun and Clarke report that the identification of themes is continuous and starts before the analysis, for example, with the determination of research questions and literature review.⁶⁷² The presentation of results can take the form of a table, and the present study intends to use this form. In particular, the specifics of the collected data are going to be organised in a table that presents the themes, codes that they incorporate, and the prevalence of themes in different groups of participants. Thus, by employing a well-established method of data analysis, the present study will be able to answer the research questions using the themes identified in them, as well as additional ones.

The following details about the thematic analysis that was carried out as a part of this research can be specified. The present thesis did not employ a specific software for qualitative analysis for the lack of a professional who would be familiar with its use. While it was possible for the researcher to learn to use the software, it would require additional resources, especially time, which rendered this option less feasible than manual

⁶⁶⁹ Edwards and Holland, *supra* (n 636) 1, 93.

⁶⁷⁰ Braun and Clarke, *supra* (n 661) 77, 92-100.

⁶⁷¹ Vaismoradi et al., *supra* (n 661) 100, 102.

⁶⁷² Braun and Clarke, *supra* (n 661) 77, 92.

investigation. Additionally, manual analysis is a common approach to thematic analysis, and it has been shown to be effective. For instance, Braun and Clarke focus on manual techniques and give related advice, which was also employed for the present research.⁶⁷³ Therefore, the choice is justified by the needs of the study and the effectiveness of the method.

The following procedures were used to ensure the quality of the resulting themes. The study mostly followed the instructions of Braun and Clarke that are described above in that the first element of the work was the familiarisation with the data. It involved the repeated reading of the transcripts of interviews, which included taking notes with the ideas and patterns that were starting to emerge. The process also overlapped with the next stage, that is, the generation of initial codes, which were based on the general patterns that the researcher was identifying. The two first stages were carried out together with the interviews, and they were used to determine the data saturation. When no new codes could be discovered, it was established that data saturation was achieved. This process resulted in a list of specific codes that were then used for the third stage.

During the third stage, the codes were reread to identify the themes, which are more general than codes and tend to unite them into groups. During this element of the analysis, the researcher started drafting the table, which united the more general patterns and the more specific codes. However, the initial table differed noticeably from the one presented in this report. According to Braun and Clarke, the use of tables for this stage is a common and appropriate tool that facilitates the process of theme identification.⁶⁷⁴ The resulting table was then used to present the “candidate themes,” which were revised during the fourth stage. The process mostly involved further solidifying the themes because the initial

⁶⁷³ *Ibid.* at 16-26.

⁶⁷⁴ *Ibid.* at 19-20.

ones were often interrelated. For instance, the eventual theme of the characteristics of Kuwaiti judicial system united the initial ones which were devoted to transparency, bureaucracy, and other factors. Appendix E can be used to demonstrate this tendency toward the development of more general themes.

The fourth stage proved to be particularly difficult, but it was necessary to ensure the validity of the themes. It involved the consideration of the themes, codes, and raw data to determine if the themes could effectively represent the data and form coherent patterns. Also, the researcher attempted to distance from the data as was suggested by Vaismoradi, Jones, Turunen, and Snelgrove: the authors believe that the rectification of themes is enhanced if the data is set aside for some time.⁶⁷⁵ The researcher chose to cease all analysis-related procedures for two days, after which the themes were reviewed and compared to the data once again. The process did yield some changes, but it is not clear if that happened because of additional checking or the distancing. After six cycles of revision, the last of which did not involve any changes, the themes were established, and the fifth phase of naming them and their sub-themes was concluded. The result can be seen in Appendix E.

The final step, which is the report, involved using the key themes to structure the findings chapter. Based on the content of each theme and its frequency, as well as the frequency of its codes, some themes were united with other ones while some of them were provided with greater attention. Also, the themes were presented in an order that would be logical and follow from the more general topics (like separation of powers) to more specific ones (like the problems with separation of powers in Kuwait). Overall, the structure of the findings chapter was guided by the need to present the relevant information in an efficient, logical, and engaging way.

⁶⁷⁵ Vaismoradi et al., *supra* (n 661) 106.

4.5. Ethics

The ethical issues of the study are predominantly connected to the fact that it employs human subjects. As a result, their safety, privacy, and autonomy were critical to protect.⁶⁷⁶ Throughout the project, these considerations were taken into account, but they were especially significant during planning and recruitment stages. The sampling section points out some of the ethical issues, but this one will detail all of them in a consistent manner.

From the perspective of autonomy, the primary requirement is that participation in the study has to be voluntary. In order to make it voluntary, the participants were provided with information sheets and informed consent documents to ensure that they could learn everything about the study prior to participation.⁶⁷⁷ Additionally, the participants were informed about the possibility of withdrawing at any time, which is also an important element of ethical research.⁶⁷⁸ Thus, their voluntary and informed participation was secured, and their autonomy was respected.

From the perspective of privacy and safety, the handling of data was important. Thus, the participants were informed about the measures meant to protect their privacy beforehand, and they have also agreed to all the relevant activities.⁶⁷⁹ Consequently, they did not mind the recording of the interviews, and they were accepting of the need to report their demographics. Thus, their autonomy was respected once again while taking into account their safety and privacy. Other than that, the data were kept confidential with only the researcher having access to it; in due time, the raw data will be destroyed, and, as can be

⁶⁷⁶ Edwards and Holland, *supra* (n 636) 8-9; see also May, *supra* (n 628) at 60-62; Hair et al., *supra* (n 635) at 55-57.

⁶⁷⁷ Edwards and Holland, *supra* (n 636) 25; May, *supra* (n 628) at 62.

⁶⁷⁸ Edwards and Holland, *supra* (n 636) 67.

⁶⁷⁹ May, *supra* (n 628) at 151; Hair et al., *supra* (n 635) at 130.

seen from the report, no direct references to the identifying information of the participants have been made.⁶⁸⁰

Furthermore, while designing the study, the risks were considered, which is also common practice.⁶⁸¹ Given the fact that the project involved interviews with minimal risks of discomfort (the interviews were not covering any sensitive topics), the participants were informed of the high safety of the procedures. However, one of the relatively risky activities that were involved was the disclosure of the demographic data. With the limited number of, for example, MPs, the demographics could be potentially identifying. It is still difficult to find the specific people using the presented information, however, and the participants had agreed to the measure, which implies that ethically, it is acceptable.

To summarize, the ethical considerations of the study were crucial because of the involvement of human subjects,⁶⁸² and their participation was predicated on the principles of autonomy, safety, and privacy. While there was at least one difficult decision to make, these principles helped to keep the participants safe and ensure their willingness to contribute to the study.

4.6. Limitations

The limitations of the study are the results of some of its methodological choices.⁶⁸³ They are important to consider when interpreting the results and drawing conclusion, but since they are a part of the methodology, they will be mentioned here as well. The sample is not very large,⁶⁸⁴ and the specifics of the data collection approach imply the strong possibility

⁶⁸⁰ Hair et al., *supra* (n 635) at 130.

⁶⁸¹ Edwards and Holland, *supra* (n 636) 67.

⁶⁸² Edwards and Holland, *supra* (n 636) 8-9; see also May, *supra* (n 628) at 60-62; Hair et al., *supra* (n 635) at 55-57.

⁶⁸³ Hair et al., *supra* (n 635) at 57.

⁶⁸⁴ Eriksson and Kovalainen, *supra* (n 628) at 168.

of personal bias.⁶⁸⁵ Additionally, as a qualitative study, this thesis cannot ensure a representative review of perspectives; rather, it introduces existing perspectives, which were drawn from different branches of power.⁶⁸⁶ Therefore, while it represents different views, it cannot be considered representative. The sample also failed to include certain participants, especially police officers, who refused to participate, and prosecutors, who were deemed represented by the judges. The literature review was plagued with the issue of limited research on the topic. Finally, only one person performed the analysis, which means that personal bias could have affected the results.⁶⁸⁷

The reason for choosing these methods consists of their benefits. Indeed, while qualitative methods, especially interviews, do not provide representative data, these approaches are most suitable for the in-depth examination of a topic.⁶⁸⁸ Similarly, small samples would be inappropriate in quantitative research, but in qualitative research, the stated sample is not very small. Also it provides the opportunity to represent different perspectives and ensures the collection of a manageable amount of data.⁶⁸⁹ The issue of police officers refusing to participate could not be alleviated, but the executive branch of power is still represented in the research. Similarly, the absence of prosecutors is alleviated by including judges, who have even more diverse and expansive experiences. The choice to involve only one researcher was explained by the project's limitations, especially monetary ones. It can also be noted that only one person got access to the participants' data, which is a positive outcome from the ethical perspective.⁶⁹⁰

⁶⁸⁵ Edwards and Holland, *supra* (n 636) 1, 92-93.

⁶⁸⁶ May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

⁶⁸⁷ Alshenqeeti, *supra* (n 648) 39, 43.

⁶⁸⁸ May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

⁶⁸⁹ Eriksson and Kovalainen, *supra* (n 628) at 168.

⁶⁹⁰ May, *supra* (n 628) at 151; Hair et al., *supra* (n 635) at 130.

Additionally, the limitations were managed to an extent. Thus, the ability of interviews to be affected by personal perspective was managed by introducing different branches of power and multiple people in each subgroup. Additionally, not all data came from the interviews; a lot of information was gathered from the literature review.⁶⁹¹ The primary limitation of the latter method was the small amount of relevant information, especially on Kuwait. However, together, the literature review and interviews contributed to triangulation,⁶⁹² which addressed the limitations of both methods. Data saturation has also been achieved, which is critical for a high-quality qualitative study.

Finally, a specific limitation is the focus of the thesis on the independence of the judiciary. While the presented literature can justify this attention, it still means that the project presents a relatively one-sided view on the separation of powers in the judiciary. However, given the lack of the literature related to the topic, this approach is justifiable.

To summarize, the chosen methods have a number of limitations, but they also have advantages, and they were chosen for the latter. The limitations were controlled to an extent, but most importantly, the understanding of the limitations enables a thoughtful analysis of the data; the consideration of these issues during data analysis and the drawing of conclusions improves the quality of this thesis. Thus, the problem of limitations was handled as recommended by the literature on the topic.

4.7. Summaries

The methodology of the study can be summarised in the following way. The adopted philosophy consists of the postpositivist perspective, which incorporates some of the positivist ideas and expands them with other ones. The work employs the qualitative

⁶⁹¹ Hair et al., *supra* (n 635) at 289.

⁶⁹² *Ibid.*

approach to study design, using the methods of literature review and semi-structured interviews. Thematic analysis is chosen to process the data due to the fact that it is a well-established and convenient method that can be applied to the data collected by the study. The recruitment of the participants (a total of 25 people) was carried out with the help of quota sampling to ensure the representation of the key occupations that are expected to indicate expertise (belonging to branches of separation of powers, the criminal justice system of Kuwait, or the academic community). All the ethical considerations pertinent to carrying out a study with participants were reviewed, and anonymity, confidentiality, and voluntary nature of participation were ensured. The specific methods fit into the chosen approach and are in line with the postpositivist perspective, which means that the study's methodology is consistent.

5. Findings

All the responses of the 25 participants were analysed with the help of thematic analysis, which produced the themes and subthemes that are presented in Appendix E. This section will consider each of the themes individually and describe them, using the examples and quotes from the participants' responses.

5.1. Demographics

The final sample corresponds to the one planned. As can be seen in Figure 3, a little more than one-fourth of the participants were female (see Figure 4).

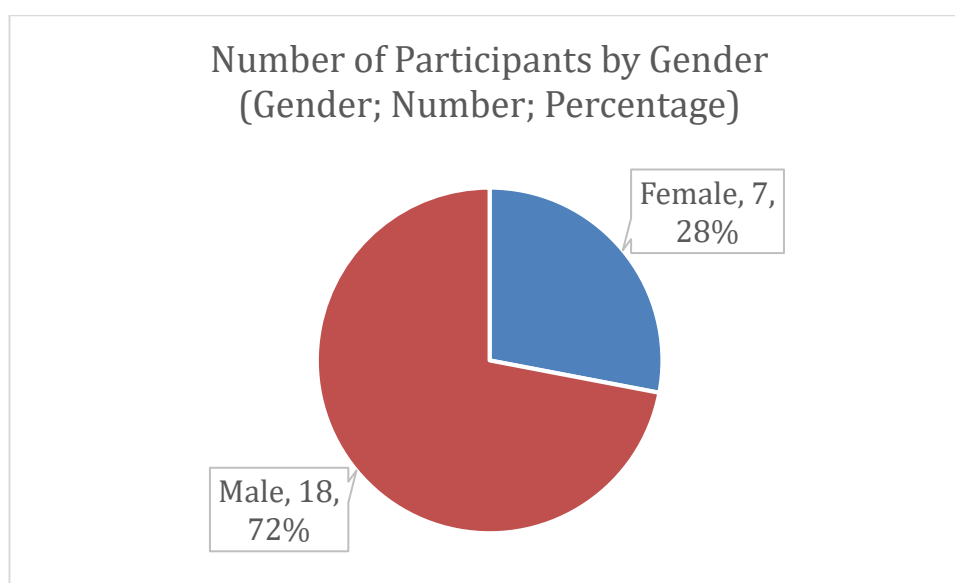


Figure 4. Gender of participants.

Most participants (nine or 36%) were between 45 and 49 years old. Only 5 participants (20%) were younger than 40 (see Figure 5). All the planned quotas were taken into account, and five participants were recruited from each group. The following groups were included: Parliament Members (PM, legislative authority), Judges (J, judicial authority), Lawyers (LW), Professionals (P, executive authority), and Academics (AC). All the

participants reported being able to respond to the questions on the topic, and only one of them (P3) expressed uncertainty, stating that she is not a specialist in the field, which is why her account might be imprecise. In general, though, the positions and age of participants imply that they would be relatively familiar with the separation of powers, especially from the perspective of Kuwait. Therefore, the recruited people were experts who could provide informed opinions to be analysed in this thesis.

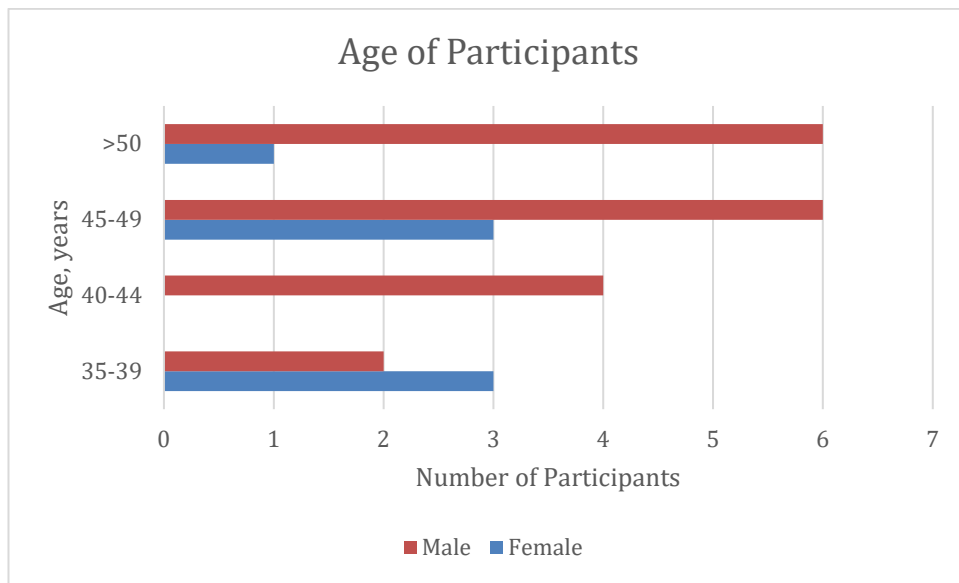


Figure 5. Age of participants.

5.2. Coverage of the Topics of Interest

None of the participants suggests that the topics of interest are not important or should not be studied. Some of the participants specifically emphasise the idea that the topics of the thesis are important and require the coverage of the practical and theoretical research. Moreover, some of the respondents believe that currently, the topics do not receive sufficient coverage. According to one of the MPs “we really have a vacuum in research specialised in the separation of powers in criminal justice”.⁶⁹³ In addition to that, the idea

⁶⁹³ Participant MP3.

of reviewing the separation of powers from the criminal justice perspective receives some support. In particular, PM2 approves of the perspective of the study, explicitly stating that “of course, the separation of powers is very important in terms of criminal justice”.⁶⁹⁴ Another interviewee believes that there “is almost no research focusing on the separation of powers in criminal justice”.⁶⁹⁵ In fact, several participants note that the constitutional separation of powers tends to receive greater coverage in research.

PM5 also highlights the importance of paying attention to the “separation of powers or criminal justice in Kuwait,”⁶⁹⁶ suggesting that the context of the country has not been extensively researched either. To clarify, other participants who do not belong to the legislative branch, also support the topics of the thesis; for instance, LW2 (a lawyer) comments that “we have almost no research addressing the separation of powers in criminal justice”.⁶⁹⁷ P4 (a legal officer at the Ministry of Justice) expresses some concern over the lack of research in phenomena that are concerned with “the development of criminal justice” in general.⁶⁹⁸ Also, a judge states that Kuwaiti criminal justice and separation of powers require more advanced investigation.⁶⁹⁹ Thus, the participants are unanimous in supporting and justifying the attention to the topic as an under-researched one.

Furthermore, the participants suggest that the present investigation and similar studies would be practically applicable; as expressed by LW4, separation of powers and related topics “actually need a lot of study to help legislators in the Kuwaiti National Assembly recognise the deficiencies in the separation of powers in justice in Kuwait”.⁷⁰⁰ Similarly,

⁶⁹⁴ Participant PM2.

⁶⁹⁵ Participant PM2.

⁶⁹⁶ Participant PM5.

⁶⁹⁷ Participant LW2.

⁶⁹⁸ Participant P4.

⁶⁹⁹ Participant J2.

⁷⁰⁰ Participant LW4.

AC2 (an academic and professor of law) thinks that “we need to discuss these issues to identify the defects in criminal justice in Kuwait and to develop it in the future”.⁷⁰¹ One of the judges also highlights the applicability of this line of inquiry to academic practice; according to J5, “we can develop the course of criminal justice in Kuwait”.⁷⁰² Thus, the significance of the topic was rather well-established as can be seen in the table below.

Themes	Subthemes and Key Codes	Representation
Importance of topics	The research of the topics is important	5PM 5LW 2P 4AC 4J
Attention to separation of powers in criminal justice	Increased attention from scientific communities required	5PM 4LW 2P 4AC 4J
	Increased practical investigation required	1PM LW P 1AC 1J

Note: Here and in the rest of the tables, the following abbreviations are used: PM – Parliament members, LW – Lawyers, P – Professionals, AC – Academics, J – Judges. The figure before the letter specifies the number of respondents of a particular group who mention the theme in their responses. For instance, the sequence “1PM LW P 1AC 1J” means that one parliament member, one academic, and one judge voiced the opinion or covered the theme to any extent in their response.

5.3. Kuwaiti Legislation Origins

The idea that the Kuwaiti legislation is the product of the influence of multiple schools is generally supported by the respondents: all of them acknowledge this fact. A few of them want to highlight the complexity of the phenomenon of hybrid law. For instance, PM1 points out that the diversity of Kuwaiti legislative origins can be further supported by the

⁷⁰¹ Participant AC2.

⁷⁰² Participant J5.

different “schools in Islamic Law” that have had their impact.⁷⁰³ Several participants emphasise and discuss particular influences; thus, PM1 decides to dwell on the Islamic and Egyptian influences and even provides the names of the Egyptian contributors to Kuwaiti legislation, including “the jurist Dr Abdul Razzaq Al-Sanhuri, Dr Mohsen Hafez, Othman Khalil Othman and others”.⁷⁰⁴ On the other hand, PM3 dedicates some time to explaining the history of Kuwaiti legislation, including Kuwaiti-British relationships and the introduction of Egyptian legislators.⁷⁰⁵ Islamic influences are also described as a very positive factor by P5.⁷⁰⁶ Thus, some of the participants exhibited a level of interest to particular sources of Kuwaiti law hybridisation, and the Egyptian, Islamic, and British influences were the primary ones.

Several participants also suggested that the diversity of the influences which have shaped Kuwaiti legislation “distinguishes”⁷⁰⁷ the latter makes it unique, “distinct”.⁷⁰⁸ The idea that the mixed origins make the Kuwaiti legislation better was also voiced. In particular, it was suggested that the origins of Kuwaiti legislation make it flexible and beneficial for separation of powers and democracy. Also, some of the participants believe that having a variety of sources is helpful for legislators. This idea is supported by PM4 who states that the hybrid nature of Kuwaiti law “has provided us, the legislators, with many channels to obtain our legislative sources”.⁷⁰⁹ A similar sentiment is expressed by one of the lawyers who asserts that “surely, the multiplicity of sources of the law is in favour of the Kuwaiti legislator”.⁷¹⁰ Similarly, one legal officer believes that the “multiplicity of sources” fosters

⁷⁰³ Participant PM1.

⁷⁰⁴ Participant PM1.

⁷⁰⁵ Participant PM3.

⁷⁰⁶ Participant P5.

⁷⁰⁷ Participant PM1.

⁷⁰⁸ Participant LW4.

⁷⁰⁹ Participant PM5.

⁷¹⁰ Participant LW4.

“creativity and innovation”.⁷¹¹ Positive comments about the hybridity of the law are very common in the sample, although a few participants remain simply neutral, stating the presence of different legislative influences as a matter of fact.

According to P1, the Kuwaiti legislation is also “consistent with the nature of its people”.⁷¹² The above-presented statements imply that the participants generally view Kuwaiti legislation from a favourable perspective. One participant does point it out that, in general, varied legislative sources may result in confusion. However, according to this interviewee, there are no contradictions within the resulting legislation that could be attributed to hybridisation.⁷¹³ As a result, the participant believes that the nature of Kuwaiti legislation is at least not harmful to the country, which supports the idea that this legislation is favoured by many of the interviewees. These findings respond to one of the research questions of the study and provide some evidence which suggests that separation of powers can be supported by the legislation of Kuwait (see table below).

Themes	Subthemes and Key Codes	Representation
Kuwaiti legislation origins	Multiplicity of origins is present	5PM 5LW 5P 5AC 5J
	Uniqueness of Kuwaiti legislation	2PM 2LW 2P 1AC J
	Positive outcomes of Kuwaiti legislation origins <ol style="list-style-type: none"> 1. Flexibility for legislators 2. Variety of sources for legislators 3. Contribution to democracy 4. Positive impact on separation of powers 	<ol style="list-style-type: none"> 1. 2PM 1LW P 1AC 3J 2. 1PM 1LW 2P 1AC 2J 3. 2PM LW P 2AC 2J 4. 2PM 1LW 3P 3AC 1J

⁷¹¹ Participant P5.

⁷¹² Participant P1.

⁷¹³ Participant LW1.

5.4. Functions and Importance of Separation of Powers

A wide variety of functions were attributed to separation of powers by the participants. First, they noted that separation of powers is required for the independence of the three authorities, including the judiciary. As stated by PM1, the separation of powers is “one of the important principles and guarantees of justice, integrity, and the authorities’ supervision of each other, with them being separate and independent powers”.⁷¹⁴ Second, the significance of separation of powers for democracy was supported. As put by J5, separation of powers “is the essence of the democratic system”.⁷¹⁵ In contrast, the lack of separation of powers was associated with dictatorship and absolute power in the participants’ responses. As emphasized by PM3, “the separation of powers limits the monopolisation of decisions and procedures”.⁷¹⁶ According to J4, the developers of the Constitution were aware of this fact and specifically worked to incorporate the principle of separation of powers into the Constitution to ensure that the judiciary would be independent and that the rights of the citizens would be protected when accused.

Consequently, several participants also noted the idea that human rights are supported by separation of powers. Other functions that were noted included the improvement of transparency and the reduction of corruption in the government and the criminal justice system. The ultimate goal of separation of powers was reported to be concerned with public justice. In particular, J5 demonstrates that all or most of the separation of powers functions are required for public justice. Thus, the mentioned functions of separation of powers are shown to contribute to the eventual goal of a just judiciary system that can uphold public justice as can be seen in the table below and Figure 6.

⁷¹⁴ Participant PM1.

⁷¹⁵ Participant J5.

⁷¹⁶ Participant PM3.

Themes	Subthemes and Key Codes	Representation
Multiple functions of separation of powers	Separation of powers for the independence of authorities	5PM 3LW 3P 2AC J
	Separation of powers for judiciary independence	PM LW P 3AC 4J
	Separation of powers to avoid dictatorship/ separation of powers for democracy	4PM 4LW 3P 3AC 2J
	Separation of powers for human rights	2PM 2LW 3P 4AC 4J
	Separation of powers against corruption	PM 1LW 1P 1AC J
	Separation of powers for transparency	2PM 2LW 1P 3AC 2J
	Separation of powers for justice	2PM 2LW 1P 3AC 4J

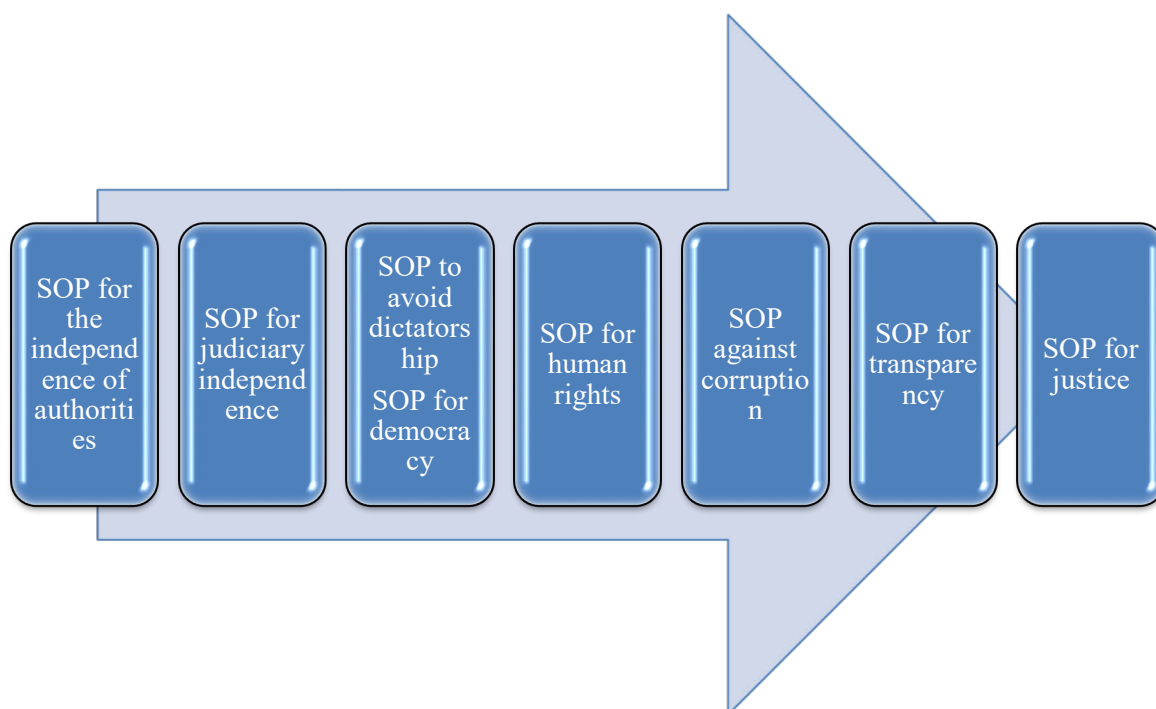


Figure 6. Separation of powers' functions contributing to justice.

Moreover, separation of powers within the judiciary was supported. In particular, as pointed out by PM1, the Constitution recommends the establishment of the Supreme Council of the Judiciary and the Council of State, in which the latter would be concerned with administrative justice. However, despite being mentioned in the Constitution,⁷¹⁷ this principle has remained inactive since 1962. According to the PM and one of the judges, this fact can affect the effectiveness and independence of the administrative judiciary in a negative way (see table below).

Themes	Subthemes and Key Codes	Representation
Separation of powers within criminal justice	Constitutional roots of separation of powers within criminal justice	1PM LW P AC 1J
	Lack of separation of powers within criminal justice in Kuwait	1PM LW P AC 1J
	Need for separation of powers within criminal justice in Kuwait	1PM LW P AC 1J

5.5. Separation of Powers in Kuwait

When considering Kuwaiti separation of powers in the field of criminal justice, the respondents employed the proposed criteria (see the end of Appendix B), and some of them directly expressed their agreement with the factors chosen for consideration (see table below). Neither of the participants suggested that the criteria were inappropriate; some of them just did not comment on their appropriateness, but they still employed the criteria, and no direct criticisms or recommendations for improvement were offered.

⁷¹⁷ Constitution of Kuwait, 1962, art. 171.

Themes	Representation
Proposed research criteria approval	2PM 1LW 1P 2AC 1J

The majority of the participants explicitly characterise separation of powers as a tool that can effectively ensure the protection of Kuwaiti population, even though some of them also note the issues that Kuwaiti separation of powers experiences. The rest of the participants also commend separation of powers as a principle, but they focus on the difficulties that Kuwaiti separation of powers faces. When considering the guarantees of separation of powers in Kuwait, the majority of the interviewees noted Constitution,⁷¹⁸ but they also mentioned other legislation (Regulation of the Judiciary Law,⁷¹⁹ as well as specific precedents), administrative provisions, the Parliament, Constitutional Court, and even public opinion.

The effectiveness of separation of powers in Kuwait can be described as follows: it is generally effective and has a relatively good legislative foundation (especially in the form of the Constitution), but there is a number of issues that “impedes its application, which makes the abuse of power potentially possible”.⁷²⁰ Given the attention of the project to criminal justice separation of powers, most of the examples offered by the participants are mostly concerned with the latter, but some illustrations are not connected to it. In particular, as pointed out by PM1, in Kuwait, “the members of the executive power, the ministers, are considered members of the legislative power by virtue of their posts”.⁷²¹ From the perspective of the PM, this issue suggests that the principle of separation of powers is not fully implemented in Kuwait.

⁷¹⁸ Constitution of Kuwait, 1962, art. 50, 163.

⁷¹⁹ Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁷²⁰ Participant AC3.

⁷²¹ Participant PM1.

Most controversial problems that are considered by the participants are related to the judiciary. The problem of the Article 2 of the Regulation of the Judiciary Law⁷²² consists of the fact that it moves the “acts of sovereignty” out of the field of the judiciary’s responsibility, which is viewed as unconstitutional by the participants since this piece of legislation violates separation of powers. The executive power also has control over the management of misdemeanour cases and has the right to contract foreign judges. Investigators are not separated from the executive power either. Furthermore, as pointed out by the respondents, the financial independence of the judiciary is compromised: the Ministry of Justice is the executive body that is busy with the judicial budget. PM2 describes this fact as a “blatant violation” of separation of powers while commenting that “the judicial system is independent in many [other] areas”.⁷²³ According to PM5, this concern is “one of the most critical problems in the judicial system”.⁷²⁴ In general, the majority of the participants treated it very seriously, and, as pointed out by J1, there are official “proposals for its [the budget’s] independence” as well, which implies that specialists who were not recruited for the sample also find themselves disagreeing with this situation.⁷²⁵

Another issue that is pointed out by the participants is the fact that the Judicial Council includes the Undersecretary of the Ministry of Justice, who is obviously a member of the executive power. PM2 suggests that this person cannot have notable power since it is just one representative of the executive power among those of the judiciary power, but he still views the presence of the Undersecretary in the Judicial Council as a concern that compromises separation of powers. In fact, the participants highlight the idea that this fact is unconstitutional. Overall, at least two participants explicitly suggest that in Kuwait, the

⁷²² Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁷²³ Participant PM2.

⁷²⁴ Participant PM5.

⁷²⁵ Participant J1.

executive branch has much power over the remaining two. As one of them puts it, “the elements of preference and influence are always in favour of the executive power over other authorities”.⁷²⁶ Thus, notable issues with separation of powers in Kuwait were found during this study (see table below).

Themes	Subthemes and Key Codes	Representation
Separation of powers in Kuwait	Separation of powers is an effective tool in achieving the protection of the population of Kuwait	4PM 2LW 5P 4AC 5J
	Guarantees of separation of powers in Kuwait <ol style="list-style-type: none"> 1. Constitution 2. Parliament 3. Regulation of the Judiciary Law 4. Public opinion 5. Precedents 6. Administrative provisions 7. Constitutional Court 	<ol style="list-style-type: none"> 1. 4PM 4LW 5P 5AC 5J 2. 1PM 2LW P 1AC 1J 3. PM LW 2P AC 3J 4. 1PM 1LW P AC 1J 5. PM 1LW P AC J 6. PM 1LW P AC J 7. 2PM 1LW 2P AC J
	Deficiencies in Kuwaiti separation of powers <ol style="list-style-type: none"> 1. Incomplete application of separation of powers in practice 2. Article 2 of the Regulation of the Judiciary Law 3. Financial dependence of the judiciary 4. Foreign judges as a problem 5. Need for investigator independence 6. Executive control over misdemeanours 7. The presence of the Undersecretary of the Ministry of Justice in the Supreme Council 8. The executive branch overpowering the rest 	<ol style="list-style-type: none"> 1. 2PM LW P 2AC J 2. 1PM LW P 4AC 4J 3. 5PM 3LW 2P 5AC 4J 4. 3PM 2LW P 1AC 4J 5. 5PM 4LW 3P 5AC 5J 6. 3PM 3LW P AC J 7. 5PM 4LW P 2AC 3J 8. 2PM LW P AC J

⁷²⁶ Participant PM1.

5.6. Characteristics of Kuwaiti Judicial System

The effectiveness of Kuwaiti separation of powers in the judiciary is supported by multiple respondents. For example, according to J4, the Kuwaiti “judiciary is considered a distinguished judiciary in the region,”⁷²⁷ which, from his perspective, indicates that the separation of powers within this system is effective. However, J4 proceeds to admit that “there may be shortcomings”⁷²⁸ which might have negative effects on the effectiveness of the system. Using the proposed criteria, the respondents noted the following characteristics of Kuwaiti judicial system, many of which can be used to exemplify the problems with separation of powers in Kuwait.

The participants commend the transparency of Kuwaiti judiciary almost unanimously; only one of the participants points out that there are “issues over cases of a special nature, such as those having a great political or commercial interest”⁷²⁹ (see Figure 7). The same person is also the only one to suggest that the judicial system demonstrates some favouritism when judge appointment is concerned, “which is evident from the repetition of certain names and family ties”.⁷³⁰ No other participant explicitly mentions favouritism. Most of the participants also commend the appeal system of Kuwait, and some of them praise the judge dismissal mechanism.

⁷²⁷ Participant J4.

⁷²⁸ *Ibid.*

⁷²⁹ Participant PM1.

⁷³⁰ *Ibid.*

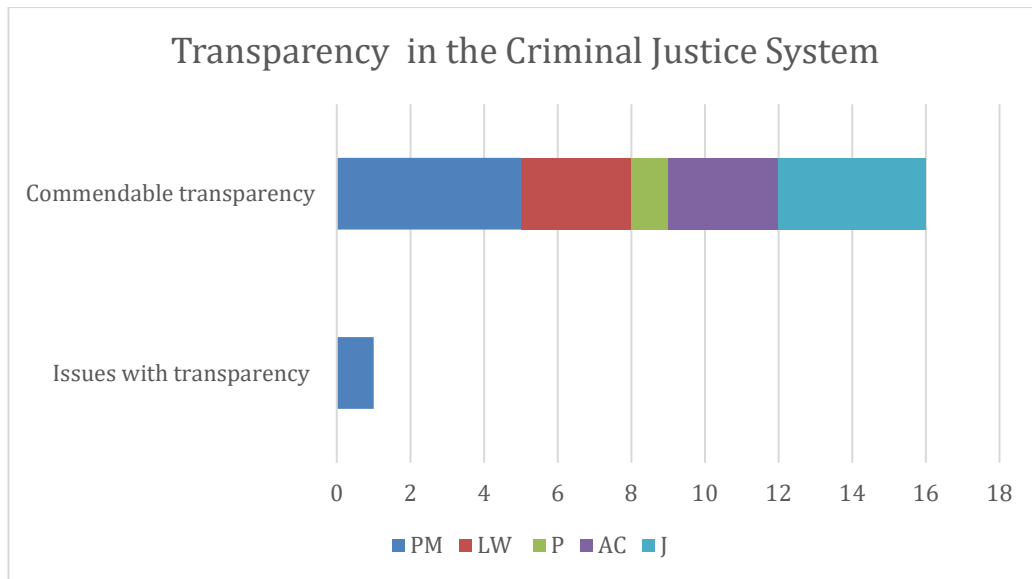


Figure 7. Transparency in Kuwaiti criminal justice system.

Another very important topic is the independence of the judiciary. According to J5 and other participants, “no person has the right to interfere in the judge's decisions and acts,”⁷³¹ which means that the independence of the judges is guaranteed in Kuwait. However, there are some aspects that can compromise this independence.

First, the fact that the Minister of Justice and his deputy attend the Supreme Judicial Council when the appointment of its members is in process was pointed out as problematic. The Minister of Justice has no right to vote in this process, but in the view of some of the participants, the situation still can be viewed as “indirect interference,”⁷³² which “may put pressure on members of the judicial authority and affect any decision that may be taken”.⁷³³

Moreover, as pointed out by participants, the Ministry of Justice does have some power over the judiciary, which might be translated to some indirect power over the appointment

⁷³¹ Participant J5.

⁷³² Participant J4.

⁷³³ Participant J3.

procedures. In particular, as stated by J4, has the right to contract foreign judges, which is “an unjustified intervention”⁷³⁴ that can compromise the independence of the judiciary. J5 calls it a “blatant violation of the judicial authority,”⁷³⁵ as well as the principle of separation of powers. PM1 reports that there are some efforts aimed at the Kuwaitization of the judiciary, but states that foreign judges are still present.

Furthermore, the Ministry of Justice is concerned with the supervision of the judicial budget. According to J4’s opinion, this dependence can provide the Ministry of Justice with the opportunity to affect the judiciary. Finally, the topic of the militarisation of the General Directorate of Police Investigations includes the concern with the transfer of interrogation authority to the military. According to PM1, the military “is constantly following the instructions of its superiors by virtue of military education,”⁷³⁶ which, consequently, can compromise the independence of the interrogator. Overall, the executive power has multiple mechanisms that it can employ to affect the judiciary.

Other themes that are mentioned by the participants include the presence of bureaucracy in the system, which slows down its processes, and the need for separation of powers within the judiciary itself (as proposed by the Constitution). Furthermore, the participants were asked to evaluate the cases of the miscarriages of justice and the rights of offenders and inmates. Most of the interviewees generally believe that the Kuwaiti criminal justice system is just and that the miscarriages do not occur particularly often. However, they report that the situation can be different for political crimes. As pointed out by PM2, “in general the Kuwaiti judiciary can be relied upon at all levels, but there may be controversial cases that are political in nature”.⁷³⁷ According to the participants, this issue

⁷³⁴ Participant J4.

⁷³⁵ Participant J5.

⁷³⁶ Participant PM1.

⁷³⁷ Participant PM2.

may be caused by the fact that there is no direct regulation of political crimes, which is a problem in itself.

Regarding the rights of inmates, as pointed out by LW1, the “evaluation of the rights of offenders and inmates is bad”⁷³⁸ specifically because the practice of their rights is insufficiently in line with the legislation. The respondents generally agree that the rights of offenders and inmates are protected in theory, but several of them also point out the idea that in practice, the relevant legislation is not always realised. All the themes pertinent to the characteristics of Kuwaiti judicial system can be seen in the table below.

Themes	Subthemes and Key Codes	Representation
Characteristics of Kuwaiti judicial system	Transparent judiciary	5PM 3LW 1P 3AC 4J
	Issues with transparency in the judicial system	1PM LW P AC J
	Favouritism and patronage in judicial system	1PM LW P AC J
	Judge independence and related issues <ol style="list-style-type: none"> 1. Legislative independence of judges (Article 163) 2. Appropriate judge dismissal mechanism 3. Favouritism in judge appointment 4. The presence of the Undersecretary of the Ministry of Justice in the Supreme Council 5. Financial dependence of the judiciary (Ministry of Justice) 6. Foreign judges (appointed by the Ministry of Justice) 7. Effort at judiciary Kuwaitization 8. No separation of investigators from the executive power 	<ol style="list-style-type: none"> 1. PM 2LW 3P 2AC 4J 2. PM LW P 1AC 3J 3. 1PM LW P AC J 4. 5PM 4LW P 2AC 3J 5. 5PM 3LW 2P 5AC 4J 6. 3PM 2LW P 1AC 4J 7. 2PM LW P 1AC J 8. 5PM 4LW 3P 5AC 5J

⁷³⁸ Participant LW1.

	Excessive bureaucracy	PM LW 3P AC J
	Need for separation of powers within the judiciary	1PM 1LW P AC J
	Miscarriages of justice 1. Rare miscarriages of justice 2. Political crimes and miscarriages of justice 3. No political crime category (legislative level issue)	1. 5PM 4LW P 1AC 4J 2. 4PM 3LW P 1AC J 3. 5PM 3LW 5P 4AC 4J
	Rights of offenders and inmates 1. Appropriate legislation for the rights of offenders and inmates 2. Inappropriate practical application of the rights of offenders and inmates	1. 5PM 2LW 1P 1AC 5J 2. 5PM 3LW P 1AC 1J
	Commendable appeal system	5PM 5LW 4P 2AC 5J

It is noteworthy that P3 who is working at the Ministry of Justice suggests that the situation with the budget “may be theoretically unacceptable, but actually, there is no interference from the part of our Ministry”.⁷³⁹ Also, she believes that the fact that the Ministry does not appoint judges mitigates the fact that it contracts foreign judges. A similar position is expressed by P1 and P2, who believe that “overseeing” the budget is not the same as “controlling” it. However, LW2 disagrees with this position, stating that even “if the ministry claims that all it regulates is the financial procedures, it does not mean that it has the right to the same”.⁷⁴⁰

⁷³⁹ Participant P3.

⁷⁴⁰ Participant LW2.

In a similar way, P1 reports that he does not “find a significant negative effect of this issue”⁷⁴¹ when talking about the lack of the separation of investigation from the executive power. P1 also believes that there is no need for a political crime law. However, these statements are contradicted by the suggestions of some of the participants that the problem of the dependence of the judiciary and the lack of appropriate legislation results in miscarriages of justice. In particular, LW2 relates almost every problem of the judiciary with the intervention of the executive power, including the miscarriage of justice in the cases of political crimes and the poor practical implementation of the rights of culprits and detainees. LW3 also suggests that the political crimes concern is connected to the fact that misdemeanours are investigated by the Ministry of Interior. The topic of the causes of the problems of separation of powers will be considered next.

5.7. Possible Causes of the Areas of Concern

A common theme in the responses is the idea that the interference of the executive power in the matters of the judiciary results in negative outcomes. This theme is also connected to the statements that some of the shortcomings of the judiciary are the result of the activity of inactivity of the executive and legislative branches. For instance, LW3 reports that the miscarriages of justice with respect to political crimes are the result of the interventions of the executive branch. Moreover, as pointed out by the participants, the lack of the definition of political crimes is an issue that is caused by the legislative bodies. Apart from that, some of the problems are interconnected. For example, AC3 and AC5 suggest that the presence of foreign judges, who are contracted by the executive branch, is the result of the financial dependence of the judiciary. Thus, at least some of the issues are connected to the executive and legislative power.

⁷⁴¹ Participant P1.

Such statements imply that while dependent, the judiciary cannot resolve some of its problems. For example, when considering the problem of political crimes, PM1 states that he does not “blame the Kuwaiti judiciary,”⁷⁴² pointing out that this issue is outside of the competency of the latter. Similarly, J4 suggests that since it is the decision of the executive branch to contract foreign judges, the related shortcomings are “not on the part of the judicial authority”.⁷⁴³

In this connection, the participants have proposed the idea that the lack of separation of powers, dependence of the judiciary, and legislative and executive shortcomings or misconducts are some of the key reasons of the difficulties experienced by the Kuwaiti judiciary. Some of the examples of the latter include the lack of required legislation (for instance, on political crimes) and the exploitation of this issue (for instance, the intervention of the executive power in political crime management). Also, the participants note “the failure of the National Assembly to perform its essential functions, its focus on supervision rather than legislation”⁷⁴⁴ and the presence of unconstitutional legislation, for example, Article 2 of the Regulation of the Judiciary Law⁷⁴⁵ (and its exploitation by the executive power). In summary, the lack of proper cooperation between the branches of power was established as the cause of the problem.

On the other hand, the participants do not suggest that the judiciary cannot do anything to improve the situation. In fact, J4 expresses firm belief that “the legislative power has a major role in reforming these shortcomings”⁷⁴⁶ because the latter are directly concerned with its field of activity. Consequently, the inactivity of the judiciary is viewed as one of the reasons for the issues. Moreover, the inactivity of the people of Kuwait was also noted;

⁷⁴² Participant PM1.

⁷⁴³ Participant J4.

⁷⁴⁴ Participant AC2.

⁷⁴⁵ Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁷⁴⁶ Participant J4.

it is the belief of some of the participants that the people can and should promote changes in Kuwait to ensure separation of powers and democracy. On the other hand, PM3 points it out that the problem of people’s inactivity (who, as he reminds, remain “the source of all powers” in Kuwait from the perspective of the Constitution) is concerned with the lack of education on how to be politically active.⁷⁴⁷ Still, the point about the delay in the public pressure on the legislators and other branches of power is a prominent theme in the interviews.

Themes	Subthemes and Key Codes	Representation
Possible causes of issues in Kuwaiti judiciary	Lack of separation of powers	1PM 2LW P AC J
	Dependence of the judiciary	1PM 2LW P AC J
	Legislative and executive shortcomings cause separation of powers inefficiencies 1. Unconstitutional legislation 2. Lack of required legislation 3. Exploitation of the inappropriate legislation by the executive power 4. National Assembly focuses on supervision, not legislation	1. 1PM LW P 2AC 2J 2. 1PM 4LW 1P 2AC 3J 3. PM LW P 1AC 1J 4. PM 1LW P 2AC 1J
	Weak cooperation between power branches	1PM 1LW P AC 1J
	Weak public activity (absence of pressure on the legislative branch from the public)	2PM LW P AC 1J
	Inactivity of the judiciary	PM 2LW P AC 1J

A number of opinions were voiced regarding the possibility of flaws in the Constitution that could result in issues. Many participants suggest that the Constitution provides sufficient information about separation of powers and can serve as its guarantee. However, it was also suggested that while “Article 50 refers to the separation of powers in a clear

⁷⁴⁷ Participant PM3.

manner,”⁷⁴⁸ other articles that mention the three branches of power tend to “mix”⁷⁴⁹ them. An example that is offered by PM1 illustrates this tendency. As pointed out by the interviewee, “the members of the executive power, the ministers, are considered members of the legislative power by virtue of their posts”.⁷⁵⁰ Therefore, the legislative and executive powers are not fully separated in the Constitution itself despite the statement made in Article 50.⁷⁵¹ Furthermore, the notion of the “cooperation” of powers was noted as problematic because it can prompt confusion and even be used to negate the principle of separation of powers. In particular, according to J2 and AC3, the Ministry of Justice employs the argument of cooperation to justify it “overseeing the judicial budget,”⁷⁵² which limits the independence of the judiciary.

It should be pointed out that this position can be contested. Some of the participants do not view the use of the word “cooperation” as problematic. Instead, they consider Constitutional phrasing to be sufficiently clear. For instance, J3 suggests that the Constitution “provides for separation and then cooperation,”⁷⁵³ which implies the greater significance of separation of powers that can be followed by cooperation in case the latter does not lead to interference. In fact, according to J3, cooperation and interference are distinct, and since the Constitution only mentions cooperation, it does not condone interference. In turn, AC3 suggests that the “cooperation” element can be beneficial since it offers opportunities for a flexible approach to the arrangement of the three branches, but in her view, it may have resulted “wrong practices”.⁷⁵⁴ According to AC3, the Constitution stresses the importance of separation of powers, which, in her view, includes

⁷⁴⁸ Participant PM1.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*

⁷⁵¹ Constitution of Kuwait, 1962, art. 50, 56.

⁷⁵² Participant J2.

⁷⁵³ Participant J3.

⁷⁵⁴ Participant AC3.

“administrative and financial separation”;⁷⁵⁵ AC3 does not view these aspects of independence as subject to the “flexibility” related to cooperation.

The existence of the legislation that is unconstitutional and tends to endanger separation of powers was also mentioned by the participants. According to J4, the “problem is not in the Kuwaiti Constitution... the problem is in the legislation that violates this article”.⁷⁵⁶ A similar idea is proposed by J2. An example of such unconstitutional legislation, which is mentioned, among other participants, by J4 is the Article 2 of the Regulation of the Judiciary Law,⁷⁵⁷ which deprives the judiciary of the right to consider the “acts of sovereignty”. J4 describes the situation as the one in which “the Executive Authority can violate the law”.⁷⁵⁸ AC2 also believes that it is the unconstitutional legislation that causes the issues while the Constitution is sufficiently clear.

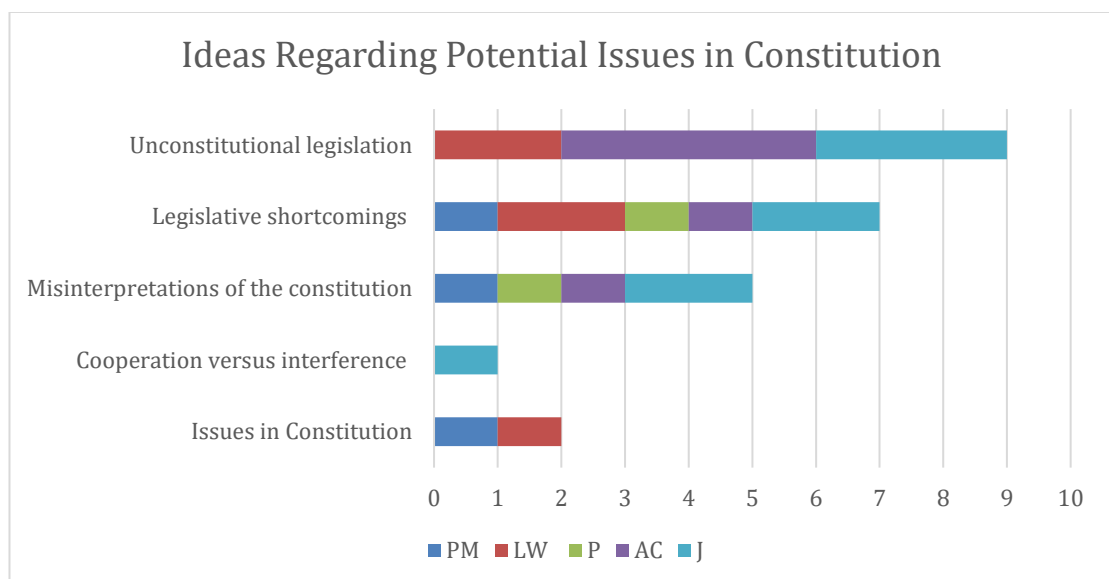


Figure 8. Considerations of the potential issues in Constitution.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ Participant J4.

⁷⁵⁷ Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁷⁵⁸ Participant J4.

J5, on the other hand, admits the presence of wrongly developed legislation but also suggests that separation of powers problems may be the result of incorrect interpretations of the law. J1 also supports the idea of misinterpretation stating that he does not “blame the Constitution” but rather “the understanding of the legislator”.⁷⁵⁹ AC1 points out that Constitutional texts are not supposed to be detailed, which implies that the definition of Kuwaiti Constitution is sufficient, but misinterpretations do take place. Finally, the absence of appropriate legislation or “legislative vacuum”⁷⁶⁰ as phrased by J3 may result in the problem of unconstitutional activities. The example of the latter issue is the absence of the regulation of political crimes, which results in miscarriages of justice and violations of separation of powers as was shown above. Figure 8 and the table below illustrate the debate regarding the appropriateness of the constitutional definition of separation of powers.

Themes	Subthemes and Key Codes	Representation
Issues in Constitution	Inappropriate constitutional definition of separation of powers	1PM 1LW P AC J
	Appropriate constitutional definition of separation of powers. Real causes of issues: <ol style="list-style-type: none"> 1. Cooperation versus interference 2. Misinterpretations of the constitution 3. Legislative shortcomings 4. Unconstitutional legislation 	<ol style="list-style-type: none"> 1. PM LW P AC 1J 2. 1PM LW 1P 1AC 2J 3. 1PM 2LW 1P 1AC 2J 4. PM 2LW P 4AC 3J

5.8. Additional Measures and Solutions

When considering the additional mechanisms that can help separation of powers or be otherwise conducive to it fulfilling its function, the participants made two major

⁷⁵⁹ Participant J1.

⁷⁶⁰ Participant J3.

suggestions: they focused on the public opinion and its various aspects and the transparency and independence of the press. The former element was mentioned predominantly for its ability to exercise pressure on the government in order to push it to ensure separation of powers and make various changes that would prevent dictatorship and support democracy. Furthermore, some of the participants point out the importance of educating the public to ensure their ability to defend their interests. As put by PM4, it is necessary to “raise the awareness of people so that they will put pressure on their representatives”.⁷⁶¹ The participants also highlighted the role of various organisations in making the public opinion heard (including the promotion of awareness and the pressuring of the government into the direction of the public will). The organisations include those concerned with human rights and transparency, as well as the professional organisations of the people working in the criminal justice system.

According to some participants, the public opinion is also greatly influenced by the press, which is why the freedom and independence of the press were also viewed as a form of complementary safeguards. For example, PM1 reports taking action in this respect by filing motions “to promote the Kuwaitization and transparency of the press,”⁷⁶² in particular, with respect to financing. Also, in his opinion, editorial policies and the appointment of editors and journalists by the owner of a newspaper should be avoided. Thus, the PM suggests a number of actions that can help to improve the freedom of speech and keep the press independent. The additional measures can be found in the table below.

Themes	Subthemes and Key Codes	Representation
Additional measures to ensure the protection of human	Additional measure: public opinion 1. The activities of the human rights organisations,	1. 1PM 4LW 2P 1AC 1J

⁷⁶¹ Participant PM1.

⁷⁶² Participant PM1.

rights (aside from separation of powers)	transparency organisations, Kuwait Lawyers Society, and Association of Lawyers 2. Improvement of public awareness 3. Pressuring the government to make changes	2. 3PM LW 1P 1AC J 3. 2PM 4LW 2P 1AC 3J
	Additional measure: transparency and independence of the press	2PM LW P 1AC J

Apart from the additional measures, the participants considered the factors that can help to resolve the issues that they had mentioned. In general, the need for change is supported by every participant, although they may have different foci. For example, the Ps who do not consider the dependence of the judiciary to be a problem focus on the problem of bureaucracy and suggest combating it. In particular, as proposed by P3, “it is time to reduce paperwork and give more powers to ordinary employees in order to speed up the course of judicial work”.⁷⁶³ However, the rest of the participants are more concerned with ensuring the independence of the judiciary.

They offer several solutions. Given the fact that many of the issues were connected to the problems with the legislative and executive branches, many interviewees focus on them. They point out the idea that legislation can be used to resolve virtually any issue and highlight the importance of the key legislative body (National Assembly) in the process. Furthermore, they emphasise that the cooperation of the executive power with the judiciary is required to combat the currently present imbalance in their power dynamics.

Moreover, since the inactivity of the judiciary was criticised by the participants, suggestions were made about some changes in it, including the introduction of

⁷⁶³ Participant P3.

Kuwaitization and separation of powers (consisting of the separation of administrative justice). Since Kuwaitization is currently prevented by the contracts with foreign judges that are made by the executive power, this measure may be not entirely within the judiciary’s power. However, as pointed out by LW3, this issue can be resolved by one of the above-mentioned solutions; in particular, the legislative power can develop “a law that prevents the Ministry of Justice from contracting foreign judges”.⁷⁶⁴ There were also direct comments about the need to ensure separation of powers, but, in general, all the suggestions seem to be related to the idea of reducing the power of one branch over the other, which constitutes separation of powers. In summary, the proposed solutions target the causes of the issues that were found by the participants, as well as some individual problems.

Themes	Subthemes and Key Codes	Representation
Solutions to the separation of powers inefficiencies in Kuwait	Need for change	5PM 5LW 5P 5AC 5J
	Legislation as a solution	PM 1LW P 3AC 1J
	National Assembly	1PM 2LW P AC J
	Cooperation of the executive branch with the judiciary	2PM LW P 1AC J
	Kuwaitization of the judiciary	2PM LW P AC J
	Separation of powers within the judiciary	1PM LW P 1AC J
	Ensuring separation of powers	2PM LW 1P AC J
	Combating bureaucracy 1. Reducing paperwork 2. Sharing power	1. PM LW 3P AC J 2. PM LW 1P AC J

⁷⁶⁴ Participant LW3.

5.9. Change Efforts

An important theme that was identified is the efforts aimed at changing the exposed issues. Multiple efforts have been mentioned. Some of them include the activities in which the participants take part due to their occupation (for example, educators spread the information about separation of powers, and PMs promote it in their practice). Apart from that, the use of research to advance separation of powers and some public efforts were also mentioned. For instance, PM1 describes the efforts aimed at taking away the authority of the executive power over misdemeanours, and PM2 discusses those targeted at improving the practical application of the guarantees of the rights of inmates and offenders with the focus on the resources of correctional institutions. Similarly, AC4 reports being engaged in relevant research, and AC5 discusses the lectures that have been carried out to spread the information about the separation of powers. Moreover, it has been stated that the government reflects the need for the improvement of the Kuwaiti criminal justice system and separation of powers in its vision (in particular, slogans). However, PM1 does not believe that change is a priority of the current government (see table below).

Themes	Subthemes and Key Codes	Representation
Change efforts	Occupational	4PM 5LW 2P 4AC 5J
	Research-related	PM 1LW P 3AC J
	Public	1PM 1LW 2P AC J
	Change is not a governmental priority in practice	1PM LW P AC J
	Change is supported by the governmental vision	1PM LW P AC J

The success of such campaigns is not discussed by the majority of the participants, but there are some conclusions that can be made. For example, PM1 reports that “several campaigns have failed to transfer”⁷⁶⁵ the authority over the investigation of misdemeanours from the executive to the judiciary power. Similarly, L4 reports that they are “tired of asking the government to respect the Kuwaiti Constitution”.⁷⁶⁶ However, neither of the participants reports giving up change efforts; rather, they all make proposals for change, and the majority of them report working to advance it.

Apart from that, some of the participants seem to communicate a call to action. For example, J5 believes that “academics, researchers and transparency societies” should “exercise pressure”⁷⁶⁷ to address the inefficiencies described above. J2 highlights the importance of the activity of the judiciary, including individuals, who can exert pressure on the legislative and executive branches. The same idea was proposed by J3 who considers the inactivity of the judiciary to be one of the reasons for current separation of powers problems. The participants believe that by taking action, the judiciary can reclaim its independence and that the public can exert sufficient pressure on the legislative branch to improve the situation.

5.10. Additional Notes: Participants’ Perspectives

It is noteworthy that most of the participants expressed their personal attitudes and evaluations of the discussed phenomena. One of the issues that many of the respondents feel strongly about is the presence of foreign judges in the system and want to ensure the Kuwaitization of the judiciary. PM1 rationalises his perspective by suggesting that Kuwaiti judges would have a greater emotional investment in their position. In particular, foreign

⁷⁶⁵ Participant PM1.

⁷⁶⁶ Participant L4.

⁷⁶⁷ Participant J5.

judges “lack any ties to Kuwait” and are not “prepared to fight battles or take risks and sacrifices” since they come “to collect his children's livelihood and return”⁷⁶⁸ to their country. PM1 also expresses strong a belief that a “citizen judge” has a better understanding of the Kuwaiti context, in particular, the “social and economic foundations on which the regime is based”.⁷⁶⁹ Thus, PM1 suggests that the employment of foreign judges should be detrimental to the country.

On the other hand, PM2 expresses confusion about the situation, suggesting that the prevalence of foreign judges implies the lack of vacancies for Kuwaiti judges. In his view, the preference of foreign judges cannot be explained logically. He states that he does not believe that there is any “justification for the existence of any foreign judge”⁷⁷⁰ because, according to him, there is no shortage of Kuwaiti law graduates. This sentiment is shared by LW4 who finds the situation “funny, as if Kuwait does not have legal Kuwaiti cadres who are capable of working as judges”.⁷⁷¹

PM3 believes that foreigners should not be contracted because they might be appointed through different criteria in their home countries, although he stipulates that in the cases when it might be necessary, the judiciary needs to be involved in the process, not the executive power. PM4 highlights the idea that Kuwaiti citizens have less reason to trust foreign judges. AC2 proceeds to suggest that “there is no need to appoint a foreign judge, unless the Executive Authority wants to interfere in the judicial authority”.⁷⁷² In summary, the problem of foreign judges is associated with multiple arguments and strong feelings for some of the participants.

⁷⁶⁸ Participant PM1.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Participant PM2.

⁷⁷¹ Participant LW4.

⁷⁷² Participant AC2.

Apart from that, some hopeful comments were offered. For instance, J1 expresses the hope that the change efforts made by him and his colleagues can improve the situation. J5 hopes to see more research on separation of powers, believing that it should be helpful in improving the criminal justice in Kuwait. Most of the participants mention change efforts and their own contribution to such efforts. They also propose meaningful solutions for the issues. They have a practically-oriented and optimistic approach to the desired changes.

5.11. Conclusions

The present chapter has summarised the findings of the interviews. The discrepancies in the responses are few; the perspectives of the respondents came into direct confrontation in the cases of the transparency of the criminal justice system, the presence of flaws in Constitution, and the impact that the interference of the executive branch has on the judiciary. There are also some varied perspectives on the employment of foreign judges in Kuwait. The discrepancies can be explained either by different experiences (for example, of working within a particular branch of power) or personal perspectives. In most cases, however, the participants' responses either support or complement each other. The significance of the topic was established along with the multiple functions of separation of powers; Kuwaiti separation of powers, especially in criminal justice, was analysed. Moreover, the criminal justice system was also analysed, the causes of issues within it were reviewed, and suggestions for its improvement were offered. The findings covered the key topics that the interviews intended to cover, and the results will be discussed in the next section.

6. Discussion

The present section will offer a discussion of the literature review and the findings of the interviews. It will focus on the key themes in the responses and their relationships with the literature review in an attempt to find similarities, differences, additional information, and other important conclusions that can be drawn from the data. The respondents covered the research questions in a way that demonstrated an almost absolute uniformity of responses. The key themes can be used to support, illustrate, or expand on the topics discovered during the literature review.

6.1. Research Justification: The Importance of Criminal-Justice Separation of Powers

One of the first topics that the participants cover in the interviews justifies the research: some of them explicitly pointed out that the discussion of its themes is essential, the rest did not oppose this idea, and some of the participants reported that increased academic or practical interest to the topics is required. Thus, the need for the current research is supported by the respondents, and they approved of the investigation. Similarly, the need for the study is also supported by the literature. The key resource in this regard is that by Barkow; she demonstrates that the topic of the criminal-justice separation of powers is understudied but crucial due to the specifics of the criminal justice system.⁷⁷³ Also, there is the literature which can be used to advocate for the importance of the mechanisms for protecting the people involved in criminal justice.⁷⁷⁴ Since separation of powers is one of such mechanisms,⁷⁷⁵ the literature review generally demonstrates that studying criminal-justice separation of powers is essential.

⁷⁷³ Barkow, *supra* (n 15) 989, 989-1031.

⁷⁷⁴ Ashworth, *supra* (n 20) 591.

⁷⁷⁵ Samuels (n 1) 703, 706; see also Montesquieu, *supra* (n 6) at 224.

Furthermore, both the participants and the literature review indicate that Kuwaiti separation of powers (as well as criminal justice) is understudied. From the literature review, it is predominantly concluded due to the lack of studies on the topic; for example, the researcher managed to find only one recent report on criminal justice in Kuwait, and it was not dedicated to separation of powers.⁷⁷⁶ In general, different elements of Kuwaiti separation of powers and criminal justice were taken from different sources; the extensive research that was carried out for this study found that the topic of Kuwaiti criminal-justice separation of powers is not well-studied.

The interviews supported this idea directly: the participants reported that separation of powers, criminal-justice separation of powers, and Kuwaiti criminal-justice separation of powers are the topics that are important and require more attention from researchers. Additionally, three participants also suggested that their practical investigation is important; that is, it should be studied both from the perspective of separation of powers theory and the practice of its application. When justifying their attention to the topics, the participants noted that there is “a vacuum in research”⁷⁷⁷ in that area, which needs to be filled for practical purposes (that is, to guide the people who are engaged in shaping the criminal system of Kuwait, especially legislators). Thus, both the literature review and the interviews support the idea that Kuwaiti criminal-justice separation of powers must be studied, justifying the present research.

⁷⁷⁶ Morison and Grimshaw, *supra* (n 128) at 3.

⁷⁷⁷ Participant MP3.

6.2. The Importance and Functions of Separation of Powers

The participants confirmed the idea that separation of powers is important for a democratic society, which is expressed in the studied literature.⁷⁷⁸ The interviewees also suggested multiple functions of separation of powers, which are mostly interconnected in that they contribute to its ultimate goal. One of the functions is the independence of all the three branches of authority, which is supported by the literature since, essentially, it is the primary characteristic of separation of powers. Even the earliest examples of separation of powers are based on the idea of distinguishing and making several of power branches independent.⁷⁷⁹ The Kuwaiti Constitution also explicitly postulates the requirement of separating the three branches of power.⁷⁸⁰ The participants proceeded to explain the importance of this independence by considering other separation of powers functions, which are connected to this feature.

The idea that separation of powers is important because it ensures the independence of the judiciary was voiced by the interviewees. Moreover, a couple of respondents suggested the need for separation of powers within criminal justice (to separate administrative separation of powers), stating that the approach is proposed by the Constitution,⁷⁸¹ which is true. This perspective mirrors Barkow's, although she does not focus on Kuwait, which is why she does not use the latter argument. Still, she exhaustively explains that the distinction between the criminal-justice and administrative separation of powers is significant because the former is less well-studied and because criminal justice has its specifics, including the fact that the people involved in which are more vulnerable.⁷⁸² Barkow also uses the same

⁷⁷⁸ Barkow, *supra* (n 15) 989, 995; see also Socarras, *supra* (n 92) 228, 228-229; Samuels (n 1) 1; Conway, *supra* (n 2) at 306- 307; Clark, *supra* (n 18) 971, 971-989; Hall, *supra* (n 19) at 352-353.

⁷⁷⁹ Al-Qudsy and Rahman, *supra* (n 11) at 620; see also Rehman et al., *supra* (n 11) at 68.

⁷⁸⁰ Constitution of Kuwait, 1962, art. 50.

⁷⁸¹ Constitution of Kuwait, 1962, art. 171.

⁷⁸² Barkow, *supra* (n 15) 989, 989-1031.

arguments to explain why the independence of the judiciary is important: it is necessary for the protection of the human rights that are related to criminal justice.⁷⁸³ Other authors also exhibit similar attitudes towards an independent judiciary,⁷⁸⁴ which highlights the significance of separation of powers as related to the judiciary and criminal justice. However, the findings of this thesis demonstrate that Kuwaiti specialists are also in favour of this decision, and since Kuwaiti criminal-justice separation of powers has not been studied extensively, it is an important application of this idea.

Many interviewees reported that separation of powers supports human rights and reduces corruption, which was also mentioned during the literature review.⁷⁸⁵ Indeed, human rights organisations, including the Human Rights Committee, for example, expressed concerns and provided recommendations associated with the insufficient separation of powers as related to the independence of the judiciary, implying that an independent judiciary is required for human rights to be upheld.⁷⁸⁶ Similarly, the interviewees described separation of powers as a requirement for democracy, which is in line with the literature on the topic.⁷⁸⁷ Eventually, the interviewees viewed public justice as the primary goal of separation of powers. Overall, the idea of separation of powers is valued by the majority of the participants, and many believe that separation of powers is vital for protecting the people of Kuwait.

One of the participants noted that in the Kuwaiti Constitution, the separation of powers principle is introduced specifically to prevent the negative outcomes of the absence of separation of powers.⁷⁸⁸ According to the interviewees, the latter include dictatorship and

⁷⁸³ Barkow, *supra* (n 15) 989, 1031.

⁷⁸⁴ Ashworth, *supra* (n 20) 591.

⁷⁸⁵ Samuels (n 1) 703, 706; see also Montesquieu, *supra* (n 6) at 224.

⁷⁸⁶ Human Rights Committee, *supra* (n 156) at 6.

⁷⁸⁷ Socarras, *supra* (n 92) 228, 228-229.

⁷⁸⁸ Participant J5.

absolute power. Also, the consequences of the lack of separation of powers are specific for criminal-justice matters; the participants cited the dependency of the judiciary and the lack of the opportunities for protecting human rights, especially those of the accused. The literature can support such claims; for instance, Montesquieu developed the notion of separation of powers specifically to avoid absolute power and, therefore, dictatorship.⁷⁸⁹ Also, as pointed out by Socarras, the practice of separation of powers indicates its actual ability to limit absolute power, therefore, promoting democracy.⁷⁹⁰ This outcome of separation of powers was also mentioned by the interviewees. Similarly, the dependence of the judiciary follows from the lack of its separation, and it is one of the primary problems that were noted by Barkow⁷⁹¹ and an issue that Ashworth discusses.⁷⁹² As it was mentioned, it is also a major concern of the Human Rights Committee.⁷⁹³ Thus, the perspectives of the participants regarding the concerns related to the absence of separation of powers are generally supported by the research and statements of the UN bodies.

Some of the functions are not mentioned in both the literature review and interviews. According to historians, one of the first examples of separation of powers, which was made by Umar ibn Al-Khattab, was predominantly aimed at effective management, which means that separation of powers can potentially improve the effectiveness of the work of the powers.⁷⁹⁴ Furthermore, the interviewees noted that separation of powers could be expected to improve transparency, although they did not provide specific examples of any related mechanisms. In general, however, most of the mentioned functions appear both in the literature and interviews. Based on them, it can be concluded that the primary feature of separation of powers (its ability to separate powers) ensures their independence, which,

⁷⁸⁹ Montesquieu, *supra* (n 6) at 151; see also Murphy and Stoica, *supra* (n 9) at 224.

⁷⁹⁰ Socarras, *supra* (n 92) 228, 228-229.

⁷⁹¹ Barkow, *supra* (n 15) 989, 1031.

⁷⁹² Ashworth, *supra* (n 20) 591.

⁷⁹³ Human Rights Committee, *supra* (n 156) at 6.

⁷⁹⁴ Al-Qudsy and Rahman, *supra* (n 11) at 620; see also Rehman et al., *supra* (n 11) at 68.

in turn, prevents absolute power, supports democracy, enables the protection of human rights (in particular, by the judiciary), reduces corruption, and, eventually, contributes to the establishment of social justice. Thus, the importance of the separation of powers in theory and practice is supported by the literature and interviews, and the latter source also supports the value of ensuring it in Kuwait.

6.3. Kuwaiti Legislation Origins

Another topic that the participants covered in their interviews is concerned with the complex origins of Kuwaiti legislation; all of them acknowledged the fact, noting several of the major influences. As shown by the literature review, the Egyptian law was used as the basis and inspiration for the Kuwaiti legislation, as well as the French law, and, in certain areas, Muslim jurisprudence.⁷⁹⁵ Additionally, the country experienced the influence of the British jurisdiction between 1925 and 1961, but this part of the legislation's origins is mostly important from the historical perspective since the Kuwaiti law is not evidenced to be founded on the legislation of that period.⁷⁹⁶ In fact, the two jurisdictions were mostly applied to different cases, and many of the people of Kuwait did not view the British jurisdiction favourably.⁷⁹⁷ Thus, Kuwait did not use a common law system to base its legislation upon; it employed a civil law one.⁷⁹⁸ The literature review also showed that the comparison country, Bahrain, experienced a similar change in that it also had to adopt the British jurisdiction but chose to use a civil law system after gaining independence.⁷⁹⁹ In general, the literature review presented more information regarding the history of Kuwait, demonstrating that its various periods had their own impact on the processes related to developing and ratifying Kuwaiti legislation.

⁷⁹⁵ Williamson, *supra* (n 10) 25-41

⁷⁹⁶ Hijazi, *supra* (n 35) 428, 429; Woodward, *supra* (n 395) para 5.

⁷⁹⁷ Joyce, *supra* (n 407) at 57.

⁷⁹⁸ Dammer and Albanese, *supra* (n 420) at 128.

⁷⁹⁹ Radhi, *supra* (n 419) at 76-77.

It should be noted that the interviewees suggested that the origins of Kuwaiti legislation can have positive outcomes. The voiced opinions included the ideas that a hybrid law is more flexible and that the existence of different sources could be good for the legislators. Also, the interviewees implied that the different sources of the legislation could contribute to democracy and separation of powers. Additionally, some of the participants expressed pride with respect to the uniqueness of Kuwaiti legislation.

The idea of the positive effects of the origins of Kuwaiti legislation is not directly supported by the literature. In fact, when discussing the specifics of the origins of Kuwaiti legislation, some negative effects were found. Williamson specifically cited the inflexibility of the French law,⁸⁰⁰ which contradicts the statements of the interviewees who consider the Kuwaiti law to be flexible. However, Williamson also explicitly notes that the idea of the rigidity of the French law is supported by limited evidence.⁸⁰¹ Regarding the flexibility of Kuwaiti legislation itself, it has been shown to be both restrictive and flexible depending on the area that is being considered, and it is not entirely clear if it has inherited the lack of flexibility from the French law or not.⁸⁰²

Moreover, it should be noted that the notion of a hybrid law is generally based on the idea of a law that changes and adjusts to the needs of its country;⁸⁰³ therefore, a hybrid law like that of Kuwait may be considered flexible simply because it is hybrid and has assimilated the features of different laws to better correspond to the needs of its country. For example, Kuwait has preserved the impact of the Islamic law, but it has also introduced the elements of the French and Egyptian law where necessary.⁸⁰⁴ Bahrain also exhibited a similar

⁸⁰⁰ Williamson, *supra* (n 10) 25-41

⁸⁰¹ *Ibid.*

⁸⁰² Oxford Business Group, *supra* (n 431) at 93.

⁸⁰³ Sand, *supra* (351) at 186.

⁸⁰⁴ Williamson, *supra* (n 10) 25-41

tendency to incorporate Islamic legislation and that of either Britain or the Arab League,⁸⁰⁵ which highlights the significance of Islam for the two countries. Thus, the statement of the interviewees that the hybrid nature of Kuwaiti law may have made it more flexible can be supported by the literature, even though the latter does not explicitly apply this concept to Kuwaiti law in particular. In addition, it can be noted that due to its hybrid nature, Kuwaiti legislation incorporates Islamic law, which has been characterized by some authors as beneficial for separation of powers.⁸⁰⁶ Thus, certain evidence can be used to suggest that the specifics of the origins of Kuwaiti legislation may be good for separation of powers in Kuwait.

Furthermore, some positive outcomes were noted with respect to the British jurisdiction: Professor Abdullah Alnafisi reported that British specialists promoted democracy in Kuwait.⁸⁰⁷ However, Salameh and Al-Sharah also note that other forms of British interventions were detrimental to Kuwait's democracy.⁸⁰⁸ Additionally, it should be noted that since the impact of the British jurisdiction is historical, it is mostly associated with the people who worked in Kuwait in the past; it must have helped the country to shape its legislation, but it cannot currently affect it.

In a similar way, the negative outcomes of basing Kuwaiti legislation on another country's law were noted by Hijazi. The author suggested that the introduction of new non-Kuwaiti legislation resulted in the excessive attraction of foreign specialists and caused a difficult assimilation process, which has made the system more complicated and less flexible than it needed to be.⁸⁰⁹ The idea is also supported by Williamson.⁸¹⁰ However, Hijazi recognises

⁸⁰⁵ Radhi, *supra* (n 419) at 76-77.

⁸⁰⁶ Rehman et al., *supra* (n 11) at 68.

⁸⁰⁷ Aljazeera Chanel, *supra* (n 415).

⁸⁰⁸ Salameh and Al-sharah, *supra* (n 54) 57, 62.

⁸⁰⁹ Hijazi, *supra* (n 35) 428, 434.

⁸¹⁰ Williamson, *supra* (n 10) at 36-37.

that at the time, the changes were necessary and the related problems were justified.⁸¹¹ Also, when considering said problems, the authors review historical data; since then, the relevant concerns were addressed.⁸¹² The interviews demonstrate that the influence of foreign judges in Kuwait may indeed be associated with certain issues as well, but the participants did not connect this tendency to the law's hybridity, which is why their perspective on the topic will be presented below.

In summary, the participants have been focusing on the positive outcomes of the hybridity of Kuwaiti legislation, and certain proofs of it can be found in the literature as well, but the latter is mostly considering the issues that were associated with the origins of Kuwaiti law in the past and nowadays. With respect to the topic of the research, it means that the participants believe that the hybrid nature of Kuwaiti legislation could be good for its democracy and separation of powers, but in the literature, there are few indications that can be used to support this idea, and a number of facts suggest that certain issues can result from the specifics of the history of Kuwaiti law.

6.4. Criminal Justice and Separation of Powers in Kuwait: An Assessment

While using the separation of powers criteria developed by the study (see the end of Appendix B), no participant critiqued them. All the topics from the criteria were commented on, although some of them received greater coverage than other ones. The participants used the criteria to structure their responses, and some suggested that they were helpful. Therefore, the tool can be employed in this study, and since it is based on the literature review, the latter can also be used to comment on the results of the interviews. The criteria helped the participants to determine that while multiple guarantees of

⁸¹¹ Hijazi, *supra* (n 35) 428, 434.

⁸¹² *Ibid.* 434.

separation of powers exist (most of the interviewees focused on the Constitution⁸¹³), in practice, separation of powers is not always applied correctly. In fact, the participants mostly focused on the issues, and similar tendencies were found in the literature review as well.

One of the concerns that the interviewees named included Article 2 of the Regulation of the Judiciary Law,⁸¹⁴ the problematic nature of which was discovered during the literature review. Indeed, it has been stated both by the participants and the relevant literature that the Article presupposes removing the “acts of sovereignty”⁸¹⁵ from the area of the matters that the judiciary is responsible for, diminishing its authority. The Article effectively violates the principles of separation of powers and, arguably, the Constitution, which postulates the need for separation of powers but also mentions that the three branches are supposed to cooperate.⁸¹⁶ Logically, the participants described this part of the Kuwaiti legislation as an indication of separation of powers being violated at the level of the law, which prevents the judiciary from addressing the problem since the judiciary has no power over the legislative body, which would be able to rectify the problem. In other words, as the participants have pointed out, in this case, the problem affects the judiciary, but it exists outside of the judiciary’s reach; it is not caused by the judiciary. Rather, it reflects a problem with separation of powers that is the result of the inefficient separation of all the powers from each other.

The Article was predominantly mentioned in connection to the independence of the judiciary, which was a very major theme from the interviews; most participants covered it in one way or another. In certain cases, the independence of the judiciary was shown to be

⁸¹³ Constitution of Kuwait, 1962, art. 50.

⁸¹⁴ Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁸¹⁵ *Ibid.*

⁸¹⁶ Constitution of Kuwait, 1962, art. 50.

limited without making it dependent on something in particular; an example is the Article discussed above. However, the judiciary was also demonstrated to actually depend on the executive power, which most of the interviewees framed as a major problem. The concerns expressed by the Human Rights Committee support the idea that this problem requires attention.⁸¹⁷

One of the factors that seem to endanger the independency of the judiciary was covered when reviewing the topic of foreign judges, which is discussed in the literature review and interviews.⁸¹⁸ Kuwait has a relatively small part of the Kuwaiti population: currently, only 30% of the people who live in the country are Kuwaiti.⁸¹⁹ In continuation of the tendency for attracting the expatriate workforce, there has been a large number of non-Kuwaiti judges in Kuwait. The literature notes the negative outcomes of excessively appointing non-Kuwaiti judges. For instance, Liebesny writes that the Kuwaiti system may be initially unfamiliar to them, which can cause issues.⁸²⁰ In addition, their dependence on the executive power and resulting vulnerability can be a concern because of the role of the Ministry of Justice in their appointment. Since foreign judges are appointed for two years only, the renewal of their appointment is a frequent affair, which increases the power of the Ministry over them.⁸²¹ Also, according to Williamson, foreign judges may be less trusted by the population, which can undermine their authority.⁸²² Admittedly, the latter outcome indicates a nationalistic approach to the situation and may be connected to other reports which highlight the problems of the migrant population in Kuwait, including both legal concerns⁸²³ and illegal mistreatment.⁸²⁴ It is generally accepted that due to the relatively

⁸¹⁷ Human Rights Committee, *supra* (n 156) at 6.

⁸¹⁸ Liebesny, *supra* (n 37) at 110; see also Williamson, *supra* (n 10) at 36; Alkarama Foundation, *supra* (n 40) at 13.

⁸¹⁹ CIA, *supra* (n 178) para. 3.

⁸²⁰ Liebesny, *supra* (n 37) at 110.

⁸²¹ United Nations, *supra* (n 606) at 5-6; see also Alkarama Foundation, *supra* (n 40) at 13.

⁸²² Williamson, *supra* (n 10) at 36

⁸²³ Freedom House, *supra* (n 158) para. 28.

short legal history of Kuwait, the appointment of non-native judges is justified by the country's initial interest in foreign expertise, but as time passes, the need for the foreign workforce can diminish.⁸²⁵

The interviewees mostly view the introduction of foreign judges into the Kuwaiti criminal justice system as unnecessary, but apart from that, they believe that they can endanger the independence of the judiciary. They explain this position by highlighting the above-mentioned fact that foreign judges are contracted by the Ministry of Justice, which represents the executive branch of power, and through these judges, the executive power can assert a level of control over the judiciary. In other words, the judiciary has less power over foreign judges, and the Ministry of Justice has some power over them. Thus, from this perspective, their prevalence in the country may indeed indicate a mechanism of the control of the judiciary by the executive branch.

Criticism can be put forward that the discussion of the appointment of non-native judges can come across as problematic and potentially nationalistic. However, the concern over the independence of the judiciary suggests that the position of the interviewees is not necessarily nationalistic because it is directly connected to the specifics of the process of appointing the judges. On the other hand, this concern regarding the independence of the judiciary does not explain the comments about foreign judges being unnecessary. In addition, it appears that the problem is being resolved through nationalistic means; in particular, both the interviews and the literature review⁸²⁶ indicate that the Kuwaitization of the Kuwaiti workforce, including that in the judiciary, is being carried out. As a result, the concerns related to the appointment of foreign judges are very valid, but they may also incorporate certain nationalistic opinions, and they are not solved through the adjustments

⁸²⁴ *Ibid.* para. 36, 41; see also Human Rights Committee, *supra* (n 156) at 2-3.

⁸²⁵ Brown, *supra* (n 37) at 159-160.

⁸²⁶ Central Statistical Bureau, *supra* (n 442) 15.

in the appointment process, which vests the executive branch with excessive power; rather, Kuwaitization becomes the answer. From this perspective, both the short tenure of and negative attitudes toward non-native judges can be characterised as discriminatory, which is reflective of the discrimination levelled against non-native populations in Kuwait.⁸²⁷

Another issue that was connected to the dependence of the judiciary is the investigator dependence, which was not directly stated in the literature review, but which was supported by many of the participants. The interviewees noted that it is a major issue which needs to be resolved before the judiciary can be considered independent. Furthermore, the oversight of the budget of the judiciary by the executive power was considered by the interviewees and the literature: since the judiciary is not independent from the executive branch with respect to its funding, it is difficult to claim that this factor cannot or will not be abused by the Ministry.⁸²⁸

In connection to the above-presented topics, the appointment issues, which are another component of the lack of the independence of the judiciary, was covered both by the interviewees and the review.⁸²⁹ In fact, the appointment issues are multiple; as it was stated, the appointment of foreign judges is not under the control of the judiciary because the Supreme Judicial Council is not engaged in it.⁸³⁰ However, the transition of the appointment to the Council would not resolve the issue completely because the Council includes a representative of the executive branch (the Ministry of Justice) and is funded by the Ministry.⁸³¹ Additionally, the Minister of Justice is the one to carry out the Council's decision with respect to appointments.⁸³² This problem may explain the nationalistic

⁸²⁷ Human Rights Committee, *supra* (n 156) at 6.

⁸²⁸ Brown, *supra* (n 37) at 158.

⁸²⁹ Alkarama Foundation, *supra* (n 40) at 13; see also Freedom House, *supra* (n 158) para. 3.

⁸³⁰ Alkarama Foundation, *supra* (n 40) at 13.

⁸³¹ Brown, *supra* (n 37) at 158.

⁸³² Kuwait, Decree Law No. 67 of 1980, 1980, art. 61.

approach to resolving the concern of the dependence of the foreign judges on the executive branch of power since the alternative would require very significant changes in the appointment mechanisms, including the Council membership. However, this fact also shows that Kuwaitization can only be a part of the solution if the independence of the judiciary is the goal; the executive branch has several means of exerting power over the judiciary with respect to judge appointment, and the lack of non-Kuwaiti judges cannot solve this problem.

Most of the participants (with the exception of two of the representatives of the executive branch) view these features as problematic for the independence of the judiciary in appointing its judges. Here, it should be highlighted that the Ministry's representative in the Council is prohibited from voting, and, technically, the Council should be able to appoint judges independently.⁸³³ The participants who spoke in favour of this approach emphasised this fact and insisted that the mentioned mechanisms of potential control (especially the budget) do not have to be employed to this end. Both disagreeing participants believe that the Ministry does not exploit these opportunities, which leaves the judiciary independent. However, even the participant who specifically asserted that the Ministry does not interfere in the matters of the judiciary also agreed that the funding issue is "theoretically unacceptable".⁸³⁴ Thus, the fact that the mentioned concerns are present is interpreted by the majority of the interviewees as a danger and an issue that may affect the independence of the judiciary in a negative way and, therefore, needs to be solved.

Additionally, the respondents also discuss the problem of the executive control over misdemeanours. In general, they conclude that the executive branch may have overpowered the rest of the branches in Kuwait, which, given the above-presented

⁸³³ Alkarama Foundation, *supra* (n 40) at 12.

⁸³⁴ Participant P3.

evidence supported by the literature is likely to be a correct representation of the Kuwaiti reality. At the very least, the executive power has the potential to control the funding and (partially) the appointment of some of the important figures of the judiciary. Therefore, even if said power is not abused (as stated by some of the participants), the system in its current form still presupposes the possibility of violating the separation of powers principles, which is present even in the legislation. Thus, the separation of powers in Kuwait can be used more effectively to ensure the independence of the judiciary.

The question of whether it is possible to completely separate the judiciary from the executive branch is not explicitly answered by the participants. Many of them state that they are working in that direction and want changes to be made so that the judiciary can become more independent. On the other hand, some of them highlight the part of the Constitution which requires cooperation between the branches of power.⁸³⁵ From this perspective, complete separation is not required as long as the branches do not struggle for control over each other. However, the responses also indicate that cooperation should not take the form of interference, and many of the interviewees describe the current relationship between the executive and judicial branches of power as interfering. This perspective is supported by the Human Rights Committee which explicitly recommends “guaranteeing” the independence of the judiciary, among other things, by improving the appointment procedures and changing the legislation related to foreign judges’ tenures.⁸³⁶

Additional problems that were found in Kuwaiti judiciary are concerned with transparency, favouritism, bureaucracy, miscarriages of justice with respect to political crimes, which, as shown in the literature review and findings analysis, are not a specific category in Kuwaiti

⁸³⁵ Constitution of Kuwait, 1962, art. 50.

⁸³⁶ Human Rights Committee, *supra* (n 156) at 6.

legislation,⁸³⁷ and some problems with the rights of the offenders and inmates. It should be pointed out that many of the participants believe that the transparency and offender and inmate rights protection in Kuwait are at an appropriate level and do not necessarily require improvements. However, the presence of negative evaluations of the mentioned phenomena in some of the responses implies that problems can be present. Transparency concerns are also evidenced by the literature,⁸³⁸ as well as the problems related to inmate rights, especially with respect to the sanitary conditions in prison.⁸³⁹ In addition, the participants commend the appeal system in the judiciary and believe that it is rather just, but the literature on the topic was proven to be difficult to find, which prevents this thesis from verifying this observation.

The topic of political crimes is a relatively complex one and needs to be discussed separately, especially because it is interconnected with another issue: miscarriages of justice. This interconnection is shown rather extensively by the literature review, but it was also covered in the interviews. The participants noted that technically, no law that would actually define political crimes is present in Kuwaiti legislation, which is supported by the literature. However, they refer to the crimes which are “political in nature”⁸⁴⁰ and state that they are sometimes associated with what can be described as miscarriages of justice. In fact, most participants report that while the Kuwaiti criminal justice system is generally just, for political crimes, this rule does not always apply. This observation is sufficiently supported by the literature, especially by the reports of different human rights organisations, including the UN’s bodies and Freedom House.⁸⁴¹ According to such reports and additional resources, the wording of the legislation that is usually applied to political

⁸³⁷ Mousavi, *supra* (n 133) 884.

⁸³⁸ Williamson, *supra* (n 10) at 36.

⁸³⁹ Freedom House, *supra* (n 158) para. 30-32.

⁸⁴⁰ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 1-58.

⁸⁴¹ Freedom House, *supra* (n 158) para. 30-32.

crimes in Kuwait is rather vague, and it has been used to restrict the freedom of expression,⁸⁴² as well as the right to protest.⁸⁴³ Overall, both the literature on the topic and the interviews indicate that political crimes in Kuwait are associated with miscarriages of justice and human rights violations. The examples of the latter include the legislation which constrains the freedom of association and expression or affects the rights of minorities.⁸⁴⁴ According to the participants, however, this problem is related to the legislative branch to a greater extent than it is connected to the judiciary: after all, the issue stems from the lack of appropriate legislation.

6.5. Reasons

When discussing the mentioned problems, many of the participants tie them together with the lack of separation of powers and the need for judiciary independence, demonstrating that the latter issue is particularly important and can cause additional concerns. The participants also consider the legislative shortcomings that were discovered during the literature review, especially the unconstitutional law which limits the judiciary's ability to work with the cases connected to sovereignty.⁸⁴⁵ This law is a direct proof of the ability of the legislative and executive branches of power to limit that of the judiciary. Furthermore, the participants commented on the insufficient cooperation of the powers (especially the executive branch and the judiciary). The interviewees suggest that many of the uncovered issues could not be resolved by the judiciary on its own; the problem of the unconstitutional legislation was one of them.

⁸⁴² *Ibid.*; see also Centre for Civil and Political Rights, *supra* (n 162) para. 4-5; Human Rights Watch, *supra* (n 161) para. 13-14.

⁸⁴³ International Humanist and Ethical Union, *supra* (n 151) 3.

⁸⁴⁴ Human Rights Committee, *supra* (n 156) at 6-7.

⁸⁴⁵ Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

The inactivity of the judiciary and the public was also specifically mentioned: according to the participants, this issue can make it difficult for separation of powers in the criminal justice system to be promoted. However, it should be pointed out that the passivity of the judiciary can be connected to the fact that it depends on the executive branch in its funding and some other aspects. As for the population's reluctance to act, it may be related to the above-discussed attempts to stifle the freedom of speech.

Indeed, the literature review demonstrates that in Kuwaiti legislation, there exist mechanisms which can be exploited to suppress the freedom of speech⁸⁴⁶ and assembly.⁸⁴⁷ Moreover, the consideration of the work of NGOs indicates that their activities can also be restrictive,⁸⁴⁸ and they are instrumental in enabling people to unite and pressure the government into changes.⁸⁴⁹ Finally, as highlighted by the participants, awareness of the specific problems that the Kuwaiti judiciary system experiences needs to be spread; the education of the population is necessary to enable it, and the lack of education and awareness can be a problem. Among other things, this concern might be connected to the constraints of NGOs and the media, which can also promote human rights awareness.⁸⁵⁰ Thus, while political inaction can be considered a cause of the described issues, that inaction also has its causes, which may need to be addressed before the population, judiciary, and the media can become more politically active.

Thus, the literature on the topic can be mostly used to support the claims of the interviewees, although little direct commentary was found on the reasons for the dependence of the judiciary or the issues with separation of powers in Kuwait. However,

⁸⁴⁶ Mousavi, *supra* (n 133) 884.

⁸⁴⁷ Human Rights Committee, *supra* (n 156) at 7-8; see also Centre for Civil and Political Rights, *supra* (n 162) para. 5.

⁸⁴⁸ Human Rights Committee, *supra* (n 156) at 8.

⁸⁴⁹ Centre for Civil and Political Rights, *supra* (n 162) para. 5.

⁸⁵⁰ *Ibid.*

all the literature that notes problems connected to the judiciary and separation of powers in Kuwait that are related to the legislation or the government may apply.⁸⁵¹ Similarly, the Human Rights Committee's instructions on leveraging legislative changes may also be interpreted to imply that legislation is a cause of the current issues.⁸⁵² Based on the two sources (literature and interviews), it can be concluded that the reasons for the separation of powers issues in the Kuwaiti criminal system are complex and interlinked, and they require relevant solutions.

6.6. Solutions

The participants suggested the need for rectifying the mentioned issues while also addressing specific problems and supporting human rights organisations. The primary solutions that were proposed were predominantly connected to the specific problems that are named above. Thus, the interviewees noted the need for dismantling unconstitutional legislation and reforming the approach to the funding of the judiciary. Furthermore, legislation was viewed as a solution in general; changes in the legislation of Kuwait could provide numerous safeguards for protecting the independence of the judiciary and other aspects of the separation of powers. Similarly, it could offer solutions for specific criminal justice problems, including the protection of the rights of inmates. Naturally, introducing the term into the legislation on political crimes would be the first step toward addressing the related challenges.

Change efforts that were suggested by the participants included Kuwaitization, as well as the occupational and research-related activities. Many of the participants reported being engaged in some of such efforts, including those aimed at education and awareness-raising

⁸⁵¹ Alkarama Foundation, *supra* (n 40) at 12; see also Human Rights Committee, *supra* (n 156) at 6; Freedom House, *supra* (n 158); Morison and Grimshaw, *supra* (n 128).

⁸⁵² Human Rights Committee, *supra* (n 156) at 6-7.

or at pushing the government to change the legislation. In continuation of the idea of change, the responses highlighted the importance of not just legislating the separation of powers but also maintaining it, especially through careful monitoring. Thus, the solutions have been proposed, and many of the participants have already started implementing them.

Some discontent with the progress of the change was also voiced, but a respondent suggested that the vision of the government supports change. However, the literature review, was relatively unlikely to propose any suggestions for improvement, even though it explicitly highlighted the same issues that the interviewees considered. The human rights organisations, the reports of which were checked for this research, including the Human Rights Committee,⁸⁵³ promoted the idea of changing the legislative norms that caused the above-described problems,⁸⁵⁴ which is in line with the interview findings. Still, for this thesis, the interviews became the primary source of the data on the possible ways of advancing the separation of power in Kuwait with respect to its criminal justice.

A part of solutions to the problems is concerned with the additional measures. In the interviews, they are not meant to improve the separation of power; rather, they are supposed to be a substitute that can advance and protect human rights in Kuwait. The participants highlighted the importance of NGOs, public awareness, and press independence in this regard; also, the fight to ensure the transparency of the government was proposed as a potential solution. These comments are in line with the statements of the human rights protection agencies reviewed for the thesis.⁸⁵⁵ Also, the additional measures are similar to the rest of the solutions, which implies that despite not being aimed at the promotion of the separation of powers, they can have this side effect.

⁸⁵³ Human Rights Committee, *supra* (n 156) at 6-7.

⁸⁵⁴ Freedom House, *supra* (n 158) para. 28; see also Centre for Civil and Political Rights, *supra* (n 162) para. 5.

⁸⁵⁵ *Ibid.*

The role of the governmental structures and the branches of power was emphasised by the participants directly. Aside from the fact that the legislative body is to be busy with most of the change, the interviews demonstrated that the cooperation of all the branches was necessary both for changes to occur and for the separation of power to be effective. Given that a major additional human rights safeguard is the transparency of the governmental structures, the willingness of the latter to ensure and monitor it is necessary. In addition, the participants recommend paying attention to the branches responsible for particular changes; thus, while inefficient legislation affects the criminal justice of Kuwait, the judiciary system cannot have any effect on it; it is the responsibility of the executive branch.

In addition, the participants pointed out the fact that the government is accountable to its population, which is why they highlighted the significance of the press, public opinions, and human rights organisations. According to the participants, the development of public awareness and increased activity of the press and human rights organisations may provide the pressure that would prompt the government to promote separation of powers and other mechanisms for the improvement of the protection of Kuwaiti from power abuse.

However, the literature review demonstrates that the process of achieving these outcomes in Kuwait is going to be complicated by some of its current legislation. First, the literature review proves that despite the significance of NGOs for the promotion of human rights, the government can complicate the process of their establishment due to the control over their licensing.⁸⁵⁶ While the Kuwaiti government is shown to cooperate with NGOs, including international ones, the limited nature of this cooperation can restrict the ability of the NGOs to perform their functions.⁸⁵⁷ In a similar way, there is legislation in place that has

⁸⁵⁶ Human Rights Committee, *supra* (n 156) at 8.

⁸⁵⁷ Bureau of Democracy, Human Rights and Labor, *supra* (n 507) 13-14.

been used to limit the freedom of speech and restrict the rights of Kuwaiti citizens to protest.⁸⁵⁸

To sum up, the participants supported the idea that human rights promotion and protection is the solution to separation of powers-related problems of the judiciary, but the literature review shows that this method is going to be difficult to execute. In addition, there is evidence to suggest that after the Arab Spring, the government became less tolerant to the freedom of expression, which indicates a negative trend that may make it more difficult to promote public awareness.⁸⁵⁹ Despite this issue, Kuwaiti NGOs and public movements have managed to achieve positive outcomes, for example, in the field of women's rights, which highlights the significance of this solution.⁸⁶⁰ However, the associated hurdles may require addressing as well.

Still, it should be pointed out that in addition to these findings, the literature review suggests that the population of Kuwait has been becoming increasingly politically active.⁸⁶¹ Despite the complications related to the legislation, a number of NGOs still operate in the country. As for the participants, they report ongoing efforts for the promotion of the independence of the judiciary, as well as other activism events that they are personally engaged in. The latter tendencies indicate that the solutions which were proposed by the participants are not unfeasible.

In other words, the change efforts remained mostly uncovered by the literature review; in fact, the latter mostly focused on the negative developments.⁸⁶² However, the review did not include the most recent reports from the people who are involved in the political life of

⁸⁵⁸ Human Rights Committee, *supra* (n 156) at 7-9.

⁸⁵⁹ International Humanist and Ethical Union, *supra* (n 151) 1.

⁸⁶⁰ Alkarama Foundation, *supra* (n 40) at 12; see also Freedom House, *supra* (n 158).

⁸⁶¹ Selvik and Alnajjar, *supra* (n 207) at 98.

⁸⁶² International Humanist and Ethical Union, *supra* (n 151) 1.

Kuwait since they were difficult to encounter in literature. As a result, the respondents added a number of important details that are not covered extensively by the recent research on Kuwait. Based on their accounts, it can be concluded that the problems of Kuwaiti separation of powers are acknowledged by an increasing portion of its population, which makes the mentioned solutions plausible.

6.7. Contradicting Points

As can be seen from the information presented above, in the majority of cases, no direct contradictions in the themes from the responses of the participants were found. Consequently, the few contradictions that do occur require close consideration. One of the reasons for the differences in opinions can be associated with the experiences of the participants. For example, the only participants who suggested that the factors which limit the independence of the judiciary are not problematic were the professionals who belonged to the executive authority. Both the representatives of the judicial and legislative authorities, as well as the lawyers and academics who did not belong to any of the authorities, disagree with this position and consider the limitation of the power of the judiciary a problem.

On the other hand, some of the representatives of the executive power described the activities of the executive power that limit separation of powers and judiciary's independence as not problematic. It can be reasonably assumed that as a part of the executive branch, they might find it difficult to criticise the approaches of the latter. Alternatively, they might never witness the problems associated with the dependence of the judiciary and the overpowered nature of the executive power the way the rest of the participants do. In general, the position of the interviewees may have been affected by their

personal experiences, and since the members of the judiciary are more likely to have relevant experience in this situation, their position seems to need to be prioritised.

Another topic with respect to which direct discrepancies were found consist of the possible flaws in the Constitution, and here, individual positions or interpretations can be viewed as the cause. For example, only one PM and one LW suggest that issues within constitution are possible; the rest of the participants do not share the position and imply that the misinterpretation of Constitution or the breach of its statements are more likely to be the problem. Here, it may also be suggested that for some people, the idea of criticising the Constitution may appear controversial. This view can be supported by the point made by one of the PMs: in the Constitution, it is established that Prime Ministers, members of the executive power, are indeed a part of the legislative power.⁸⁶³ While the number of Prime Ministers in the legislative body is limited, the situation still presupposes a breach of separation of powers that is present directly in the Constitution.

On the other hand, some of the Constitution-related discrepancies in answers may be associated with different interpretations of the same phenomenon. In particular, the question of cooperation is viewed as a loophole for anti- separation of powers activities by some of the participants who also describe the cases of it being used that way by the executive power.⁸⁶⁴ On the other hand, some participants believe that cooperation differs from interference, and the problem is not in the phrasing of the Constitution but the deliberate or accidental misinterpretation of an understandable term.⁸⁶⁵ Such different perspectives are accompanied with sufficient arguments to consider them both valid.

⁸⁶³ Constitution of Kuwait, 1962, art. 50, 56.

⁸⁶⁴ Participant J2.

⁸⁶⁵ Participant J3.

Furthermore, some minor discrepancies were also found. For example, only one participant explicitly criticised transparency in the country's judiciary, suggesting that in special cases (for instance, political ones), transparency suffers. While other participants also mentioned the fact that political cases are treated specifically and can, among other things, be associated with miscarriages of justice, no other respondent introduced transparency issues, and many praised the judiciary's transparency in Kuwait. In such cases, the themes that are voiced by a few persons cannot be neglected and should be taken into account as they demonstrate possible problems which are not witnessed or experienced by every participant.

6.8. Research Questions and Responses to Them

After the review of the key themes from both the literature review and the interviews, it is necessary to reconsider the research question and aims of this thesis and determine its ability to respond to and achieve them. Since the thesis was structured around its aims, it has successfully achieved them: the research discussed the topics of separation of powers, Kuwaiti legislation and its origins, Article 50 of the Constitution, and the solutions to the problems in the criminal justice system of Kuwait, including the potential for the promotion of human rights. The following information can be used to respond to the research question based on the findings and their discussion.

The primary goal of the thesis was to test the effectiveness of separation of powers as related to the criminal justice of Kuwait in protecting the human rights in the country. The question required reviewing the roots of Kuwaiti separation of powers in Constitution and various aspects of Kuwaiti law. The research demonstrated that the Kuwaiti Constitution does ensure separation of powers, but it is also associated with some issues. First, the Amir's figure is vested in immense power, including the executive and legislative

power.⁸⁶⁶ Second, since the members of the executive power are supposed to be represented in the legislative branch as per the Constitution,⁸⁶⁷ the two branches may be insufficiently separated. Furthermore, according to the respondents, since Article 50 of the Constitution demands that the three branches cooperate, there is a loophole which can justify interference. Thus, the Constitution requires the presence of separation of powers, but it incorporates some points which can be problematic from the perspective of separation of powers.

However, it should also be pointed out that the mentioned issues are alleviated by particular factors. First, the Amir's power, while considerable, is not absolute; Kuwait has the bodies that share the executive and legislative power with Amir. Similarly, only a limited number of Ministers can appear in the legislative body of Kuwait; they do not dominate this branch of power. As for the last issue, a number of respondents pointed out that it is not a Constitutional problem. Rather, the Constitutional statement about the importance of the cooperation between branches of power is reasonable; the use of this requirement as a loophole should be considered unconstitutional. Thus, the Constitution of Kuwait operates the concept of separation of powers to protect the country from the negative consequences of absolute power.

Regarding the origins of Kuwaiti legislation, they are not directly connected to separation of powers in the literature, but some indirect connections were found. As a hybrid law, Kuwaiti legislation is flexible, and it incorporates Islamic law. The latter has been described as compatible with separation of powers.⁸⁶⁸ The participants also supported the idea that the unique nature of Kuwaiti hybrid law is good for separation of powers within it. Thus, the idea that the origins of Kuwaiti legislation may have had an impact on its

⁸⁶⁶ Constitution of Kuwait, 1962, art. 51.

⁸⁶⁷ Constitution of Kuwait, 1962, art. 50, 56.

⁸⁶⁸ Rehman et al., *supra* (n 11) at 68.

ability to support separation of powers is not without proof. Still, the majority of the literature on the topic points out the problems in the history of Kuwaiti legislation rather than its potential positive features.

The idea that separation of powers must contribute to the protection of human rights is supported by the literature and participants. The mechanisms of this protection include the limitation of the power available to individual people and branches of power, which is supposed to prevent abuse of power. In the case of the judiciary, separation of powers needs to ensure its independence and fairness, and in the case of the criminal justice system,⁸⁶⁹ the protection of the human rights of the vulnerable populations that are involved in it are especially important.⁸⁷⁰ While the participants did not provide direct examples of the mechanisms of the protection of human rights with the help of separation of powers, they used the examples of the opposite cases, in which because of the influence of the executive power of the judiciary, justice was difficult to attain for the people who were prosecuted for political crimes.

As demonstrated by the research, the Kuwaiti power branches have not yet managed to achieve a level of separation of powers that would ensure the independence of the judiciary from the rest of the branches, especially from the executive power. There are multiple aspects that limit the independence of the judiciary and even make it directly dependent on the executive power, including funding and appointment procedures. Moreover, the reports of the participants connect this issue to human rights concerns, especially when political crimes are considered. Thus, it can be suggested that because of the lack of an effective separation of powers, separation of powers can be prevented from ensuring the protection of the rights of humans in Kuwait. The response to the primary research question is that

⁸⁶⁹ Human Rights Committee, *supra* (n 156) at 6.

⁸⁷⁰ *Ibid.* at 2; see also Human Rights Council, *supra* (n 155) at 2-3, 8.

currently, multiple issues prevent separation of powers in the criminal justice system of Kuwait from protecting the rights of humans involved in it fully and comprehensively.

Regarding the final two aims of the research, they were concerned with potential solutions. Based on the results of the interviews, it can be suggested that the reasons for the potential ineffectiveness of separation of powers in Kuwait are multiple and interconnected. Some of them are outside of the control of the judiciary, including inappropriate legislation or the misdemeanour of the executive power. In addition, the participants suggest that the three branches have not found the means of effective cooperation yet. It is apparent that these problems need to be resolved, and they can be addressed by the government. However, when discussing the potential solutions, the participants mostly focused on alternative measures that are not directly connected to separation of powers or the activities of the three branches.

The thesis demonstrates that human rights are connected to separation of powers and suggests that the promotion of public awareness of the concept and the support of human rights organisations can provide the sufficient motivation for the government to enforce the concept of separation of powers better. While there is legislation in place that makes this solution difficult, it is still feasible and is currently employed by some of the participants.

6.9. Changes in the Research Process

Over the course of the development of the thesis, certain changes to it have been made. The proposal defined the methodology, which remained the same throughout the process, and research questions and objectives, which were also not altered since they provided the necessary structure to the research. However, as the interviews were conducted and analysed, it became apparent that there was a certain lack of the literature reviewed to contextualise the findings. In addition, due to the focus of the participants on the

independence of the judiciary, the rest of the branches and, in general, other topics related to the separation of powers in Kuwait appeared to have received too little coverage. Thus, while addressing its aims, the thesis was diverted from its focus on the separation of powers as applied to the criminal justice system of Kuwait to the independence of the judiciary of the country, which was of particular interest to the respondents.

The attention of the participants to the independence of the judiciary indicates that it is a particularly important aspect of separation of powers in Kuwait. The resulting research is still closely connected to the initial topic, and it responds to the research questions and fulfils its aims, but the change in its focus is noteworthy and was addressed during revisions. In particular, to rectify the problem, additional instances of the literature review were introduced. Their primary aim was to provide more context for the interviews, but it was also intended to cover several important gaps that the primary sources did not consider. It should be pointed out that the research process can be reiterative when such an approach is justified;⁸⁷¹ for the purposes of this thesis, it helped to produce more insights, which is very important for an exploratory study. This process of reframing the research can be viewed as an example of the solutions that were used to address the problems that were encountered throughout the processes of the thesis, which is especially relevant in terms of limitations.

6.10. Limitations

The discussion of the findings of the thesis is supposed to be carried out while taking into account the limitations of this research. As it was mentioned, most of them are associated with the chosen methodology. First, the specific features of qualitative research are that it

⁸⁷¹ May, *supra* (n 628) at 134; see also Eriksson and Kovalainen, *supra* (n 628) at 130.

focuses on exploring the topics of interest to the researcher and not quantifying them.⁸⁷² As a result, this thesis can indicate the presence of problems but cannot assert that they are common, general, or pervasive, and it cannot make any conclusions about their prevalence. The thesis did not mean to quantify issues or solutions, though; it was developed to explore the criminal-justice separation of justice in Kuwait, and it has achieved this goal. The above-presented findings and discussions do not attempt to provide any quantifiable statements. However, the limitation needs to be kept in mind when reviewing the findings; it is important to avoid generalising them.

Secondly, there are limitations to the interview method of data collection,⁸⁷³ which is concerned with the fact that the participants may make incorrect, subjective, or even false statements.⁸⁷⁴ Since the majority of the topics received unanimous agreement from all the participants, it is reasonable to assume that the findings are reliable, but when participants disagree, it is difficult to make conclusive statements about the correct position. For instance, it is impossible to specify if and how often the executive branch may have abused its power over the judiciary based on the participants' responses. This limitation is mitigated through the introduction of objective data, including, for example, the facts about the legislation that exists in Kuwait. Therefore, the application of two methods of data collection (the review of literature, as well as relevant documents, and the interviews) resulted in a form of triangulation. Based on the legislation analysis, the existence of the loopholes that can give the executive branch power over the judiciary can be viewed as a fact, which implies that their abuse is not impossible. Therefore, this approach to method triangulation can help to reduce the potential limitations of the methodology of the thesis.

⁸⁷² May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

⁸⁷³ Edwards and Holland, *supra* (n 636) 1, 29-30.

⁸⁷⁴ *Ibid.* 1, 92-93.

Naturally, it is important to remember that there were limitations to the literature review as well. While most of the chosen materials were high-quality academic papers or books, as well as primary sources, some of them were reports with vaguely defined methodology,⁸⁷⁵ as well as the information from human rights organisations that do not always report their methodology and sources.⁸⁷⁶ They were utilized when a lack of primary and reliable secondary data was encountered, which was not uncommon for the sections that heavily focused on Kuwait. Given the lack of the literature on Kuwaiti criminal justice, the above-described triangulation method may not have been as effective as desired, and this issue can also be considered a limitation.

In addition to that, interviews were a crucial element of data collection for this thesis, which can be justified by reviewing its research question. Indeed, the thesis was meant to gain insights into the Kuwaiti separation of powers, which could only be achieved through qualitative means.⁸⁷⁷ Since the primary and secondary sources on the topic were scarce and often outdated, it was reasonable to introduce expert opinions and then validate the findings by comparing them to those of the literature review. Thus, the limitations of the qualitative data and means of obtaining them were balanced out through the introduction of different methods and justified by the needs of this research.

Regarding the sample, it was not small for a qualitative research,⁸⁷⁸ but it also involved quotas of five people per every represented group. As a result, it cannot be claimed that the findings are sufficiently generalisable to assume that all the representatives of each of the groups (various branches of power, lawyers, and academics) would agree with the information presented here. The fact that the participants' responses were mostly similar,

⁸⁷⁵ Morison and Grimshaw, *supra* (n 128) at 3.

⁸⁷⁶ Freedom House, *supra* (n 158) para. 3.

⁸⁷⁷ May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

⁸⁷⁸ Eriksson and Kovalainen, *supra* (n 628) at 168.

as well as the supporting evidence in the literature on the topic, legitimises the results of the interviews. However, the fact that at least one of the groups (the representatives of the executive branch) demonstrates dissent can be used as a reminder of this limitation. Additionally, the project failed to involve police officers and did not engage prosecutors who were not judges, which further narrows down the represented perspectives. Still, the goal of the thesis was not to represent the perspective of a particular group of Kuwaiti specialists; several groups of them were included specifically to ensure the comparison of different perspectives. Since most of them align, the likelihood of the responses being reliable is relatively high.

The chosen data analysis strategy is very reliable and common,⁸⁷⁹ but it should be pointed out that it was performed by one person. As a result of that, the possibility of the researcher's subjectivity or human error should not be excluded and can be considered a limitation. This type of potential problems in research is not specific to a particular type of designs or methods; every investigation is subjected to it because every inquiry is carried out by humans.⁸⁸⁰ However, there exist some solutions that can mitigate it. Thus, the process of data analysis was carried out in accordance with the recommendations on thematic analysis, which involved careful and repeated re-reading and labelling of the raw data, as well as multiple checks of the resulting themes.⁸⁸¹ These activities should reduce the possibility of errors, which means that the potential problem of subjectivity, bias, and errors was accounted for and addressed.

The fact that the interviews' findings have been mostly revolving around the independence of the judiciary may be viewed as a limitation as well. It has been balanced out by the additional and more rigorous literature review to an extent, but this focus is still affecting

⁸⁷⁹ Braun and Clarke, *supra* (n 661) 77, 87; Vaismoradi et al., *supra* (n 661) 100, 100-101.

⁸⁸⁰ Alshenqeeti, *supra* (n 648) 39, 43.

⁸⁸¹ Braun and Clarke, *supra* (n 661) 77, 92-100.

the types of issues and solutions that have been discovered. Given that the secondary sources which constitute the literature review included rather outdated information also contributes to this limitation; the participants have provided more recent, if not unbiased, data. Still, the fact that the participants chose to focus on the judiciary while being asked about the criminal-justice perspective on separation of powers has its implications as well. It demonstrates that this topic is important or, at least, is deemed as important by the participants. From this perspective, the limitation can be framed as a finding rather than an issue that prevents the thesis from achieving its objectives.

In summary, the limitations did not prevent the thesis from achieving the desired outcomes and responding to its question. The findings are sufficiently extensive to offer an answer, which might not be exhaustive but contributes some information to a topic that is studied very rarely. The limitations are predominantly associated with the methodology and are either justified by it or can be framed as peculiar features rather than significant flaws. If the findings are viewed from the perspective of the limitations, it is apparent that they may not be very generalisable, but since the thesis aimed to be explorative, it is not a problem. Still, when discussing the results, it is necessary to keep the mentioned concerns in mind.

6.11. Discussion Conclusions

The present section considers the similarities and differences between the findings of the literature review and interviews. Most of the results do not contradict each other; the discrepancies that are present might be explained by the specifics of qualitative research; namely, by the subjectivity of perceptions and personal experiences. For the time being, it can be concluded that Kuwaiti's criminal justice system experiences multiple problems, many of which stem from the insufficient separation of powers in it; in particular, the executive branch holds noticeable power over the judiciary. However, there are numerous

efforts that aim to rectify the issue, and they employ the reported mechanisms for improvement and the supplementary measures. Also, the specifics of the origins of Kuwaiti legislation might be beneficial for separation of powers.

The literature review and interview analyses complemented each other, providing the data that could not be acquired by employing only one of the two methods. The notable overlap between the results of the two parts of the research can be used as the evidence of triangulation: since both methods produced comparable findings, they are more likely to reflect the reality of Kuwait. However, the interviews were able to provide the information about the potential causes of separation of powers issues in Kuwait, their solutions that are planned to be implemented or are being implemented, and some additional details about Kuwaiti judiciary that were not found in the literature on the topic. Given that the latter is rather scant, this additional source of information is particularly valuable.

As can be seen from the results, most of the new data from the interviews covered the topic of the independence of the judiciary, which limited the scope of the project to an extent. The fact that the interviewees gravitated towards the discussion of the issues with judiciary's independence while noting few other problems may be indicative of the significance of both judiciary's independence and the idea that in Kuwait, it is not yet achieved. Given that many of the other concerns that the participants reviewed were connected to the lack of separation of powers with respect to the judiciary, this conclusion appears to be logical. However, the information from the literature review allowed diversifying the discussed topics and introducing additional criteria and topics that were not directly considered in the interviews.

The significance of the present research is supported by both the literature review and the responses of the participants. All the aims of the thesis were achieved, and the primary

research question was answered. However, some of the aspects were covered to a greater extent due to the different availability of information on the considered topics. Additional research can help to uncover more details about separation of powers in Kuwaiti criminal justice system.

7. Practical Implications

The findings of this thesis have direct practical implications that include the recommendations from the interviews and literature review. In general, both sources of data allow detecting the problems that are relevant for Kuwaiti criminal-justice separation of powers; also, the interviews supplied some information regarding the current and potential future change efforts. An analysis of these recommendations with suggestions for improvement will be offered in this section.

7.1. Separation of Power and Criminal Justice Problems that Require Solutions

Given the scarcity of the literature that would investigate Kuwaiti criminal-justice separation of powers, the findings of this thesis yield very important and practically applicable information related to the problems that require addressing. While the solutions that have been proposed may be not very exhaustive, future investigators may take a look at these problems and propose advanced methods of working with them. Also, while certain issues that will be presented below were evaluated differently by the participants, the fact that they are mentioned by Kuwaiti experts indicates that they should be at least considered.

First, there are significant problems in the legislation of Kuwait, which either prevents the criminal-justice separation of power from occurring or provides opportunities for subverting it. A prime example is Article 2 of the Regulation of the Judiciary Law.⁸⁸² In addition, the participants have raised concerns regarding Article 50 of the Constitution.⁸⁸³ However, since there has been some disagreement on the matter, a more in-depth

⁸⁸² Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁸⁸³ Constitution of Kuwait, 1962, art. 50.

investigation may be required to make conclusions about the areas of the Constitution that may benefit from revising.

In connection with the topic of legislation, specific procedures within the judiciary are connected to certain problems.⁸⁸⁴ Thus, aside from the fact that the funding of the judiciary is within the control of the executive branch, there are several instances in which judge appointment is either controlled by or can theoretically be affected by it. The latter outcome is associated with the Ministry of Justice representative being a part of the Supreme Council; while it is asserted that the Minister does not have any impact on appointments, many of the participants classified this fact as a potential problem. The same can be said about the investigator independence and the misdemeanours being controlled by the executive branch; the topic of the foreign judges may require additional investigation. It is apparent that these features of the judiciary are a danger to the separation of powers, and since the participants focused on its independence, it is a very important concern for modern-day Kuwait.

Additional problems that may cause trouble with the separation of powers consist of nepotism or favouritism, miscarriages of justice, as well as any direct actions aimed at undermining the separation of powers principles. From this perspective, the participants state that establishing the separation of power is important, but its maintenance is even more significant and difficult. Therefore, the mechanisms of monitoring the separation of power principles are also a challenge.

Some specific issues that were mentioned by the participants can be used to illustrate the interconnections of the above-presented problems. The most important example is the

⁸⁸⁴ Alkarama Foundation, *supra* (n 40) at 13.

question of political crimes.⁸⁸⁵ It is connected to the problems of inefficient legislation; indeed, the lack of political crime definitions has caused significant problems, especially from the perspective of freedom of speech.⁸⁸⁶ However, the mismanagement of political crimes can be further exacerbated by the potential human rights issues when inmates are concerned. Therefore, the problem is mostly the result of the legislation that needs changing, which is a concern that is outside of the criminal justice domain, but it is also interconnected with the inefficient policies and procedures existing within the criminal justice system. To summarize, criminal-justice separation of powers in Kuwait faces multiple problems, which can be both internal and external in origin. Looking into the ways of rectifying them is of paramount importance.

7.2. Possible Solution Mechanisms

The methodology of this thesis cannot guarantee an exhaustive coverage of its topics. However, the following conclusions can be made to demonstrate the practical implications of the findings. First of all, every potential and existing problem can be addressed directly. Thus, if there is an ineffective law, it may need revisions. Similarly, if there are transparency or nepotism issues, the existing safeguards against them should be reviewed and instituted, and if the current methods of preventing inmate abuse are not appropriate, their improvement is in order. However, the mechanisms through which these changes can and should be attained are more important to consider.

Both the interviews and the literature review demonstrate that protests, awareness-raising campaigns, and human rights activism are the primary mechanisms of change that are

⁸⁸⁵ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 1-58.

⁸⁸⁶ Mousavi, *supra* (n 133) 883.

available to the Kuwaiti population.⁸⁸⁷ These actions are supposed to push the government to review its legislation, policies, and practices, making them more capable of promoting human rights and the separation of powers principles. In addition, the participants provided short reports of their own actions associated with the advancement of Kuwaiti separation of powers. Their examples demonstrate that the representatives of each of the branches, as well as academics, are important actors in promoting the principles of the separation of powers. Thus, academics and educators would be expected to raise awareness of the above-described problems; representatives of each branch are supposed to promote change in their domains, and legislators are meant to contribute to launching the revisions of the existing problems in legislation.

It is notable that all the above-described efforts to improve the situation are interconnected. Thus, an individual educator may work to raise awareness, which will then be used by the population to exercise their right to peaceful protesting. Similarly, the work of NGOs may help to make assembly laws less strict, which will lead to the protests being easier to conduct. In turn, the protests would improve the government's understanding of the interests of the people, which would facilitate the work of a minister trying to change the current legislation. Thus, the solutions are interlinked, and in order to achieve positive outcomes, their combination is required.

In addition, it can be stated that some of the suggestions of the participants may be ineffective or otherwise questionable. For example, the discussion of foreign judges demonstrates that Kuwaitization is the primary solution to what is perceived as a danger to the independence of the judiciary. However, Kuwaitization does not, in fact, address the problems that made foreign judges a potential mechanism for the executive control over

⁸⁸⁷ Freedom House, *supra* (n 158) para. 28; see also Centre for Civil and Political Rights, *supra* (n 162) para. 5.

the judiciary; instead, it just removes foreign judges. In other words, this solution appears to be aimed at a sign of a problem rather than its cause. From this perspective, it is important to reiterate that further investigation of effective and ineffective solutions to the problems may be required since the perspectives of 25 experts may be limited, subjective, or biased.

7.3. A Note on Research

The solutions that have been proposed by the interviews are unlikely to be all-encompassing; alternative options can probably be suggested. Similarly, while the issues that have been found are rather numerous, the participants decided to focus on the independence of the judiciary, which means that some other important concerns may not have been reflected in this paper. As was stated by most participants, the topics of this thesis are notably understudied, and more research is required to rectify this problem. Furthermore, the fact that Kuwaiti power structures are not very well-investigated in general was also demonstrated both by the interviews and literature review. This finding can be considered a practical implication for academics, as well as other people involved in research. As shown by the participants, they are already contributing in this regard by conducting their own studies. Thus, the thesis can be used as a call to action for Kuwaiti researchers in the field of criminal justice; the existence of Kuwait-specific data would assist all the above-described change efforts by directing them toward problems and arming them with facts that would make their positions more persuasive. More specific research recommendations are presented below in a separate section.

7.4. What is Being Done

As it has been mentioned, the interviews demonstrate that individuals are working to reduce many of the above-described problems. While they do not believe that the

government has been prioritising change, the fact that the representatives of the three branches of power try to promote it indicates that there are some governmental efforts to resolve the concerns related to the separation of power. However, other actors should be mentioned as well, including the media, NGOs, and the people of Kuwait.

There is not much information about the current activeness of the mass media in Kuwait, but they have been described as a factor which promotes awareness and has been pressing the government to make changes.⁸⁸⁸ Online media were particularly important, for example, in disseminating information about particular instances of injustice,⁸⁸⁹ although certain legislative factors, especially the law related to blasphemy, may limit their effectiveness.⁸⁹⁰ Still, it can be stated that the media are currently contributing to resolving the above-described issues, especially by empowering the people of Kuwait to take action.

NGOs can also be considered a human rights protection factor that is currently active in Kuwait. There is little information on NGOs helping to reduce the problems in the criminal-justice separation of powers, but there is enough evidence to them addressing more specific issues. The latter incorporate the advancement of human rights and freedoms.⁸⁹¹ Since the latter factor is required for the people of Kuwait to have an impact on the government, NGOs are indeed an important actor in resolving the above-described problems. Therefore, despite the constraints put forward by NGO-related legislation, NGOs are contributing to the actions that may eventually improve the separation of powers in Kuwait or enable the people of Kuwait to do it instead.

⁸⁸⁸ Salameh and Al-sharah, *supra* (n 54) 57, 59.

⁸⁸⁹ Mousavi, *supra* (n 133) 883.

⁸⁹⁰ International Humanist and Ethical Union, *supra* (n 151) 3.

⁸⁹¹ Freedom House, *supra* (n 158) para. 28; see also Centre for Civil and Political Rights, *supra* (n 162) para. 5.

Indeed, the most important actors in the protection of human rights and the principles of the separation of powers in Kuwait are its people. The present thesis demonstrates that they may experience difficulties, especially since their most common tool is protests, and the laws pertaining to the rights to peaceful assembly and freedom of speech are rather strict.⁸⁹² Still, the Kuwaiti population is believed to have become more politically active, which is a major factor in resolving the above-presented issues.⁸⁹³ Therefore, the people of Kuwait have been working to advance human rights in their country, and they will proceed to do so provided that they receive accurate information about the issues that need solving.

To summarize, the current activities of human rights activists, governmental officials, academics, and various organisations established by them, as well as the people of Kuwait at large may contribute to the reduction of the above-described problems. This finding implies that future actions can be modelled similarly. However, there exists little evidence of such efforts being directed at the separation of powers in criminal justice. From this perspective, it is important to raise the awareness of the problems discovered or highlighted by this thesis, which may be carried out, among other things, through the dissemination of this manuscript.

7.5. Conclusions

With all the limitations of the current thesis in mind, it can still be asserted that it has significant practical implications. Indeed, it is a novel research in that it considers the topics that are very rarely studied and investigates the context of a country that is also under-represented in recent literature. As a result, it can be used to draw attention to the legislative, procedural, and other shortcomings which endanger the criminal-justice separation of powers in Kuwait. Moreover, it proposes actionable solutions, including

⁸⁹² Mousavi, *supra* (n 133) 883.

⁸⁹³ Selvik and Alnajjar, *supra* (n 207) at 98.

some examples of the efforts that are currently conducted, and demonstrates that there are multiple actors who can make a difference, including the Kuwaiti people. While additional research on the topic can be recommended, the present thesis can be used to direct action as well.

8. Conclusions

8.1. Research Process Summary

This thesis presents the results of a study dedicated to separation of powers in the criminal justice system of Kuwait. The work involved an analysis of the concept of separation of powers and its value for criminal justice systems, a review of the specifics of both separation of powers and the criminal justice system of Kuwait, and an investigation of the way separation of powers could be used in Kuwait for human rights protection. Throughout the project, its focus was modified, although the research question remained the same: it consisted of determining the effectiveness of separation of powers in protecting human rights in Kuwait.

The study of primary sources, relevant legislation, and secondary sources was chosen as the main research method. A preliminary literature review allowed establishing the core aims of the work, which considered the individual areas that required researching. As a result, it was determined that the investigation of the hybrid law of Kuwait and Article 50 of its Constitution would assist in responding to the primary research question. In addition to that, to make the research more practice-focused, another aim presupposed considering the alternative solutions to human rights protection. Finally, the preliminary literature review provided the evidence which could be used to indicate the importance and value of the study: it showed that the topic of criminal-justice separation of powers had not been studied very extensively. In addition, Kuwaiti criminal justice system received remarkably little coverage in the recent literature. Thus, it became apparent that the thesis was capable of contributing to an understudied area of research.

Given that the research on the studied topic was not very extensive, it was determined that an additional source of data would be useful for the investigation. As a result, the methodology of the study was adjusted to include interviews which would supply the information that could not be found in the primary or secondary sources on the topic. Specifically, since it was established that the literature on criminal-matters separation of powers in Kuwait is not very common, the thesis was supposed to collect more information about the Kuwaiti context from the people who would be expected to be familiar with the studied phenomena. In other words, expert interviews were introduced as another data source.

The choice of the methodology was extensively justified. The literature on research methods was used to find the appropriate approaches to collecting and analysing data. Interviews are particularly helpful in obtaining expert opinions, which is why they fit the needs of the study.⁸⁹⁴ Semi-structured interviews were chosen for their flexibility,⁸⁹⁵ and thematic analysis was introduced due to its suitability for working with qualitative data.⁸⁹⁶ In addition, the methodology section explained the choice of qualitative methods rather extensively. In summary, qualitative methods are appropriate for investigating and exploring phenomena,⁸⁹⁷ which was required for the present thesis. Thus, the methodology of the study was sufficiently justified.

In order to recruit the participants, the quota sampling approach was used because the study intended to involve people from particular groups. Specifically, it focused on the people who would be familiar with the criminal justice system of Kuwait, including academics who study it, legal professionals who work with it, as well as lawyers and

⁸⁹⁴ Edwards and Holland, *supra* (n 636) 1, 29-30.

⁸⁹⁵ *Ibid*; see also Eriksson and Kovalainen, *supra* (n 628) at 94.

⁸⁹⁶ Braun and Clarke, *supra* (n 661) 77, 92-100.

⁸⁹⁷ May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

judges. In addition, parliament members were involved since they would also be familiar with the criminal justice system while also having a particular insight into the inner workings of the country's executive branch of power. In order to ensure the equal representation of the populations of interest, gather enough data, and fit the requirements of the study, five people from each group were recruited. Thus, the total sample included 25 people.

Since the interview-based part of the research involved human subjects, the relevant ethical concerns were reviewed. The confidentiality of the participants was ensured; they were not required to provide any information that could identify them, and they consented to provide the rest of the data that collected from them. A participant information sheet and an informed consent document were used to ensure that the participants understood the specifics of the study and learned about their rights as research subjects. Overall, the rights of the participants were protected. The questions for the interviews were developed with the help of the literature review. In general, the literature review informed the interviews, and the interviews complemented the literature review.

Upon the collection of the interview data, they were analysed using the approach to thematic analysis that was described by Braun and Clarke.⁸⁹⁸ The procedure allowed identifying thirteen general themes that included multiple subthemes and codes which were considered separately. In general, they covered the studied phenomena and responded to the research question. They were also employed to construct a narrative that would describe the findings of the interviews.

⁸⁹⁸ Braun and Clarke, *supra* (n 661) 77, 92-100.

8.2. Findings Summary

There are significant limitations to the study that should be taken into account. Mostly, they are determined by the specifics of the methods employed in it. The interview sample was not particularly large, especially if separate groups are taken into account, and a non-probability sampling method was used. As a result, the findings are not exactly generalisable. The study did not intend to provide generalisable results, but still, the results should be interpreted while taking into account this factor. Similarly, the findings of the interviews may be not objective since they represent the views and opinions of individual people. The comparison of the opinions of different people and their connection to the results of the literature review should assist in resolving this issue, but it is still important to highlight the subjectivity of certain comments present in the findings. With the limitations in mind, conclusions that are based on both the literature review and interviews can be offered.

In the majority of cases, the interviewees and literature review offered similar findings, which can be summarised as follows. Separation of powers, including separation of powers within the criminal justice system and in Kuwait, appear to be important topics. Separation of powers is necessary because it ensures the independence of the different branches of power,⁸⁹⁹ resulting in the protection of human rights, reduction of corruption, increase in transparency, and facilitation of justice. The specifics of criminal-justice separation of powers that make it especially significant are concerned with the vulnerability of the people affected by it and the potential negative outcomes of power abuse in it.⁹⁰⁰

⁸⁹⁹ Montesquieu, *supra* (n 6) at 224.

⁹⁰⁰ Barkow, *supra* (n 15) at 989-1000.

Theoretically, separation of powers should protect the rights of the people of Kuwait. It is guaranteed by Article 50⁹⁰¹ of the Constitution, as well as Kuwaiti legislation; important precedents and various governmental bodies are supposed to ensure it. However, in practice, multiple hurdles prevent separation of powers from being truly effective in Kuwait. First of all, separation of powers is not fully implemented, which is why different branches of power are not completely independent of each other. In particular, the executive branch has notable opportunities for controlling the judiciary, especially through funding⁹⁰² and judge appointment.⁹⁰³ Other concerns were also mentioned; they included miscarriages of justice, the lack of appropriate legislation for political crimes, favouritism, bureaucracy, and so on.⁹⁰⁴

Despite the mentioned problems, certain aspects of the criminal justice system were commended by the respondents. For example, the appeal system was found to be praiseworthy, and the legislation related to the rights of offenders was described as appropriate. However, the numerous problems required the investigation of potential causes and solutions. According to the interviews, the dependence of the judiciary and other difficulties with separation of powers (for instance, the lack of independence of the legislative body and the weak cooperation within the government) were a major cause. Further, certain legislative deficiencies, especially the lack of important legislation or its misuse, were noted. In addition, the participants suggested that the judiciary and public were not particularly active, but there were significant explanations for these phenomena, including the lack of awareness, the potential restrictions of the rights to assembly and freedom of speech, and the difficulties associated with establishing NGOs in Kuwait.

⁹⁰¹ Constitution of Kuwait, 1962, art. 50.

⁹⁰² Brown, *supra* (n 37) at 158.

⁹⁰³ Alkarama Foundation, *supra* (n 40) at 12.

⁹⁰⁴ Alkarama Foundation, *supra* (n 40) at 12; see also Freedom House, *supra* (n 158).

The solutions that were proposed addressed the mentioned causes. In the case of legislative deficiencies, new or improved legislation would be required, and in the case of insufficient independence of the judiciary, the limitation of the executive power could help. However, the participants also noted that major alternative mechanisms of protecting human rights are the public opinion and the independence of the press. According to the participants and the literature review, Kuwaiti legislation and separation of powers proceed to evolve, which has already led to certain improvements in human rights protection. However, a lot remains to be done. Thus, in response to the primary research question, it can be stated that Kuwaiti separation of powers is theoretically guaranteed by the Constitution, but in practice, it is not fully supported within the criminal justice system, which results in separation of powers being ineffective.

It can be added that the use of the literature review and interviews enabled a form of triangulation in which the findings of the two main methods of this research were contrasted. The majority of the results were supported by both approaches to investigation, and very few discrepancies were found. For example, the participants provided only positive comments about law hybridisation, which can indeed be supported by the relevant literature.⁹⁰⁵ However, the literature also introduced some negative perspectives on the hybrid nature of Kuwaiti law,⁹⁰⁶ which was not mentioned by the respondents. It can be suggested that the findings indicate the presence of both positive and negative outcomes of law hybridisation in Kuwait.

Furthermore, there were discrepancies in the responses of the participants. Thus, the participants who worked with the executive branch of power did not find the multiple opportunities available to the executive branch for the control of the judiciary to be

⁹⁰⁵ Sand, *supra* (351) at 186.

⁹⁰⁶ Williamson, *supra* (n 10) at 36-37.

controversial. According to them, the opportunity for control does not imply the presence of control. However, the rest of the participants found the issue problematic and could offer some examples of the instances in which the opportunity for control resulted in control, particularly when describing political crimes. In addition, there was a discrepancy in the assessment of the potential flaws of the Constitution. Such differences are likely to be the result of the tendency of interviews to produce subjective data, but they may also be explained by different experiences rather than viewpoints.

In addition to supporting the results of each other, the methods of the thesis presented some unique findings. Thus, the literature review did not encounter extensive commentary on the reasons for problems with separation of powers in Kuwait or solutions to them. The interviewees offered their interpretation of the potential causes of the issues that they considered and contributed some information about the currently implemented and desired interventions. On the other hand, the literature review provided more extensive coverage of many topics, including, for example, the role of NGOs in Kuwait, indicating the hurdles experienced by them that the participants did not consider. Thus, the two methods allowed paying attention to varied topics that were related to the research question.

It should also be mentioned that the interviewees shifted the focus of the thesis towards the topic of the independence of the judiciary. This outcome can be connected to the fact that in Kuwait, the executive branch of power has notable opportunities for controlling the judiciary, which is why it was a major concern that was stated in almost every interview. In other words, this finding indicates a problem that preoccupies a number of the respondents. However, the revisions of the thesis produced a more extensive literature review, which allowed bringing the focus away from this topic for a more extensive consideration of criminal-matters separation of powers in Kuwait.

The present thesis is unique in its focus on the separation of powers in the criminal justice system of Kuwait. It investigates understudied phenomena within an understudied context, which explains the reason for its existence. However, its findings can also be of interest to the investigators of other contexts and countries, especially those that experienced similar historical events. Criminal-justice separation of powers is especially important because of the significance of preventing power abuse within criminal justice systems. As a result, future research on the topic is advised.

8.3. Recommendations for Future Research

The literature review demonstrates that the research on Kuwaiti separation of powers is not very extensive and appears to be dominated by rather outdated sources. The same can be said about the study of Kuwaiti criminal justice, its attitudes toward political crimes, and other important topics that were discussed throughout the thesis. Given that the thesis reliably shows that certain flaws in the separation of powers in Kuwait can be found, additional research that would provide more recent data for informing solutions and future decisions is justified. The present thesis is rather unique in its focus on the seminal justice of Kuwait and its separation of power, and as one of the pioneering studies, it can offer some suggestions regarding the directions that future inquiry can take. The lessons that can be learned from this thesis include those related to its objectives, methodology, and studied topics.

8.3.1. Current Research Objectives

The research question of this thesis has been answered. In other words, this study has contributed to the exploration of the separation of powers in Kuwait from the perspective of criminal justice and also considered its effectiveness in protecting human rights. Furthermore, the thesis has offered several suggestions that can become recommendations

for future actions aimed at protecting human rights in Kuwait. However, this thesis cannot claim to have exhausted the topic. Other recommendations might be produced by an ongoing investigation that would involve more expert perspectives, which means that future research can proceed with the same or similar goals to uncover more insights on the topic.

8.3.2. Methodological Suggestions

As a study that investigated a relatively understudied topic, the experience of this thesis can provide insights into the methods of inquiry that can be more or less effective in similar endeavours.⁹⁰⁷ Thus, the qualitative approach was proven effective; a quantitative study would not respond to the research question, which justifies the application of qualitative methods to similar investigations. Furthermore, the thematic analysis allowed analysing the raw data and establishing the themes which contained responses to the research question.⁹⁰⁸ Thus, the methodological choices of the thesis, which were motivated predominantly by theoretical considerations, were proven to be suitable in practice, and they can be recommended for future research.

Semi-structured interviews were useful due to their ability to gather the data, but they also allowed the participants to report additional details, which contributed to responding to the research question.⁹⁰⁹ In addition, the collection of the opinions of the people who were directly involved in the different branches of powers of Kuwait, as well as those who studied this and similar topics, proved to be an effective method of gathering primary data. The general unanimity of the participants in their assessment of the aspects of the separation of powers in Kuwait suggests that interviews with experts can provide fairly

⁹⁰⁷ May, *supra* (n 628) at 132; see also Eriksson and Kovalainen, *supra* (n 628) at 4.

⁹⁰⁸ Braun and Clarke, *supra* (n 661) 77, 95-96; Vaismoradi et al., *supra* (n 661) 100, 104.

⁹⁰⁹ Edwards and Holland, *supra* (n 636) 1, 29-30; see also Eriksson and Kovalainen, *supra* (n 628) at 94.

reliable data, and this method can be recommended for future investigations. The different opinions supported by some of the participants, especially with respect to the ability and tendency of the executive branch to exert power over the judiciary, also give validity to the decision to involve people from different branches. Indeed, varied experiences may affect people's perspectives on the subject, which is why the collection of different viewpoints can be helpful. The thesis included the perspectives of the representatives of all three branches, as well as some people who were not affiliated with either and, therefore, would be considered objective. Since interviews produce subjective data, it is an important recommendation for future research.

A note can also be made regarding the framework of the thesis. Post-positivism⁹¹⁰ allowed the study to postulate an objective reality of Kuwaiti separation of powers while taking into account the context of the collected data, especially as related to the participants' backgrounds. Basically, the framework fit the project in that it provided a structure for it and its methods, allowing them to align, which suggests that it is a workable tool for qualitative studies. However, this thesis did not test or compare the framework to any other option, which is why this conclusion is tentative; another approach could also work for this or a similar future research.

In connection to helpful frameworks, Barkow's⁹¹¹ work has provided a suitable ground for the present thesis. Indeed, it highlighted the primary issue in the representation of the separation of powers in research and directed the attention of this project toward the criminal-matters perspective. As a piece of thinking which analyses the existing research on separation of powers, Barkow's article can be helpful in other studies that consider this topic. Simultaneously, Barkow presents a framework for analysing the protection of human

⁹¹⁰ Frane, *supra* (n 623) at 6.

⁹¹¹ Barkow, *supra* (n 15) 989, 989.

rights from the perspective of criminal justice, which makes it applicable to the future research dedicated to criminal justice and human rights concerns. Thus, the present thesis demonstrates the usability of this article. Given that Barkow focuses on the US criminal justice, the application of this framework to a different context (in this case, Kuwait) may further prove its usefulness.

In addition, future studies can rectify the limitations of the methodology of this thesis, improving the quality of their findings. Thus, it should be noted that the sample of the thesis could cause some concerns. To be more precise, the sample was quite large for a qualitative study, and it allowed data saturation, but it also meant that each of the groups was represented by five people. Additionally, no police officers or prosecutors were involved. From this perspective, future studies may either employ larger samples or, possibly, focus on one particular branch but offer its greater representation. This way, more reliable data pertinent to each of the branches can be produced. Also, while no particular differences between the responses of men and women or people of different generations were checked for, it should be acknowledged that such differences could exist. This thesis focused on making the sample representative of different branches of power rather than individual socioeconomic groups, but samples that focus on particular populations from the perspective of demographics could be useful to investigate. A quantitative approach would allow determining if any significant differences between their ideas and assessments could be found.

Finally, as a qualitative study, this thesis does not produce the type of data that can be considered generalisable.⁹¹² The thesis cannot offer conclusions about the prevalence of each of the problems that it has discussed (such as, for example, the treatment of prisoners or politically motivated incarcerations). Simultaneously, the literature review demonstrates

⁹¹² May, *supra* (n 628) at 102.

a lack of data on Kuwait, which justifies future qualitative investigations. Therefore, future research may incorporate quantitative elements to provide more quantifiable descriptors of Kuwait and its performance with respect to the separation of powers criteria and criminal justice.

8.3.3. Topics

Both the literature review, which shows the restricted amount of research on Kuwait, and the limitations of this thesis imply that the additional investigation of criminal justice and separation of powers in Kuwait is necessary. A major limitation is the focus of the participants on the separation and independence of the judiciary. This problem is compensated to an extent by the literature review; also, it can be justified by the fact that the participants clearly viewed it as the main issue when the criminal justice and separation of power in Kuwait are concerned. However, it cannot be denied that other topics were also raised, indicating that the judiciary is not the only branch of power that demonstrates insufficient separation. In fact, the excessive power held by the executive branch can be considered an even more significant problem, which is also reported to have caused the dependence of the judiciary. Therefore, future research may consider investigating in greater detail the separation of powers in Kuwait that either would not focus on one particular branch or would contribute the perspectives of the remaining two branches.

When considering more specific suggestions for future research direction, the dynamics of the branches and their interaction are a noteworthy topic. In particular, it could be important to investigate the ways in which, as stated in the Constitution, the branches are supposed to ensure the “separation and cooperation of powers”.⁹¹³ The perspectives of the representatives on how they understand this statement and try to achieve that outcome

⁹¹³ Constitution of Kuwait, 1962, art. 50.

could also be complemented by the objective reports of the ways in which the cooperation and separation are ensured. The impact of these endeavours and actions on the criminal justice system would make this direction an appropriate continuation of the current research.

Moreover, the thesis helped to uncover interesting and important individual issues which can benefit from additional exploration. Among other things, it would be necessary to gain deeper insights into the problems of bureaucracy, the treatment of inmates, and transparency, including the transparency of particular branches of power in Kuwait. As demonstrated by the interviews, these issues are an important aspect of the general concerns associated with the separation of powers or the criminal justice in Kuwait, but the present thesis has only briefly considered them. Also, the topic of political crimes, especially in the absence of the terminology that would describe it,⁹¹⁴ and the problems of associated miscarriages of justice could be studied on their own or in connection to the separation of powers. Based on the findings, these problems are very acute and complex, and this thesis has not covered them to a significant extent. In summary, since this thesis was focusing on under-investigated topics and a rarely explored context, it could not possibly cover them to exhaustion. Future research can use the information about the potential areas of interest identified by the literature review and interview analysis.

Thus, as an inquiry into an underrepresented area of study, the present thesis can offer insights for future potential investigations. This thesis has already been expanded to incorporate more commentary on the separation of power in Kuwait; through this process, its focus on the judiciary concerns was compensated with additional literature reviews. An ongoing investigation that would supply data and recommendations for action would

⁹¹⁴ Kuwait, Law No. 31 of 1970: Act Amending the Provisions of the Penal Code (National Security Law), 1970, art. 25.

facilitate the solution of the problems that were identified by this inquiry. The thesis allows making topic-related recommendations; the methodology's limitations and successes can also be of help.

8.4. Recommendations for Political Actors in Kuwait

Despite the limited amount of research, the presented information can be used to provide guidance for different political actors in Kuwait. Based on the interviews, as well as the literature review, it can be concluded that some of the crucial actors include the public, the media, NGOs, and governmental agencies. In this section, recommendations will be offered for each of them.

Given the amount of power and knowledge governmental actors have, it is reasonable to start with them. First, it is necessary for governmental agencies to officially research and address the issues that have been found throughout this project, including the concerns of the lack of appropriate legislation, as well as its implementation. Depending on the issue, different branches of power may be involved. Thus, the introduction of new legislation is a problem that can only be addressed by the legislative power, but the concern of the relationship between the police and prosecution or the independence of the judiciary involves more than one branch. Also, certain issues may be universal; for example, the problems of bureaucracy or bribery are less branch-focused and more concerned with the procedures employed by Kuwaiti government.

Each of these issues requires investigation, which calls for government-funded research. The presented concern of the lack of relevant information, including academic papers and statistics, can be resolved with the help of the government, which should prioritise research. Similarly, the government can assist other actors, especially NGOs by making the

NGO-controlling legislation⁹¹⁵ less restrictive and the public by empowering them to participate in political discourse through education, information, and improved legislation that makes the laws on public assembly less restrictive.⁹¹⁶ Overall, a lot depends on the governmental agencies, which highlights the importance of this actor.

However, the presented literature, as well as the expert opinions from the interviews, clearly demonstrate that the NGOs, media, and people of Kuwait can prompt the government to act. Indeed, while each of these actors can have their own agendas, it is also critical that they explore their influence on the government to promote the above-mentioned changes. With the public clearly demonstrating their interest in the advancement of the separation of powers, the governmental agencies may be more inclined to adequately respond.

It can be pointed out that the current legislation related to NGOs and public assembly might not be indicative of the government's willingness to listen to the people of Kuwait. However, Kuwait is a democratic country, as pointed out in Article 6⁹¹⁷ of its Constitution, which means that the will of the people is the "source of all powers" in it. From this perspective, it is the responsibility of the government to listen to the public will and respond accordingly. Additionally, Kuwait is a part of international organisations and agreements that also push for democratic changes.⁹¹⁸ As pointed out by the expert opinions, as well as some of the literature, changes are already being made.

⁹¹⁵ Human Rights Committee, *supra* (n 156) at 8.

⁹¹⁶ Human Rights Committee, *supra* (n 156) at 7-8; see also Centre for Civil and Political Rights, *supra* (n 162) para. 5.

⁹¹⁷ Constitution of Kuwait, 1962, art. 6.

⁹¹⁸ Human Rights Committee, *supra* (n 156) at 7-8.

NGOs are particularly responsible for the changes. The literature review proves that human rights NGOs in Kuwait have achieved notable positive outcomes,⁹¹⁹ for example, in the advancement of the rights of women.⁹²⁰ Therefore, NGOs can be considered a capable actor that can promote the relevant areas of research and awareness of the separation of powers, as well as exert pressure on the government to advance relevant agendas.

Furthermore, the power of the media was highlighted by the experts. Indeed, the media can objectively have an impact on the society, and its primary abilities consist of informing and motivating the public. The media can advance the awareness and understanding of the separation of powers and related issues, which, in turn, empowers the latter to act. While individual citizens of Kuwait can also contribute through research and education, the primary role of the public is in influencing the government. By exerting their power as the source of Kuwaiti sovereignty,⁹²¹ the people of Kuwait should push for improvements in the field of the separation of powers after having been informed by research, NGOs, the media, and the government about its importance and the current issues in the area.

It should also be noted that neither of the mentioned issues (from the judiciary's dependence on the executive branch to bureaucracy) should be considered in isolation. While individual groups and actors may focus on particular concerns, they need to be addressed in concert because all of them are interrelated through the general issue of the need for an improved separation of powers in the criminal justice system. Thus, the presented research suggests that, given the importance of the separation of powers, especially in criminal matters, it is critical for all the political actors of Kuwait to participate in research, education, and action geared toward the understanding and

⁹¹⁹ Al-Kazi, *supra* (n 506) 175-176; see also Bureau of Democracy, Human Rights and Labor, *supra* (n 507) 14.

⁹²⁰ Al-Kazi, *supra* (n 506) 175-176.

⁹²¹ Constitution of Kuwait, 1962, art. 6.

resolving of the issues that have been uncovered here and that may be uncovered in the future.

8.5. Specific Practical Implications

One of the major disadvantages of the previous sections, as well as the thesis as a whole, is that there are few direct recommendations put forward by the participants. The vagueness of the suggestions for improvement can be alleviated through the introduction of specific proposals that are based on the presented information. The currently available information cannot substantiate an exhaustive plan for the introduction of the separation of powers into the criminal justice of Kuwait, but several specific suggestions can still be made.

1. In terms of legislation, the Regulation of the Judiciary Law, especially its Article 2,⁹²² require revision. To be more specific, “acts of sovereignty” should be included into the judiciary’s area of expertise to avoid the currently unconstitutional exception that it has.
2. Furthermore, legislative protections are necessary for the judiciary; in particular, it needs to be financially independent and fully in control of judge appointment and dismissal, as well as the management of all types of criminal activity.⁹²³
3. All types of criminal activity require appropriate definitions and legislations. Based on the current research, the most topical issue here consists of political crimes.⁹²⁴ It can be proposed that a political crime should be defined as as the crimes which are committed against or by the state, using the definition by Ross,⁹²⁵ but the government of Kuwait might want to add more information to the definition.

⁹²² Kuwait, Decree Law No. 23 of 1990: Regulation of the Judiciary Law, 1990, art. 2.

⁹²³ Human Rights Committee, *supra* (n 156) at 7-8.

⁹²⁴ Mousavi, *supra* (n 133) 884; see also International Humanist and Ethical Union, *supra* (n 151) 1.

⁹²⁵ Ross, *supra* (n 146) at 4.

4. The protections from specifically the executive branch are important. The executive branch must be prevented from overpowering the rest of the branches legislatively and also in practice.⁹²⁶ In this regard, the separation of the investigators from the executive branch is critical. These protections should be legally introduced and enforced.
5. In terms of prosecutorial powers and roles, more specificity is required. Currently, even the prosecutors themselves report confusion, especially in terms of the separation of their power and that of the police.⁹²⁷ This issue requires additional investigation, but currently, improved definitions of prosecutorial roles can be helpful based on, for example, the international standards.⁹²⁸
6. The three branches need to explore the ways of cooperation and introduce new, more effective ones. The Constitutional recommendation of branches cooperation⁹²⁹ needs to be redefined to avoid its exploitation to the detriment of the separation of powers.
7. More education on the matters of separation of powers is needed for the public to become more politically active in that regard. The process can be championed by politicians, researchers, academics and journalists.
8. Additionally, researchers need to pay more attention to the concept of the separation of powers and its implementation in Kuwait. More data about the practical aspects of it is likely to produce more recommendations on the matter.
9. Protections for the freedom of speech are required to ensure the ability of the media and public discourse to function in Kuwait.⁹³⁰ It is important to expand the

⁹²⁶ Human Rights Committee, *supra* (n 156) at 7.

⁹²⁷ Morison and Grimshaw, *supra* (n 128) at 7.

⁹²⁸ International Association of Democratic Lawyers, *supra* (n 473).

⁹²⁹ Constitution of Kuwait, 1962, art. 50.

⁹³⁰ Mousavi, *supra* (n 133) 884; see also International Humanist and Ethical Union, *supra* (n 151) 1.

protection of the rights to free speech and assembly, and the laws related to defamation may need to be reconsidered.

10. NGO legislation requires a revision. Among other things, the legislation needs to be less restrictive in terms of establishing NGOs, and their independence needs to be ensured.⁹³¹

11. The practical application of offender rights needs to be tracked and examined; if violations of the relevant legislation are encountered, especially as related to separation of powers, appropriate mechanisms for their control need to be developed. The current study might not be enough to prove that such violations exist, which is why additional research is required.

While these activities are not a direct plan for separation of powers improvement, they address the issues that have been uncovered during the research. Based on the presented data, working to eliminate them is likely to help redefine the rules of interaction for the branches of power and, as a result, assist in re-introducing the concept of the separation of powers into their rules of engagement. This way, it will be possible to make the values of the separation of powers and their independence central in their relationship.

⁹³¹ Bureau of Democracy, Human Rights and Labor, *supra* (n 507) 13-14.

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Media Interviews

- Aljazeera Chanel, Program name is; the “Interview” published by Aljazeera on Mar 9, 2017. <https://www.youtube.com/watch?v=GknsmBRss7o> assessed 16 March 2018

Appendix A

Responded Table (Check List)

Parliament Member: PM

Judge: J

Lawyer: LW

Professional: P

Academic: AC

PM1 Age: 39 (Interview duration: 60 mins) Position: Parliament Member (Gender: M)

PM2 Age: 43 (Interview duration: 50 mins) Position: Parliament Member (Gender: M)

PM3 Age: 47 (Interview duration: 50 mins) Position: Parliament Member (Gender: M)

PM4 Age: 55 (Interview duration: 60 mins) Position: Parliament Member (Gender: M)

PM5 Age: 53 (Interview duration: 50 mins) Position: Parliament Member (Gender: M)

LW1 Age: 38 (Interview duration: 60 mins) Position: Lawyer (Gender: F)

LW2 Age: 42 (Interview duration: 45 mins) Position: Lawyer (Gender: M)

LW3 Age: 45 (Interview duration: 60 mins) Position: Lawyer (Gender: F)

LW4 Age: 50 (Interview duration: 50 mins) Position: Lawyer (Gender:M)

LW5 Age: 46 (Interview duration: 60 mins) Position: Lawyer (Gender:M)

P1 Age: 38 (interview duration: 45 mins) Position: Legal Officer at Ministry of Justice (Gender: F)

P2 Age: 35 (Interview duration: 45 mins) Position: Legal Officer at Ministry of Justice (gender: M)

P3 Age 48 (Interview duration: 45 mins) Position: Legal Officer at Ministry of Justice
(Gender: F)

P4 Age 44 (Interview duration: 45 mins) Position: Legal Officer at Ministry of Justice
(Gender: M)

P5 Age 36 (Interview duration: 45 mins) Position: Legal Officer at Ministry of Justice
(Gender: F)

AC1 Age 48 (Interview duration: 60 mins) Position: Law Professor (Gender: M)

AC2 Age 51 (Interview duration: 60 mins) Position: Law Professor (Gender: F)

AC3 Age 46 (Interview duration: 60 mins) Position: Law Professor (Gender: F)

AC4 Age 45 (Interview duration: 60 mins) Position: Law Professor (Gender: M)

AC5 Age 56 (Interview duration: 60 mins) Position: Law Professor (Gender: M)

J1 Age 45 (Interview duration: 45 mins) Position: Judge (Gender: M)

J2 Age 48 (Interview duration: 45 mins) Position: Judge (Gender: M)

J3 Age 55 (Interview duration: 45 mins) Position: Judge (Gender: M)

J4 Age 41 (Interview duration: 45 mins) Position: Judge (Gender: M)

J5 Age 52 (Interview duration: 45 mins) Position: Judge (Gender: M)

Total of Participants: 25

Appendix B

Separation of Powers in the Kuwait Criminal Justice System:

Interview Materials

Introductory Questions

1. The present research is devoted to the separation of powers (SOP) from the criminal justice perspective. It will predominantly employ the illustration of the criminal justice system of Kuwait. Are you familiar with the topics, and which channels provide you with the information on them (for instance, personal experience or research)?
2. Does your practical or theoretical experience imply that the topics (the Kuwaiti SOP or the criminal justice aspect of SOP) are sufficiently represented in modern research and paid sufficient attention in practice? If they are not, do you believe that they need greater coverage and attention?

Criminal Justice SOP

3. Do you believe that SOP (in general and in the criminal justice system) has specific functions? In other words, why is SOP desired and what is it expected to achieve? Please consider the interrelationships between the SOP in criminal justice and citizen's rights and describe them.
4. Please check the provided assessment criteria for SOP (see below). Do you agree with them? If not, please feel free to suggest changes and explain them.
5. Do you think that the separation of powers is an effective tool in achieving the protection of the population of Kuwait? Can you think of an alternative or a complementary measure (for example, the improvements in protecting human rights)?

Kuwaiti Legislation

6. The Kuwaiti legislation has multiple origins (including, for example, the French law and the religion of Islam). Can this factor somehow distinguish the legislation from more homogenous ones (in a positive or a negative way) in your opinion? Feel free to consider the potential impact of mixed origin on criminal justice SOP.

Kuwaiti Constitution

7. Consider the contribution of the Constitution of Kuwait (especially Article 50) to the development of criminal justice SOP. Do you think that criminal justice SOP is sufficiently guided by Kuwaiti Constitution?

Kuwaiti SOP and Criminal Justice System

8. Consider Kuwaiti criminal justice system from the perspective of SOP. Do you think that SOP is executed effectively (if it is, it should be present and fulfil the functions that you have suggested above)? If you want to, you can employ the proposed assessment criteria for criminal justice SOP, but please feel free to offer your personal criteria. Among other things, please consider the division of functions within the system (for example, the functions of the police, prosecutors, and judges) and the potential for wrongful conduct (abuse of power). If you find inefficiencies or issues, please try to describe them specifically.

9. When analysing the mentioned inefficiencies, consider their reasons. Can you trace the reasons for the existing issues or detect vulnerabilities that can become reasons for future issues?

10. Consider the consequences of the inefficiencies (existing or potential) in Kuwaiti criminal justice SOP. Can you already witness these consequences in practice or in personal life?

11. Can you pinpoint any safeguards (for example, legal or administrative ones) that are aimed at ensuring SOP in the Kuwaiti criminal justice system (or have the potential to do so)?

Change Efforts and Recommendations

12. Do you witness, experience, or participate in any efforts that are aimed at improving the Kuwaiti criminal justice system separation of powers? If yes, please describe and evaluate them (for example, consider the level of their appropriateness and timeliness, assess the execution processes and outcomes, and so on).

13. Do you think that the separation of powers in Kuwaiti criminal justice system should be improved? Please feel free to make recommendations and explain them and their feasibility.

Criminal Justice SOP Assessment Criteria

1. Transparency of the judiciary.
2. Independence of the judiciary:
 - 2.1.1. appointment and removal of judges;
 - 2.1.2. financing of the judiciary;
 - 2.1.3. miscarriages of justice;
 - 2.1.4. political crimes;
 - 2.1.5. rights of offenders and inmates;
 - 2.1.6. the work of the appeal system;
 - 2.1.7. police interrogation.

Appendix C

Participant Information Sheet

Research title: Separation of Powers in the Kuwaiti Criminal Justice System

Abdulrahman Alhajri

Middlesex University, Law School

Research title: Separation of Powers in the Kuwaiti Criminal Justice System

You are invited to be in a research study of separation of power in the criminal justice. You were selected as a possible participant because you are specialised in the field. I ask that you read this form and ask any questions you may have before agreeing to be in the study.

Procedure

If you agree to be in this study, I would ask you to do the following things;

- Sign a consent form
- Participate in a one-on-one interview that will be audio recorded with the researcher and the time will be between 50-60 minutes

Risk and Benefit of being in the study

This research has a minimal risk to the participant. No one is being pressured to participate. There are no monetary benefits for participating in this study. The benefits are that you will know that you will be contributing to the body of knowledge regarding the separation of powers in the criminal justice system.

Confidentiality

The record of this study will be kept private and confidential in any sort of report I publish, I will not include any information that will make it possible to identify a subject. Research records will be sorted securely and only researcher will have access to the records. The records, notes and data from interviews and questions will be kept locked on the researcher's flash drive or computer under password protection.

Voluntary nature of the study

Participation in this study is voluntary. You have the decision whether or not to participate. If you decide to participate, you are free to not answer any question or withdraw at any time.

How to withdraw from the study

You have the full right to withdraw from this study, and all information will be permanently deleted or erased. If at any time you feel uncomfortable, you may contact me, Abdulrahman Alhajri via email (AF777@live.mdx.ac.uk) or in person, or via telephone contact at (+965) 99818868.

Contacts and questions

You may ask any questions that you have now. If you have questions later, you are encouraged to contact me.

You will be given a copy of this information to keep for your records.

Appendix D

Participant Identification Number:

CONSENT FORM

Title of Project: Separation of Powers in the Kuwaiti Criminal Justice System

Name of Researcher: Abdulrahman Alhajri

Middlesex University, Law School

1. I confirm that I have read and understand the information sheet datedfor the above study and have had the opportunity to ask questions.
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.
3. I agree that the information I give during the study can be used in any related publications, such as reports and academic articles.
4. I understand that my interview may be taped and subsequently transcribed (where applicable).
5. I agree that anonymised quotes can be used in any publications related to the study (where applicable).
6. I agree that the dissertation supervisor and associated examiners can review my anonymised interview transcript if required. I am assured that anonymity and confidentiality will be upheld in this case.

7. I agree that if it is selected as part of audit processes to ensure quality assurance this form bearing my name and signature may be seen by a designated auditor

8. I agree to take part in the above study.

Name of participant	Date	Signature
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Researcher	Date	Signature
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1 copy for participant; 1 copy for researcher

Appendix E

Themes	Subthemes and Key Codes	Representation
Importance of topics	The research of the topics is important	5PM 5LW 2P 4AC 4J
Attention to SOP in criminal justice	Increased attention from scientific communities required	5PM 4LW 2P 4AC 4J
	Increased practical investigation required	1PM LW P 1AC 1J
Kuwaiti legislation origins	Multiplicity of origins is present	5PM 5LW 5P 5AC 5J
	Uniqueness of Kuwaiti legislation	2PM 2LW 2P 1AC J
	Positive outcomes of Kuwaiti legislation origins <ol style="list-style-type: none"> 1. Flexibility for legislators 2. Variety of sources for legislators 3. Contribution to democracy 4. Positive impact on SOP 	<ol style="list-style-type: none"> 1. 2PM 1LW P 1AC 3J 2. 1PM 1LW 2P 1AC 2J 3. 2PM LW P 2AC 2J 4. 2PM 1LW 3P 3AC 1J
Multiple functions of SOP	SOP for the independence of authorities	5PM 3LW 3P 2AC J
	SOP for judiciary independence	PM LW P 3AC 4J
	SOP to avoid dictatorship/SOP for democracy	4PM 4LW 3P 3AC 2J
	SOP for human rights	2PM 2LW 3P 4AC 4J
	SOP against corruption	PM 1LW 1P 1AC J
	SOP for transparency	2PM 2LW 1P 3AC 2J
	SOP for justice	2PM 2LW 1P 3AC 4J
SOP within criminal justice	Constitutional roots of SOP within criminal justice	1PM LW P AC 1J
	Lack of SOP within criminal justice in Kuwait	1PM LW P AC 1J
	Need for SOP within criminal	1PM LW P AC 1J

	justice in Kuwait	
Proposed research criteria approval		2PM 1LW 1P 2AC 1J
SOP in Kuwait	SOP is an effective tool in achieving the protection of the population of Kuwait	4PM 2LW 5P 4AC 5J
	<p>Guarantees of SOP in Kuwait</p> <ol style="list-style-type: none"> 1. Constitution 2. Parliament 3. Regulation of the Judiciary Law 4. Public opinion 5. Precedents 6. Administrative provisions 7. Constitutional Court 	<ol style="list-style-type: none"> 1. 4PM 4LW 5P 5AC 5J 2. 1PM 2LW P 1AC 1J 3. PM LW 2P AC 3J 4. 1PM 1LW P AC 1J 5. PM 1LW P AC J 6. PM 1LW P AC J 7. 2PM 1LW 2P AC J
	<p>Deficiencies in Kuwaiti SOP</p> <ol style="list-style-type: none"> 1. Incomplete application of SOP in practice 2. Article 2 of the Regulation of the Judiciary Law 3. Financial dependence of the judiciary 4. Foreign judges as a problem 5. Need for investigator independence 6. Executive control over misdemeanours 7. The presence of the Undersecretary of the Ministry of Justice in the Supreme Council 8. The executive branch overpowering the rest 	<ol style="list-style-type: none"> 1. 2PM LW P 2AC J 2. 1PM LW P 4AC 4J 3. 5PM 3LW 2P 5AC 4J 4. 3PM 2LW P 1AC 4J 5. 5PM 4LW 3P 5AC 5J 6. 3PM 3LW P AC J 7. 5PM 4LW P 2AC 3J 8. 2PM LW P AC J
Characteristics of Kuwaiti judicial system	Transparent judiciary	5PM 3LW 1P 3AC 4J
	Issues with transparency in the judicial system	1PM LW P AC J
	Favouritism and patronage in judicial system	1PM LW P AC J
	<p>Judge independence and related issues</p> <ol style="list-style-type: none"> 1. Legislative independence of 	<ol style="list-style-type: none"> 1. PM 2LW 3P 2AC 4J 2. PM LW P 1AC 3J

	<p>judges (Article 163)</p> <ol style="list-style-type: none"> 2. Appropriate judge dismissal mechanism 3. Favouritism in judge appointment 4. The presence of the Undersecretary of the Ministry of Justice in the Supreme Council 5. Financial dependence of the judiciary (Ministry of Justice) 6. Foreign judges (appointed by the Ministry of Justice) 7. Effort at judiciary Kuwaitization 8. No separation of investigators from the executive power 	<ol style="list-style-type: none"> 3. 1PM LW P AC J 4. 5PM 4LW P 2AC 3J 5. 5PM 3LW 2P 5AC 4J 6. 3PM 2LW P 1AC 4J 7. 2PM LW P 1AC J 8. 5PM 4LW 3P 5AC 5J
	Excessive bureaucracy	PM LW 3P AC J
	Need for SOP within the judiciary	1PM 1LW P AC J
	<p>Miscarriages of justice</p> <ol style="list-style-type: none"> 1. Rare miscarriages of justice 2. Political crimes and miscarriages of justice 3. No political crime category (legislative level issue) 	<ol style="list-style-type: none"> 1. 5PM 4LW P 1AC 4J 2. 4PM 3LW P 1AC J 3. 5PM 3LW 5P 4AC 4J
	<p>Rights of offenders and inmates</p> <ol style="list-style-type: none"> 1. Appropriate legislation for the rights of offenders and inmates 2. Inappropriate practical application of the rights of offenders and inmates 	<ol style="list-style-type: none"> 1. 5PM 2LW 1P 1AC 5J 2. 5PM 3LW P 1AC 1J
	Commendable appeal system	5PM 5LW 4P 2AC 5J
Possible causes of issues in Kuwaiti judiciary	Lack of SOP	1PM 2LW P AC J
	Dependence of the judiciary	1PM 2LW P AC J
	<p>Legislative and executive shortcomings cause SOP inefficiencies</p> <ol style="list-style-type: none"> 1. Unconstitutional legislation 2. Lack of required legislation 3. Exploitation of the 	<ol style="list-style-type: none"> 1. 1PM LW P 2AC 2J 2. 1PM 4LW 1P 2AC 3J 3. PM LW P 1AC 1J 4. PM 1LW P 2AC

	<p>inappropriate legislation by the executive power</p> <p>4. National Assembly focuses on supervision, not legislation</p>	1J
	Weak cooperation between power branches	1PM 1LW P AC 1J
	Weak public activity (absence of pressure on the legislative branch from the public)	2PM LW P AC 1J
	Inactivity of the judiciary	PM 2LW P AC 1J
Issues in Constitution	Inappropriate constitutional definition of SOP	1PM 1LW P AC J
	<p>Appropriate constitutional definition of SOP. Real causes of issues:</p> <ol style="list-style-type: none"> 1. Cooperation versus interference 2. Misinterpretations of the constitution 3. Legislative shortcomings 4. Unconstitutional legislation 	<ol style="list-style-type: none"> 1. PM LW P AC 1J 2. 1PM LW 1P 1AC 2J 3. 1PM 2LW 1P 1AC 2J 4. PM 2LW P 4AC 3J
Additional measures to ensure the protection of human rights (aside from SOP)	<p>Additional measure: public opinion</p> <ol style="list-style-type: none"> 1. The activities of the human rights organisations, transparency organisations, Kuwait Lawyers Society, and Association of Lawyers 2. Improvement of public awareness 3. Pressuring the government to make changes 	<ol style="list-style-type: none"> 1. 1PM 4LW 2P 1AC 1J 2. 3PM LW 1P 1AC J 3. 2PM 4LW 2P 1AC 3J
	Additional measure: transparency and independence of the press	2PM LW P 1AC J
Solutions to the SOP inefficiencies in Kuwait	Need for change	5PM 5LW 5P 5AC 5J
	Legislation as a solution	PM 1LW P 3AC 1J
	National Assembly	1PM 2LW P AC J
	Cooperation of the executive branch with the judiciary	2PM LW P 1AC J

	Kuwaitization of the judiciary	2PM LW P AC J
	SOP within the judiciary	1PM LW P 1AC J
	Ensuring SOP	2PM LW 1P AC J
	Combating bureaucracy 1. Reducing paperwork 2. Sharing power	1. PM LW 3P AC J 2. PM LW 1P AC J
Change efforts	Occupational	4PM 5LW 2P 4AC 5J
	Research-related	PM 1LW P 3AC J
	Public	1PM 1LW 2P AC J
	Change is not a governmental priority in practice	1PM LW P AC J
	Change is supported by the governmental vision	1PM LW P AC J

Note: PM – Parliament members, LW – Lawyers, P – Professionals, AC – Academics, J – Judges. The figure before the letter specifies the number of respondents of a particular group who mention the theme in their responses.

Appendix F

Samples from Interviews Transcript

Participant 1: PM1

Black: Main Questions

Red: Participant Answer

Green: Researcher Questions during the interview

Introductory Questions

1. The present research is devoted to the separation of powers (SOP) from the criminal justice perspective. It will predominantly employ the illustration of the criminal justice system of Kuwait. Are you familiar with the topics, and which channels provide you with the information on them (for instance, personal experience or research)?

Participant: Yes, I have had a Bachelor and Master's degree in law and practiced law for a long time. Also, I am a member of the Kuwaiti National Assembly and a member of the Legislative Committee of the Kuwaiti National Assembly.

2. Does your practical or theoretical experience imply that the topics (the Kuwaiti SOP or the criminal justice aspect of SOP) are sufficiently represented in modern research and paid sufficient attention in practice? If they are not, do you believe that they need greater coverage and attention?

Yes, certainly this issue is very important and needs more attention at the scientific and practical levels as well.

Criminal Justice SOP

3. Do you believe that SOP (in general and in the criminal justice system) has specific functions? In other words, why is SOP desired and what is it expected to achieve? Please consider the interrelationships between the SOP in criminal justice and citizen's rights and describe them.

The principle of the separation of powers is one of the important principles and guarantees of justice, integrity, and the authorities' supervision of each other, with them being separate and independent powers. This will not be realised if we have one central authority. Unfortunately, in our country of Kuwait, the principle is not sufficiently applied. There is power that overwhelms other powers and we mean here the executive power, which greatly overlaps with the legislative and judiciary power. Based on various practical experiences, we see that the elements of preference and influence are always in favour of the executive power over other authorities. For example, despite the proper quorum of Parliament members being available, parliamentary sessions may be disrupted. Because of the absence of ministers, the session may be adjourned. Here, we have a customary and not legal or

constitutional rule that if one minister at least is not attending the session, it should be adjourned due to the absence of a quorum. Therefore, the executive power becomes able to disrupt the work of the legislative authority, contrary to the adjournment and suspension provisions mentioned in the Constitution. So, there is a great failure in this aspect on the practical level.

4. Please check the provided assessment criteria for SOP (see below). Do you agree with them? If not, please feel free to suggest changes and explain them.

Participant: I have looked at the criteria below, which are proper criteria for evaluating any judicial system. You can ask me about each criterion and I will answer.

I: What is your assessment of the transparency of the judicial system in Kuwait?

Participant: Transparency is realised significantly in the judicial system. There is a system for archiving cases according to their chronological order. Moreover, there are specific dates and general forms for daily routine cases. As I hold a supervisory job, I see that transparency is largely realised. If we have issues over cases of a special nature, such as those having a great political or commercial interest, the transparency may be decreased. But in general, for the routine cases of the citizens or the residents of Kuwait, transparency is achieved.

I: What about the independence of the judiciary with respect to the appointment and removal of judges?

Participant: Unfortunately, appointments in the judiciary system are sometimes subject to favouritism and patronage. Even if there are ads for the appointment, there are faults on the practical side, which is evident from the repetition of certain names and family ties. So, regarding that question, I have submitted a parliamentary question on the acceptance criteria applicable to the judiciary system and whether they are complied with, and if so, what are these criteria? Have any grievances been reported? What were the results of those grievances? Because we have heard that some people joined the training sessions for judges two months after they had begun - on which basis did this happen? Is this due to the acceptance of a grievance? It is true that this is an individual case, but in terms of the appointment or dismissal of judges, transparency and independence are poor.

I: According to the legal and procedural rule, the appointment is decided by the judiciary itself and by the Supreme Council of the Judiciary?

Participant: Unfortunately, even in the Supreme Judicial Council, which is supposed to be an absolute Judicial Council, there is the position of the Undersecretary of the Ministry of Justice, which is an executive position represented in the Supreme Council of the Judiciary. Also, independence means that those who represent this council should occupy such positions on the basis of decisions made by the General Assemblies, but not through appointments and Amiri decrees signed by the Minister of Justice. However, the key

positions in the judiciary system are being occupied under Amiri decrees and decisions, not under judicial decisions made by the General Assemblies by election.

I: But aren't they nominated for those positions through the judiciary itself before the Amiri Decree is issued?

Participant: Yes, but they are nominated by the Supreme Council of Judiciary. The role of the General Assemblies should be activated to select their representatives in the Supreme Council of Judiciary, not by means of Amiri decrees, even if such appointments are from the judicial system. Selection should be made by means of election through the General Assemblies, not by means of Amiri decrees.

I: Are there cases that have been nominated by the Supreme Judicial Council and where no decree has been issued for it? If the answer is no, such decrees may be formal only and do not affect the judges' independence.

Participant: No, I have not seen any such cases, and the appointment upon decrees may be formal. These nominations are actually made by the judiciary system itself (Supreme Judicial Council) not through the General Assemblies. The General Assemblies are in place, but their duties are to distribute the tasks and they have a limited role in appointing the heads of courts and members of the Supreme Judicial Council.

I: What is your assessment of the financing of the judicial system?

Participant: The budget of the judges is still part of the general budget of the state and it is subject to the full control and financial procedures developed by the Ministry of Justice, which is an executive body. Financial and administrative independence has not been available until now.

I: It should be financially independent?

Participant: Of course.

I: What about appointing a foreign judge?

Participant: In principle, the judiciary positions should be occupied by citizens because the citizen judge in fact is able to evoke the idea of the public order of the state. Here, I mean that the social and economic foundations on which the regime is based will be present in his mind more than in others and he follows the development of society. Sometimes, the judge may be a legislator, as we find in the administrative judiciary. Many of the principles of administrative justice were developed by judges, for example the theory of the Amir's action, emergency circumstances and other judicial theories. Regrettably, however, the government continues to contract foreign judges annually to work as Kuwaiti judges, which is unjustified behaviour by the executive power. I interpret that behaviour in bad faith, as influencing the judiciary. Foreign judges who are appointed lack any ties to Kuwait and will not have the same keenness as Kuwaiti citizens, with due respect to all.

Moreover, they will not be prepared to fight battles or take risks and sacrifices. He (the foreign judge) is coming on a temporary basis to collect his children's livelihood and return to his country. This is unfortunately a flawed behaviour of the government, so we have made many recommendations and proposals to compel the government to make a timetable and abide by it, and to work on raising the percentage of Kuwaitisation in the judiciary, particularly year after year, until the foreign judge phenomenon diminishes.

I: What is your assessment of the miscarriages of justice?

Participant: Very limited. Justice in Kuwait is generally in place and the controversial cases raised are individual cases. If the issue is not politically sensitive, the administration of justice is in place in Kuwait, the same as in the surrounding countries. We are very advanced and even the poorest person can litigate against the most famous character and the case is decided in his favour, as we see, for example, in labour and wage cases.

I: What about political crimes?

Participant: Unfortunately, this category of crime does not exist and I don't blame the Kuwaiti judiciary. The term 'political crimes' is one of the sections of criminal and public law that is not legislated or regulated here in Kuwait. It is a juridical term, but it does not exist as a legislative term. The political class of cases is not legislated, and this is not a deficiency in the judiciary as much as a failure and shortcoming by the legislative power to legislate and regulate political crimes.

I: What is your assessment of the rights of offenders and inmates in Kuwait?

Participant: There has been an improvement as we have reduced the period of pre-trial detention which the investigator and prosecutors are entitled to without a judicial order. Now, the investigator and the prosecutor are periodically obliged to present the charges to a judge to renew the detention pending investigation. The law here approved a large number of rights. On the actual operational level, the situation regarding places of legal custody and temporary or permanent detention is an inappropriate situation, and there are large deficiencies in terms of material and logistical equipment and privacy. The number of people in prison should be reduced and hygienic conditions must be provided, whether it is a case of temporary detention for 48 hours pending investigation, or in central prisons. There is a failure here – while there are proper legislative, legal and regulatory guarantees, in reality there are many shortcomings.

I: How do you evaluate the appeal system here in Kuwait?

Participant: It is guaranteed, and I give this system in Kuwait the highest appreciation. All appeals, cassations, motions, rehearings and other means of challenge are available and guaranteed without being subject to any threats and pressures.

I: What about police investigations?

Participant: A significant decline has been experienced in the last period and there is a constitutional gap which has given the police at the Ministry of Interior the right to investigate misdemeanours. This exception has been introduced into the Constitution and the government always resorts to it, relies on it and refuses to attach investigations into misdemeanours to the judicial bodies – it wants to keep them under the control of the executive power. Several campaigns have failed to transfer such authority from the executive power to the judiciary power, therefore investigations into misdemeanours are still under the control of the executive power. Also, there is another decline in the executive power, i.e. the Ministry of Interior, which gives the authority of investigation to civilians. But in recent years, we have witnessed the militarisation of the General Directorate of Police Investigations and a transfer of authority from civilians to the military. We know that the military is constantly following the instructions of its superiors by virtue of military education. This has negated the principle of the independence of the interrogator and undermined his image. This therefore violates the principle of the separation of powers and boosts direct subordination, seen in the nature of the relationship between the military and their superiors.

5. Do you think that the separation of powers is an effective tool in achieving the protection of the population of Kuwait? Can you think of an alternative or a complementary measure (for example, the improvements in protecting human rights)?

Of course, I agree with the first part of the question. Separation of powers as I said is important and needs to be boosted and the gaps in it should be filled. Regarding the second part, I think that complementary means of protecting the Kuwaiti population, along with the principle of separation of powers, would be to strengthen safeguards and tools, and to protect the control of public opinion. We have freedom of expression, but in terms of freedom of the press and publications, the reality is not satisfactory. There has been a large decline in the printed press and we have a limited number of newspapers. The headings of these newspapers are mostly unified, which deteriorates this area. Moreover, control over the owners of these newspapers, in terms of financial integrity and not receiving payments from politicians, foreign embassies or various authorities should be in place. This kind of control does not exist, so the citizens have no guarantee that a newspaper or journalist is honest. In my view, the guarantees over controlling public opinion are important, but are unfortunately flawed. Therefore, I have filed motions to promote the Kuwaitization and transparency of the press, and to make it compulsory for them to publish and declare their financial liabilities so that the audience can be assured that what they publish is a neutral opinion and is not affected by the owner of the newspaper. There is also the important principle of separating editorial responsibility and commercial responsibility. The owner of the newspaper does not have the right to appoint editors and journalists and impose a certain editorial policy, which is followed in democratic systems. Unfortunately, there is a mixture of editorial responsibility and commercial responsibility, which weakens public opinion control.

Kuwaiti Legislation

6. The Kuwaiti legislation has multiple origins (including, for example, the French law and the religion of Islam). Can this factor somehow distinguish the legislation from more homogenous ones (in a positive or a negative way) in your opinion? Feel free to consider the potential impact of mixed origin on criminal justice SOP.

I believe that these different schools, particularly the French or Latin schools as we call them, had a very significant influence, alongside the influence of Islamic Law, not as jurisprudence, but as a legal law. I mean here the publication of Sharia law, in which the Family Law and the Civil Code contributed to the legislative structure. Even in terms of Islamic Law, the legislator did not take one doctrine or one trend but took from various schools in Islamic Law to fit with the Kuwaiti society. Both have contributed significantly to the development of the principle of separation of powers in criminal justice.

I: What about the Egyptian law?

Participant: Of course, the Egyptian school had a great impact as well and it is still the second nationality here in Kuwait in terms of population in all authorities, after the Kuwaiti nationality. They are working as legal advisers in various governmental bodies and organisations. Even when the Kuwaiti Constitution was put in place, there were Egyptian contributions, besides those from the constitutional committees and the First Nation Council (Parliament), for example, the jurist Dr. Abdul Razzaq Al-Sanhuri, Dr. Mohsen Hafez, Othman Khalil Othman and others from the Egyptian school. The Egyptian school was influential.

Kuwaiti Constitution

7. Consider the contribution of the Constitution of Kuwait (especially Article 50) to the development of criminal justice SOP. Do you think that criminal justice SOP is sufficiently guided by Kuwaiti Constitution?

Participant: In fact, the Kuwaiti Constitution sets out the principle of the separation of powers but introducing exceptions may abolish the principle, as it mentioned "with its cooperation". Therefore, with regard to cooperation, there has been a lot of confusion between the powers and impotence in the line between the powers. Article 50 refers to the separation of powers in a clear manner, while the various articles near Article 50 have mixed the powers. For example, the members of the executive power, the ministers, are considered members of the legislative power by virtue of their posts. Therefore, the Constitution did not take into account the complete separation of powers, even though it is mentioned in Article 50, for example, as in the American system. This is the clearest example of the separation of powers, but it has been taken in a flexible way. The social and emotional nature of Eastern societies has led to more overlapping and mutual influence between the authorities.

Kuwaiti SOP and Criminal Justice System

8. Consider Kuwaiti criminal justice system from the perspective of SOP. Do you think that SOP is executed effectively (if it is, it should be present and fulfil the functions that you have suggested above)? If you want to, you can employ the proposed assessment criteria for criminal justice SOP, but please feel free to offer your personal criteria. Among other things, please consider the division of functions within the system (for example, the functions of the police, prosecutors, and judges) and the potential for wrongful conduct (abuse of power). If you find inefficiencies or issues, please try to describe them specifically.

Participant: I hold the opinion that the law created an overlap between the powers of the police regarding investigations and the prosecution. It gives the police or Ministry of Interior the right to investigate misdemeanours and it gives the prosecution the right to investigate crimes. Some cases of misdemeanours, such as press misdemeanours and others, are prosecuted. However, we would prefer the power of prosecution to be unified and independent, being affiliated to the judiciary power, and not the current situation, which reflects the overlap between the executive power and the judiciary power. This is what happens between prosecution and police investigations.

9. When analysing the mentioned inefficiencies, consider their reasons. Can you trace the reasons for the existing issues or detect vulnerabilities that can become reasons for future issues?

Participant: I mentioned previously the weaknesses and some of the reasons that have led to them, and the need to activate the role of General Assemblies in the judiciary and an overlap between police and public prosecution investigations and others.

10. Consider the consequences of the inefficiencies (existing or potential) in Kuwaiti criminal justice SOP. Can you already witness these consequences in practice or in personal life?

Participant: I think I answered this question before. All I have said is what I have experienced through my personal and practical life.

11. Can you pinpoint any safeguards (for example, legal or administrative ones) that are aimed at ensuring SOP in the Kuwaiti criminal justice system (or have the potential to do so)?

Participant: As I mentioned earlier, activating the role of General Assemblies in the judiciary to select, for example, the head of the court and members of the Supreme Judicial Council. With regard to the appointment of the Attorney General, which is one of the most important positions in Kuwait, the legislative power should have a role in the selection, similar to the situation of the President of the State Audit Bureau. The legislative power, along with the executive power, selects the President of the State Audit Bureau. Therefore,

the representatives of the people should participate in the selection of the Attorney General, not only courts with executive power, as is happening now. Thirdly, the judiciary system should be Kuwaitised so that all judges are Kuwaiti. Finally, there should be separation inside the judiciary system itself. Even though the Constitution mentioned the separation of administrative justice from the ordinary judiciary, so as to have a Supreme Council of the Judiciary and the Council of State, this is inactive and has not been applied from 1962 to now. Nevertheless, the Constitution explicitly referred to the necessity of establishing a Council of State to manage the administrative judiciary. However, this is not in place because the ordinary judiciary wants to monopolise power, as least that is what I think. Moreover, it has no intention of making administrative judges independent at various levels of litigation. Now, the administrative judge is suffering because he is included in the General Assemblies with the rest of the judiciary, such as the civil and other judiciary.

Change Efforts and Recommendations

12. Do you witness, experience, or participate in any efforts that are aimed at improving the Kuwaiti criminal justice system separation of powers? If yes, please describe and evaluate them (for example, consider the level of their appropriateness and timeliness, assess the execution processes and outcomes, and so on).

Participant: There are many civil and popular efforts aimed at strengthening the promotion of the separation of powers, and there are many parliamentary efforts made in this regard through the imposition of management and good governance in various authorities, including the judiciary. Unfortunately, we have not seen this as a priority of the government – we see it in government slogans, but it is not reflected in the legislative agenda of the government.

13. Do you think that the separation of powers in Kuwaiti criminal justice system should be improved? Please feel free to make recommendations and explain them and their feasibility.

Participant: As mentioned previously, especially in the answer to question no. 12.

Criminal Justice SOP Assessment Criteria

1. Transparency of the judiciary.
2. Independence of the judiciary:
 - 2.1.1. Appointment and removal of judges;
 - 2.1.2. Financing of the judiciary;
 - 2.1.3. Miscarriages of justice;
 - 2.1.4. Political crimes;
 - 2.1.5. Rights of offenders and inmates;
 - 2.1.6. The work of the appeal system;
 - 2.1.7. Police interrogation.

Participant 22: J2

Introductory Questions

1. The present research is devoted to the separation of powers (SOP) from the criminal justice perspective. It will predominantly employ the illustration of the criminal justice system of Kuwait. Are you familiar with the topics, and which channels provide you with the information on them (for instance, personal experience or research)?

Participants: In my capacity as a judge in the Kuwaiti courts, it is normal to be familiar with the criminal justice system in Kuwait.

2. Does your practical or theoretical experience imply that the topics (the Kuwaiti SOP or the criminal justice aspect of SOP) are sufficiently represented in modern research and paid sufficient attention in practice? If they are not, do you believe that they need greater coverage and attention?

Participants: Yes, I have the experience, and I think that every study that includes such topics needs more coverage, because unfortunately we do not have much research on criminal justice in Kuwait, or the principle of the separation of powers.

Criminal Justice SOP

3. Do you believe that SOP (in general and in the criminal justice system) has specific functions? In other words, why is SOP desired and what is it expected to achieve? Please consider the interrelationships between the SOP in criminal justice and citizen's rights and describe them.

Participants: Yes, it has specific and important functions, the most important of which is the fight against the so-called absolute power. The separation of powers ensures the existence of an independent judicial authority and non-interference in the course of criminal justice, which, certainly, positively reflects on the rights of citizens.

4. Please check the provided assessment criteria for SOP (see below). Do you agree with them? If not, please feel free to suggest changes and explain them.

Participants: I can say that some of these criteria are available. However, there are some defects that require legislative reform. With regard to transparency, it is widely available. However, there is some overlap between the Executive Authority and the judicial authority when the Ministry of Justice oversees the judicial budget. This may be seen as one of the shortcomings that limits the effectiveness of the separation of powers. The appointment of foreign judges by the Ministry of Justice is also an interference and it undermines the independence of judges. In addition, the existence of the General Directorate of Investigations under the umbrella of the Ministry of Interior is interference in the conduct of criminal justice, in my view; this is one of the features that limits the effectiveness of the separation of powers. The Political Crime Law is not applicable yet due to legislative shortcomings.

The non-administration of justice is limited and detainees' rights are available. The right of appeal, cassation and challenge is available and they are a basic right for all people in Kuwait.

I: As the Ministry of Justice oversees the judiciary's budget, is there any possibility of the judiciary being under pressure in some cases, especially political cases?

Participants: In accordance with the law, no one has any authority over the judge even if it is the head of the Supreme Judicial Council.

5. Do you think that the separation of powers is an effective tool in achieving the protection of the population of Kuwait? Can you think of an alternative or a complementary measure (for example, the improvements in protecting human rights)?

Participants: Yes, but we still have issues, especially in terms of the independence of the judiciary.

Kuwaiti Legislation

6. The Kuwaiti legislation has multiple origins (including, for example, the French law and the religion of Islam). Can this factor somehow distinguish the legislation from more homogenous ones (in a positive or a negative way) in your opinion? Feel free to consider the potential impact of mixed origin on criminal justice SOP.

The first legislators in the Constituent Assembly chose this model based on their belief in democracy and popular participation, and because of the Kuwaiti culture, as an Islamic country. Islamic Law in its various schools of jurisprudence was present, and it is effective to this day. This pluralism has certainly contributed greatly to the development of laws in Kuwait and to the establishment of its institutions. Undoubtedly, this diversity can positively influence the separation of powers in criminal justice in Kuwait.

Kuwaiti Constitution

7. Consider the contribution of the Constitution of Kuwait (especially Article 50) to the development of criminal justice SOP. Do you think that criminal justice SOP is sufficiently guided by Kuwaiti Constitution?

Participants: The Constitution of Kuwait has contributed significantly, but there is an abuse of power by some of them because there must be "cooperation" between the two authorities, and this is used as justification by the Ministry of Justice for overseeing the judicial budget. I think that the deficiency is not in the Constitution but in the implementation and legislations that violate this principle. Therefore, the legislator must issue new laws that give the judiciary greater independence in line with the Kuwaiti Constitution.

Kuwaiti SOP and Criminal Justice System

8. Consider Kuwaiti criminal justice system from the perspective of SOP. Do you think that SOP is executed effectively (if it is, it should be present and fulfil the functions that you have suggested above)? If you want to, you can employ the proposed assessment criteria for criminal justice SOP, but please feel free to offer your personal criteria. Among other things, please consider the division of functions within the system (for example, the functions of the police, prosecutors, and judges) and the potential for wrongful conduct (abuse of power). If you find inefficiencies or issues, please try to describe them specifically.

Participants: Prosecutors and judges in Kuwait work independently and no one can interfere in the work of the prosecution or judges. Nevertheless, there is a problem with police investigations and this is because of the lack of independence of the investigator. There may be an abuse of power in the conduct of police investigations, which may harm the functioning of justice. Therefore, there should be a law that separates the general administration of investigations from the Ministry of Interior.

9. When analysing the mentioned inefficiencies, consider their reasons. Can you trace the reasons for the existing issues or detect vulnerabilities that can become reasons for future issues?

Participants: The reason behind our current situation is that there is no cooperation between the Executive Authority and the legislative authority. I think that transparent societies, the Kuwait Lawyers Society, and all jurists should exercise pressure on the legislative authority to issue the necessary laws, as well as exercising pressure on the Executive Authority to cooperate in the issuance of such legislations.

10. Consider the consequences of the inefficiencies (existing or potential) in Kuwaiti criminal justice SOP. Can you already witness these consequences in practice or in personal life?

Participants: We face some problems when we look at judges in the Ministry of Interior's investigations, and there are always mistakes, which sometimes require the case to be closed by the prosecution before being submitted to the court. I think the main reason is the non-independence of investigators from the Executive Authority.

11. Can you pinpoint any safeguards (for example, legal or administrative ones) that are aimed at ensuring SOP in the Kuwaiti criminal justice system (or have the potential to do so)?

Participants: There is the guarantee of the Constitution, the Judicial Authority Law, and the guarantee of public opinion as well.

I: Since you touched on the Judicial Authority Law, do you think that Article 2 of this law constitutes an infringement to the course of justice?

Participants: I think it will not be an infringement when the type of "sovereignty" that the courts do not consider is explained. However, in its current position it may be subject to criticism.

Change Efforts and Recommendations

12. Do you witness, experience, or participate in any efforts that are aimed at improving the Kuwaiti criminal justice system separation of powers? If yes, please describe and evaluate them (for example, consider the level of their appropriateness and timeliness, assess the execution processes and outcomes, and so on).

Participants: We always seek for the best and for justice to be done in our sessions.

13. Do you think that the separation of powers in Kuwaiti criminal justice system should be improved? Please feel free to make recommendations and explain them and their feasibility.

Participants: As I mentioned earlier, I think the legislative authority has major duties to improve and develop the separation of powers in criminal justice in Kuwait.

Criminal Justice SOP Assessment Criteria

1. Transparency of the judiciary.
2. Independence of the judiciary:
 - 2.1.1. Appointment and removal of judges;
 - 2.1.2. Financing of the judiciary;
 - 2.1.3. Miscarriages of justice;
 - 2.1.4. Political crimes;
 - 2.1.5. Rights of offenders and inmates;
 - 2.1.6. The work of the appeal system;
 - 2.1.7. Police interrogation.

Participant 9: LW4

Introductory Questions

1. The present research is devoted to the separation of powers (SOP) from the criminal justice perspective. It will predominantly employ the illustration of the criminal justice system of Kuwait. Are you familiar with the topics, and which channels provide you with the information on them (for instance, personal experience or research)?

Participants: I am not an academic specialist, but in my capacity as a lawyer, I am familiar with such legal subjects.

2. Does your practical or theoretical experience imply that the topics (the Kuwaiti SOP or the criminal justice aspect of SOP) are sufficiently represented in modern research and paid sufficient attention in practice? If they are not, do you believe that they need greater coverage and attention?

Participants: These issues actually need a lot of study to help legislators in the Kuwaiti National Assembly recognise the deficiencies in the separation of powers in justice in Kuwait. Therefore, I will answer according to my practical experience and knowledge in the legal field in Kuwait.

Criminal Justice SOP

3. Do you believe that SOP (in general and in the criminal justice system) has specific functions? In other words, why is SOP desired and what is it expected to achieve? Please consider the interrelationships between the SOP in criminal justice and citizen's rights and describe them.

Participants: Yes, It has several functions, most notably the non-exclusivity of power. It is assumed that this principle must be applied in any country claiming to be a democratic state.

4. Please check the provided assessment criteria for SOP (see below). Do you agree with them? If not, please feel free to suggest changes and explain them.

Participants: Yes, there is considerable transparency in the judicial system. As for the independence of the judiciary, there is the independence of the judge in the judgements, but in the appointments, there is interference by the Ministry of Justice and its representative in the Supreme Judicial Council. A Kuwaiti judge is appointed through the judicial authority, but foreign judges are appointed through the Ministry of Justice, which is subordinate to the Executive Authority. This is funny, as if Kuwait does not have legal Kuwaiti cadres who are capable of working as judges. There are many lawyers and some of the most skilled lawyers, after graduation, have applied to join the judiciary and have been rejected on the grounds that they need a certain number. Although their appointment is through the judiciary, the Ministry of Justice determines the number of accepted candidates, because it manages and oversees the budget of the judiciary. Then we are shocked to find it contracting foreign judges, in an attempt to control the judicial power.

My assessment of the non-establishment of justice is positive and I think that the judiciary is not affected much by the intervention of the Executive Authority in daily cases, but in

large political cases, the Executive Authority uses all its tools to intervene, which sometimes affects the course of justice. We saw, for example, the issue of the entry of a group of Kuwaiti citizens into the National Assembly, in protest against the wrong practices of the Executive Authority in 2012. Since it was a political case, the government interfered to incite against those people in the media, claiming that they were "saboteurs" who broke into a public facility with the intention of "vandalism". The Public Prosecutor's Office found no evidence of the alleged sabotage in the government's claim, and the court in the first instance ruled in favour of acquittal.

The Public Prosecutor suddenly appealed against the dissidents and the Court of Appeal sentenced them to imprisonment, although there was no law criminalising access to public facilities without permission. Nevertheless, they relied on the prosecution's claim that they had instigated against the security forces, which was denied by some of the witnesses who were present at the place and who belonged to the security forces. The decision of the Court of Appeal is illegal and void, as it was triggered by the government's pressure on the Judicial Authority, due to the shortcomings in the separation between powers. However, the defendants went to the Court of Cassation, which is characterised by its Kuwaiti judges, and it is the last degree of litigation. The Cassation Prosecution considered, before the ruling of Cassation we expect, that the ruling of the Court of Appeal was invalid. This makes us feel that the judiciary is separate and independent but to some extent. Therefore, this deficiency should be reformed and the required legislation that regulates political cases should be enacted.

The rights of detainees and accused people are guaranteed under the Kuwaiti Law, but there are deficiencies in its application. Appeals and Cassation procedures are guaranteed and available in Kuwait. As for the police investigations, there is a problem with not separating investigators from the police and this is contrary to the separation of powers in criminal justice.

5. Do you think that the separation of powers is an effective tool in achieving the protection of the population of Kuwait? Can you think of an alternative or a complementary measure (for example, the improvements in protecting human rights)?

Participants: Definitely, the separation of powers is an effective tool, and the most important principle in the democratic system.

Kuwaiti Legislation

6. The Kuwaiti legislation has multiple origins (including, for example, the French law and the religion of Islam). Can this factor somehow distinguish the legislation from more homogenous ones (in a positive or a negative way) in your opinion? Feel free to consider the potential impact of mixed origin on criminal justice SOP.

Participants: Surely, the multiplicity of sources of the law is in favour of the Kuwaiti legislator, and it characterises the flexibility of law in Kuwait.

Kuwaiti Constitution

7. Consider the contribution of the Constitution of Kuwait (especially Article 50) to the development of criminal justice SOP. Do you think that criminal justice SOP is sufficiently guided by Kuwaiti Constitution?

Participants: The inclusion of the principle in the Constitution is not sufficient. The legislations of the National Assembly must be consistent with that principle. The National Assembly is supposed to legislate several laws in accordance with Article 50, and most importantly, the Executive Authority must not interfere in appointing foreign judges and separating the budget of the judiciary.

Kuwaiti SOP and Criminal Justice System

8. Consider Kuwaiti criminal justice system from the perspective of SOP. Do you think that SOP is executed effectively (if it is, it should be present and fulfil the functions that you have suggested above)? If you want to, you can employ the proposed assessment criteria for criminal justice SOP, but please feel free to offer your personal criteria. Among other things, please consider the division of functions within the system (for example, the functions of the police, prosecutors, and judges) and the potential for wrongful conduct (abuse of power). If you find inefficiencies or issues, please try to describe them specifically.

Participants: Effective to some extent, but there are several shortcomings, which allow the executive power to interfere in judicial power, as I mentioned earlier.

9. When analysing the mentioned inefficiencies, consider their reasons. Can you trace the reasons for the existing issues or detect vulnerabilities that can become reasons for future issues?

Participants: I think the most important reason is the shortage of legislation in Kuwait.

10. Consider the consequences of the inefficiencies (existing or potential) in Kuwaiti criminal justice SOP. Can you already witness these consequences in practice or in personal life?

Participants: Yes, when I go to police stations, as a lawyer, and see that some of the investigators are police officers, I know that there is a problem that needs to be solved by a legislation that abolishes such behaviour.

11. Can you pinpoint any safeguards (for example, legal or administrative ones) that are aimed at ensuring SOP in the Kuwaiti criminal justice system (or have the potential to do so)?

Participants: We are tired of asking the government to respect the Kuwaiti Constitution, but I think that the role of the National Assembly is the most important through legislating laws that address the existing shortcomings. Moreover, the role of the Kuwaiti Bar Association, which is an elected association, is to exercise pressure on the government and the Members of Parliament to legislate the necessary laws that prevent explicit governmental violations of Article 50 of the Constitution.

Change Efforts and Recommendations

12. Do you witness, experience, or participate in any efforts that are aimed at improving the Kuwaiti criminal justice system separation of powers? If yes, please describe and evaluate them (for example, consider the level of their appropriateness and timeliness, assess the execution processes and outcomes, and so on).

Participants: I have participated in several conferences and lectures that aim to improve the Kuwaiti judicial system. We need research similar to yours that may help develop the judicial system in Kuwait.

13. Do you think that the separation of powers in Kuwaiti criminal justice system should be improved? Please feel free to make recommendations and explain them and their feasibility.

Participants: Yes, as I mentioned earlier, I think that the improvement in the separation of powers in criminal justice comes first through the National Assembly, through the legislation of appropriate laws to limit the interference of the executive power.

Criminal Justice SOP Assessment Criteria

1. Transparency of the judiciary.
2. Independence of the judiciary:
 - 2.1.1. Appointment and removal of judges;
 - 2.1.2. Financing of the judiciary;
 - 2.1.3. Miscarriages of justice;
 - 2.1.4. Political crimes;
 - 2.1.5. Rights of offenders and inmates;
 - 2.1.6. The work of the appeal system;
 - 2.1.7. Police interrogation.

Participant 17: AC3

Introductory Questions

1. The present research is devoted to the separation of powers (SOP) from the criminal justice perspective. It will predominantly employ the illustration of the criminal justice system of Kuwait. Are you familiar with the topics, and which channels provide you with the information on them (for instance, personal experience or research)?

Participants: Yes, I am a law Professor in Kuwait and I have relevant experience in Kuwaiti Law.

2. Does your practical or theoretical experience imply that the topics (the Kuwaiti SOP or the criminal justice aspect of SOP) are sufficiently represented in modern research and paid sufficient attention in practice? If they are not, do you believe that they need greater coverage and attention?

Participants: Yes, I am teaching Administrative Law in Kuwait and I think that this research is very important as it addresses the key issue of the separation of authorities in criminal justice. I think we need to discuss these issues to identify the defects in criminal justice in Kuwait and to develop it in the future.

Criminal Justice SOP

3. Do you believe that SOP (in general and in the criminal justice system) has specific functions? In other words, why is SOP desired and what is it expected to achieve? Please consider the interrelationships between the SOP in criminal justice and citizen's rights and describe them.

Participants: Undoubtedly, separating powers grants each authority its separate competence; therefore, no authority can interfere in another authority's competences. This increases the transparency level and reduces corruption in such authorities. This also applies to criminal justice and its institutions, which should be separate from each other to guarantee high transparency, which in turn will reflect on justice and citizens and maintain their rights.

4. Please check the provided assessment criteria for SOP (see below). Do you agree with them? If not, please feel free to suggest changes and explain them.

Participants: I can say that transparency is achieved in the judiciary, but there is a problem with the independence of judicial power regarding the appointment of foreign judges through the Ministry of Justice, which represents interference with the judicial power. Moreover, there is no need to appoint a foreign judge, unless the Executive Authority wants to interfere in the judicial authority. This will bring us to the other criterion, which is the budget of the judiciary and this is, unfortunately, not yet applicable, as the judiciary's budget is still under the supervision of the Executive Authority. Another point is police investigations. I think there is a problem with the non-separation of investigators and the police, and this represents one of the deficiencies within the course of criminal justice in

Kuwait. The remainder of the criteria are applied properly, except for the law regulating political crimes, since it has not been enacted, despite our pressing need for it.

I: What about judges' dismissal? Are there real guarantees in this respect?

Participants: There is no problem with the dismissal of judges, which is in accordance with Article 22 of the Judicial Authority Law. The Article states that "Judges and prosecutors are not subject to dismissal except in accordance with the disciplinary procedures stipulated in this Law...". Judges cannot be dismissed except through a fair trial and we have not seen a judge being dismissed on political grounds or through interference from any other authority; this is very reassuring to us, as jurists and citizens.

5. Do you think that the separation of powers is an effective tool in achieving the protection of the population of Kuwait? Can you think of an alternative or a complementary measure (for example, the improvements in protecting human rights)?

Participants: We still need to work on it.

Kuwaiti Legislation

6. The Kuwaiti legislation has multiple origins (including, for example, the French law and the religion of Islam). Can this factor somehow distinguish the legislation from more homogenous ones (in a positive or a negative way) in your opinion? Feel free to consider the potential impact of mixed origin on criminal justice SOP.

Participants: Although Kuwait applies the French school in law and in the courts, I think that the structure of the authorities and the regime of Kuwait are close to the structure of the British system. Here in Kuwait and constitutionally the Parliament is stronger than the government, as it is in Britain, and Kuwait is a constitutional or parliamentary state and this is contrary to the French presidential system. This may be due to the influence by the British before 1962, but the procedural law and other philosophy remain from the Latin school. Kuwait differs from France, for example, in that here the Constitutional Court considers the law after its approval by the National Assembly, which is contrary to what is applicable in France. In France, the Constitutional Court considers the Law before its issuance, and there is much controversy over which system is the best. In addition, there is a role for Islamic Law in Legislation, for example the Personal Status and Inheritance Law, and there are other Islamic laws in Commercial Law. All of these schools, no doubt, participated in developing the laws in Kuwait, for example the separation of powers and criminal justice.

Kuwaiti Constitution

7. Consider the contribution of the Constitution of Kuwait (especially Article 50) to the development of criminal justice SOP. Do you think that criminal justice SOP is sufficiently guided by Kuwaiti Constitution?

Participants: I think our problem is not in the Constitution, but in legislation and laws. I think that the Constitution is clear regarding the separation of powers, but there are legislative shortcomings and legislation that contradict this principle as well.

Kuwaiti SOP and Criminal Justice System

8. Consider Kuwaiti criminal justice system from the perspective of SOP. Do you think that SOP is executed effectively (if it is, it should be present and fulfil the functions that you have suggested above)? If you want to, you can employ the proposed assessment criteria for criminal justice SOP, but please feel free to offer your personal criteria. Among other things, please consider the division of functions within the system (for example, the functions of the police, prosecutors, and judges) and the potential for wrongful conduct (abuse of power). If you find inefficiencies or issues, please try to describe them specifically.

Participants: I think I mentioned that before. However, there is a law that contravenes the principle of the separation of powers provided for in the Constitution and in Article 2 of the Judicial Authority Law, which states that the judiciary has no jurisdiction over sovereign acts. I believe that this article is an explicit interference in judicial acts by the Executive Authority. Therefore, the National Assembly, through its powers, must repeal this elastic article, which gives the Executive Authority the right to exercise certain acts in the name of sovereignty, which is against the Kuwaiti Constitution.

9. When analysing the mentioned inefficiencies, consider their reasons. Can you trace the reasons for the existing issues or detect vulnerabilities that can become reasons for future issues?

Participants: The most important reasons that led to these shortcomings are the failure of the National Assembly to perform its essential functions, its focus on supervision rather than legislation, and the role of the government in exploiting those shortcomings and not addressing them by submitting proposals to the National Assembly to enact the necessary laws.

10. Consider the consequences of the inefficiencies (existing or potential) in Kuwaiti criminal justice SOP. Can you already witness these consequences in practice or in personal life?

Participants: Certainly, these practices are noticed when we go to court and find a foreign judge, and when we go to the police investigations, which end with the seal of the Ministry of Interior, and other things.

11. Can you pinpoint any safeguards (for example, legal or administrative ones) that are aimed at ensuring SOP in the Kuwaiti criminal justice system (or have the potential to do so)?

The first guarantor should be the Constitution, as Article 50 gives the legislator the right to enact every law that supports the separation of powers in criminal justice.

Change Efforts and Recommendations

12. Do you witness, experience, or participate in any efforts that are aimed at improving the Kuwaiti criminal justice system separation of powers? If yes, please describe and evaluate them (for example, consider the level of their appropriateness and timeliness, assess the execution processes and outcomes, and so on).

Participants: Certainly, I teach Law and contribute to solving that issue by teaching my students such principles. I have also conducted some research that aimed to improve democratic practices in Kuwait.

13. Do you think that the separation of powers in Kuwaiti criminal justice system should be improved? Please feel free to make recommendations and explain them and their feasibility.

Participants: Undoubtedly, I mentioned it earlier and I repeat this again in quick points. First, investigators must be separated from the police, then there is the issue of the separation of the budget of the judiciary, and the abolition of Article 2 of the Decree Law on Judicial Authority.

I: What about political crimes?

Participants: Yes, thanks for reminding me, I think political crimes law should be regulated as well.

Criminal Justice SOP Assessment Criteria

1. Transparency of the judiciary.
2. Independence of the judiciary:
 - 2.1.1. Appointment and removal of judges;
 - 2.1.2. Financing of the judiciary;
 - 2.1.3. Miscarriages of justice;
 - 2.1.4. Political crimes;
 - 2.1.5. Rights of offenders and inmates;
 - 2.1.6. The work of the appeal system;
 - 2.1.7. Police interrogation.

Participant 15: P5

Introductory Questions

1. The present research is devoted to the separation of powers (SOP) from the criminal justice perspective. It will predominantly employ the illustration of the criminal justice system of Kuwait. Are you familiar with the topics, and which channels provide you with the information on them (for instance, personal experience or research)?

Participants: I have some knowledge about criminal justice in Kuwait by virtue of my job. I am also a legal specialist, I have a law degree and I have worked in the field of law for several years.

2. Does your practical or theoretical experience imply that the topics (the Kuwaiti SOP or the criminal justice aspect of SOP) are sufficiently represented in modern research and paid sufficient attention in practice? If they are not, do you believe that they need greater coverage and attention?

Participants: Yes, I think I have enough experience to participate, although this type of issue needs much research from the theoretical aspect.

Criminal Justice SOP

3. Do you believe that SOP (in general and in the criminal justice system) has specific functions? In other words, why is SOP desired and what is it expected to achieve? Please consider the interrelationships between the SOP in criminal justice and citizen's rights and describe them.

Participants: Certainly, it has specific and important functions, and it is one of the most important pillars of democratic systems. The idea of the separation of powers aims to limit the absolute power of non-democratic states. Anyway, the failure to apply the separation of powers in general or in criminal justice is detrimental to the rights of citizens at all levels. The degree of transparency will be reduced and the judgements of the judiciary will not be trusted unless there is a full separation of the judicial system.

4. Please check the provided assessment criteria for SOP (see below). Do you agree with them? If not, please feel free to suggest changes and explain them.

Participants: Having reviewed the criteria, I believe that most of them are applicable in Kuwait, but political crimes are not regulated yet. I also have a point of view regarding police investigations. Unfortunately, we do not have separation in Kuwait between investigators and the police, which may violate the principle of the separation of powers in criminal justice.

5. Do you think that the separation of powers is an effective tool in achieving the protection of the population of Kuwait? Can you think of an alternative or a complementary measure (for example, the improvements in protecting human rights)?

Participants: Yes, it is very effective, and there are limited cases of abuses of power so I hope there will be greater activity by transparency societies and the lawyers association to address these practices. The media can exercise pressure on those authorities, so that it will not be repeated.

I: Could you give me an example of the abuse of power you mean?

Participants: For example, an accused person is held for more than 48 hours by the investigator, and does not appear before the renewal judge. This is an infringement of the judge's powers, and an abuse of power.

Kuwaiti Legislation

6. The Kuwaiti legislation has multiple origins (including, for example, the French law and the religion of Islam). Can this factor somehow distinguish the legislation from more homogenous ones (in a positive or a negative way) in your opinion? Feel free to consider the potential impact of mixed origin on criminal justice SOP.

Participants: Kuwait applies civil law, or the Latin school that is applied in France and Egypt, and other states. The Islamic Law or Islamic Shariaa is one of the most important sources of legislation and this is positive as well. The multiplicity of sources gives the legislator more chance for creativity and innovation to achieve the best model of legislation and this certainly has resulted in the separation of powers in criminal justice.

Kuwaiti Constitution

7. Consider the contribution of the Constitution of Kuwait (especially Article 50) to the development of criminal justice SOP. Do you think that criminal justice SOP is sufficiently guided by Kuwaiti Constitution?

Participants: The basis of the separation of powers in Kuwait is Article 50 of the Constitution. I think the Constitution is clear in that but the deficiencies result from practice and the legislative vacuum that has caused these bad practices.

Kuwaiti SOP and Criminal Justice System

8. Consider Kuwaiti criminal justice system from the perspective of SOP. Do you think that SOP is executed effectively (if it is, it should be present and fulfil the functions that you have suggested above)? If you want to, you can employ the proposed assessment criteria for criminal justice SOP, but please feel free to offer your personal criteria. Among other things, please consider the division of functions within the system (for example, the functions of the police, prosecutors, and judges) and the potential for wrongful conduct (abuse of power). If you find inefficiencies or issues, please try to describe them specifically.

Participants: I think that the failure to separate investigators from the police causes an abuse of power. Therefore, although the separation of powers has been effectively implemented, the lack of separation of powers gives the Executive Authority the space to intervene in the judiciary.

9. When analysing the mentioned inefficiencies, consider their reasons. Can you trace the reasons for the existing issues or detect vulnerabilities that can become reasons for future issues?

Participants: The most important reason is the legislative vacuum. It is necessary to exercise pressure on Members of Parliament to approve the laws required to fill this legislative vacuum, most important of which is to pass a law that separates investigators.

10. Consider the consequences of the inefficiencies (existing or potential) in Kuwaiti criminal justice SOP. Can you already witness these consequences in practice or in personal life?

Participants: Personally, I have not witnessed that.

11. Can you pinpoint any safeguards (for example, legal or administrative ones) that are aimed at ensuring SOP in the Kuwaiti criminal justice system (or have the potential to do so)?

Participants: There are many guarantees, the most important of which is the Kuwaiti Constitution. There are also the decisions of the Constitutional Court, which confirm the principle of the separation of powers.

Change Efforts and Recommendations

12. Do you witness, experience, or participate in any efforts that are aimed at improving the Kuwaiti criminal justice system separation of powers? If yes, please describe and evaluate them (for example, consider the level of their appropriateness and timeliness, assess the execution processes and outcomes, and so on).

Participants: No, I did not.

13. Do you think that the separation of powers in Kuwaiti criminal justice system should be improved? Please feel free to make recommendations and explain them and their feasibility.

Participants: I think it is important to start with separating the General Directorate of Investigations from the Ministry of Interior and this will only come with the enactment of a law by the National Assembly in accordance with Article 50 of the Constitution.

Criminal Justice SOP Assessment Criteria

1. Transparency of the judiciary.
2. Independence of the judiciary:
 - 2.1.1. Appointment and removal of judges;
 - 2.1.2. Financing of the judiciary;
 - 2.1.3. Miscarriages of justice;
 - 2.1.4. Political crimes;
 - 2.1.5. Rights of offenders and inmates;
 - 2.1.6. The work of the appeal system;
 - 2.1.7. Police interrogation.