The Diffusion of Western Legal Concepts in Kuwait: reflections on the state, the legal system and legal education from comparative and historical perspectives

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1. Introduction

This paper seeks to examine the phenomenon of the diffusion of Western legal concepts in non-Western legal systems, focusing upon one legal system in particular, namely Kuwait. Before embarking on this project, a few introductory remarks are offered regarding the paper's purpose and perspective.

First, the paper adopts a prima facie comparative law approach but it is interdisciplinary to the extent that law is always (necessarily) interdisciplinary. The borders between the study of law, politics, history, economics, geography, language, sociology, psychology, religion, philosophy, anthropology, and virtually any other area of study in the humanities, are always somewhat blurred. The more one learns about the law and different legal systems, the fuzzier those borders become. That is a good thing. The law is, of course, a social construct and it can never be studied with any meaning in isolation from the contributions made by those other branches of the humanities.

Second, it is noted that this is not a pure 'comparative law' paper in the sense of comprehensively and systematically comparing two or more legal systems against one another although some simple comparisons will be noted. A few tentative comparisons are drawn between Kuwait and New Zealand without artificially extending this comparison beyond what it can stand but this paper does not purport to provide a comparative analysis of the New Zealand and Kuwaiti legal systems. The purpose is to explore the diffusion of Western legal concepts in Kuwait in three specific areas but the discussion goes beyond the law and touches upon related areas of study such as legal history, religion, sociology and the teaching of law.

Third, the final form that this paper takes was influenced by the theme of the conference for which it was originally researched and written.1 The author was originally motivated to focus on the concept of 'diffusion' as that term is understood in comparative law. However, the author is a relative newcomer to the discipline of comparative law so a disclaimer of sorts is humbly offered. With teaching and/or research experience in areas as diverse as public international law, jurisprudence, comparative law, constitutional law, company law, terrorism and international law, law and societies, and legal terminology in English, one often notices connections and relationships between subject areas that may not appear obvious. In all these areas of teaching and research one may unconsciously undertake comparative legal analysis without calling it by that name. The overlaps that exist between discrete subjects of law study and comparative law have been described and discussed in the literature.2 However, the author does not purport to be an expert in the field of comparative law thus the conclusions offered here will benefit from further research.

The fourth and final introductory comment is really a self-admonishment: there are apparently several dangers in utilizing comparative law methodology, many of which were identified by the famous legal comparativist, Alan Watson, in his intriguing book, Legal Transplants.3 Watson wrote a chapter called 'The Perils of

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1) The conference which provided the impetus for the writing of this paper was the inaugural conference of Juris Diversitas organized in conjunction with the Swiss Institute of Comparative Law. The theme of the conference was: "Diffusion: An International, Interdisciplinary Conference on Comparative Law" and the conference was held in Lausanne, Switzerland, from 3-5 June 2013.

2) For example, see Mathias Reimann "Comparative law and neighbouring disciplines" in Mauro Bussani and Ugo Mattei (eds.) The Cambridge Companion to Comparative Law (Oxford University Press, 2012) at 18-34.

3) Alan Watson, Legal Transplants - An Approach to Comparative Law, (2nd ed. University of Georgia Press, 1993) at 10-15.

Comparative Law' which contains several warnings for budding legal comparativists including his statement that "comparative law is superficial" - a peril that he says is usually compounded with simply getting the foreign law wrong. Watson intoned that "[e]rror of law is probably more common in Comparative Law than in any other branch of legal study".1

The author agrees that there is a grave danger when someone approaches the study of a foreign legal system, such as Kuwait, with neither a deep cultural affiliation nor Arabic language ability. Coming from New Zealand which is a common law legal system and attempting to offer insights on Kuwait's legal system is fraught with difficulty, especially since Kuwait is not only a different jurisdiction but is also from a different legal family, namely, the family of civil law legal systems. Watson's 'third peril' of comparative law methodology is that "comparative law can scarcely be systematic".2 Again, this warning speaks directly to the current inquiry. In selecting a few concepts for discussion, this paper is far from a systematic and comprehensive analysis but hopefully it will provide some food for thought.

2. Definitions: 'Diffusion' of 'Western legal concepts'

It is appropriate to briefly clarify two terms used in the title for this paper. There is a body of *diffusion* research in various areas of the humanities. As noted by Carolan:

Diffusion research combines scholarship in areas such as sociology, anthropology, psychology, marketing and communication studies ***to examine the process by which ideas and innova-***

1 Ibid, 11.
2 Ibid.

tions spread.[1] (emphasis added)

This paper adopts Carolan's interpretation of diffusion: research that looks at the process by which legal ideas and legal innovations have spread. 'Diffusion' is a concept that is gaining ground in comparative law circles and it is appearing frequently as a focus point for discussion.[2] That is not to say that it is a new term but it has, arguably, been more associated with the hard sciences and the social sciences generally rather than law in particular.[3] As for the phrase 'Western legal concepts', this is a little trickier to define. The phrase could be the subject of a paper in and of itself. Here, it is used in a fairly loose way to refer to legal concepts that could be traced ultimately to Ancient Greece or Rome, but are likely to be traceable to more recent developments in either Europe or the United States. 'The West' is a term that is used (overused) frequently supposedly without any need for definition or clarification. Perhaps it has lost its exact meaning over time although it seems to refer to anything belonging to Western Europe and any of the countries that descended from that region, which share common values, traditions and religion. Without wanting to labour the point, the paper will touch briefly on selected concepts such as the notion of the sovereign state, the separation of powers, the rule of law, and common law and civil law legal traditions, which are all usually accepted as West-

1 **Eoin Carolan, "Diffusing Bad Ideas: What the Migration of the Separation of Powers Means for Comparative Constitutionalism and Constitutional Transplants" (July, 1 2010) Hart Legal Workshop, 2010 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203680.**

2 **For example, see the title of the Juris Diversitas conference, supra n2; see also an upcoming conference entitled "From Diffusion of Practice to Practices of Diffusion: Workshop on the Circulation of Ideas, Procedures and Regulations in Culture, Law and Economy" to be held in Poland in May 2014.**

3 **For an interesting discussion of the gap between social science writing on diffusion and legal literature on transplantation, and the implications for legal diffusion, see William Twining "Social Science and Diffusion of Law" (2005) Journal of Law and Society 32, 203-240.**

ern legal concepts. However, it is noted that arguments could be raised against such a classification. To round out this point, the author agrees with the view, expressed more elegantly by Glenn, that '[t]he] 'West', as it is usually described, contains some of the 'East'. The French expression 'mixité' thus best describes the common condition of humanity."[1]

3. Diffusion: 'the West', Kuwait and New Zealand

An analysis of the diffusion of Western legal concepts in the Kuwaiti legal system ought to begin with some background information regarding the Kuwaiti legal system. However, whilst researching Kuwaiti legal history, the author began to notice some unexpected parallels with New Zealand legal history. New Zealand is a common law country, formerly a colony of Great Britain. The exact date on which New Zealand gained its full independence from Great Britain is not a simple matter to ascertain. Perhaps it could be said to have occurred in 1947 when the New Zealand Parliament adopted the Statute of Westminster Adoption Act, giving it full legislative powers. That date is not conclusive, however, as the constitutional changes that were needed to completely separate New Zealand from Great Britain occurred slowly and in stages over many years. As all students of comparative law seem destined to repeat, there are both *similarities and differences* between New Zealand's path to independence and Kuwait's. But the point here is not to focus on New Zealand, nor to make a direct comparison between New Zealand and Kuwait as drawing such a comparison would surely lead one to fall into one of Watson's other "perils" (choosing systems for study which have no proper relationship, thereby leading to conclu-

1 **H. Patrick Glenn, Legal Traditions of the World 4th ed.(Oxford University Press, 2010) 39.**

sions which are lacking in significance).[1] Having said that, there are some Western legal concepts, familiar to a New Zealand law academic, which are visible in the Kuwaiti legal system.

There are three main points discussed below. They are discussed in a particular order, moving from broad observations towards more narrowly focused ones. The objective is to identify Western legal and/or political concepts and determine to what extent the Kuwait legal system is influenced by the diffusion, dissemination, transmission and movement of those Western concepts.[2]

3.1. Diffusion of the concept of 'the state'

Kuwait, officially known as 'The State of Kuwait' or (in Arabic) 'Dawlat al Kuwayt', is a small state in the Middle East that has a 222 kilometre land border with the Kingdom of Saudi Arabia to the south, and a 242 kilometre land border with Iraq to the north.[3] On its eastern coast it is bordered by the waters of the Persian Gulf. As for its government, Kuwait is sometimes described as a 'nominal constitutional monarchy'[4] or as a 'constitutional emirate'.[5] Kuwait has some democratic features; Article 6 of the Kuwait Constitution states that "the system of government in Kuwait shall be democratic". Whilst it is often lauded as the most democratic of the Gulf states, it is arguably not a 'democracy' as that term is usually defined in the literature since it does not sat-

1 Ibid.

2 Assuming, of course, that we can call these 'Western' concepts. That is taken for granted here, but see discussion above.

3 International Business Law Publications, Kuwait Business Law Handbook – Volume 1 Strategic Information and Basic Laws (International Business Publications, 2012).

4 Ibid, 12.

5 Central Intelligence Agency, World FactBook – Kuwait available at https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html accessed on 1 June 2013.

isfy all the generally accepted criteria.[1] The question of whether Kuwait is or is not a genuine democracy could be discussed here (is democracy a 'Western legal concept' anyway?) but it entails a wider discussion, which is beyond the scope of the current paper. Kuwait gained independence from Great Britain on 19 June 1961 in an amicable split. The Constitution of the State of Kuwait was approved and promulgated on 11 November 1962. Article 1 of the Constitution states that "Kuwait is an Arab State, independent and fully sovereign." Article 2 states that "The religion of the State is Islam and the Islamic *Shari'a* shall be a main source of legislation." Kuwait is a Muslim country with a Sunni/Shi'a split usually estimated at approximately 70/30 respectively. It is noted that Islamic *Shari'a* is a main source of legislation in Kuwait but it is not the *only* or even the *main* source of legislation. The debate around that particular wording in Article 2 is interesting and is discussed elsewhere.[2] Yet hidden amongst these mainly straightforward and fairly well known facts about Kuwait lies the first point to be raised in this paper: the very existence of the 'State of Kuwait' as a sovereign and independent *state* is evidence of a profound diffusion of Western political and legal concepts.

It is contended that in Islam there is no concept of a nation state. Various writers have explored whether the concept of a

1 **A democracy could be said to possess four minimum characteristics: 1) free, fair and competitive elections; 2) full adult suffrage; 3) basic civil liberties, including freedom of speech, press and association; and 4) the absence of non-elected authorities such as militaries, monarchies and non-elected bodies that limit the governing power of elected officials: see Robert A. Dahl Polarchy: Participation and Opposition (Yale University Press, 1971). It would be interesting to assess Kuwait against each of those four criteria in turn. Currently, Kuwait does not satisfy 3) and 4) in the author's opinion. Other writers have also treated Kuwait as a non-democracy. For example, see Jill Goldenziel "Veiled Political Questions: Islamic Dress, Constitutionalism and the Ascendance of Courts" 61 American Journal of Comparative Law 1 (2013) wherein she discusses judicial independence in non-democracies. Goldenziel categorises Kuwait as a "hybrid" in so far as it has both democratic and authoritarian features. A discussion of the meaning of 'democracy' and Kuwait's satisfaction of democratic criteria is beyond the scope of the present paper.**

2 **For example, see Mohammed al-Moqatei "Introducing Islamic Law in the Arab Gulf States" 4 Arab Law Quarterly 138 (1989) for a discussion of this provision.**

'state' existed in the traditional Islamic sources (the Quran and Sunnah) and the consensus seems to be that Islam did not provide for 'states' in so far as that concept is understood today.[1] Islam was not a political movement – it did not seek to create political or legal entities.[2] At the time that the Qur'an was revealed, there were no 'states' in existence and, as an aside, the concept of a state did not exist in pre-Islamic Arabia either.[3] Kuwait has a long archeological record that pre-dates Islam. The earliest traces of civilization in what is modern-day Kuwait, can be traced back to the second millennium BCE with the colonization of the island of Failaka by the Mesopotamians and then later by the Greeks. It came under the Islamic caliphate during Arab expansions throughout the Arabian peninsula. It seems fairly well accepted that the area was permanently settled by the Bani Khalid tribe in around the 17th century.[4]

It is also fairly well-accepted that the 'sovereign state' is a Westphalian creation, dated to the signing of the Peace of Westpahlia in 1648. Glenn notes that nationality and statehood "appear historically as creations of the western enlightenment."[5] The notion of the state has become an enduring concept of international law and politics that now permeates and dominates the global community. The modern State of Kuwait, as with all other Muslim-majority nations, has completely embraced the Westphalian notion

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1 For example, see Ashgar Ali Engineer, Asia-Pacific Human Rights Information Center, FOCUS June 1999 Volume 1 wherein he notes that: "A thorough examination of the scripture and Hadith literature shows that there is no such concept of Islamic state" available online at: http://www.hurights.or.jp/archives/focus/section2/1999/06/the-concept-of-islamic-state.html last accessed on 30 May 2013.

2 Ibid: "the Qur'an lays more emphasis on values, ethics and morality than on any political doctrines. It is Din (religion) which matters more than governance. Allah says in the Qur'an that al-yauma akmaltu lakum dinakum (I have perfected your Din today, 5:3). Thus what the Qur'an gives us is a perfect Din, not a perfect political system."

3 Ibid: "the pre-Islamic Arab society had not known any state structure".

4 Oxford Business Group, The Report Kuwait 2013 (Oxford Business Group, 2013).

5 Glenn, supra n 10 at 38.

of the sovereign state and (almost) all that that entails. Space does not permit a detailed analysis here of the concept of the 'Islamic state'; that substantial topic has been explored elsewhere.[1] The point made here is a simple one: it is interesting that a modern 'State of Kuwait'[2] has evolved and exists today, given that the land, which is now modern Kuwait, was once occupied by nomadic, tribal, people who fished for pearls and seaweed, and herded camels without any notion of statehood. The people of the land that later became the State of Kuwait had no interest in the concept of states, with their related requirements of borders, passports, immigration, policing and the like. They moved freely around the land of the Arabian peninsula as members of the wider Muslim 'umma'. Yet when one speaks to a young Kuwaiti law student today one observes that their understanding of the notion of a 'state' is integral to their self-identity and they consider that the concept of their state sits easily alongside their Islamic beliefs, of which they are equally and justifiably proud. They take Kuwait's statehood for granted.[3] Vehicles in Kuwait are occasionally seen emblazoned with stickers that loudly and proudly state that "Kuwait is for Kuwaitis"[4] and it is clear that modern Kuwaitis identify closely with their *state* as it is currently defined. Arguably, it has been taken as a given that Kuwaitis are part of a state and

1 For instance, see Wael Hallaq The Impossible State: Islam, Politics and Modernity's Moral Predicament (Columbia University Press, 2012).

2 The name of 'Kuwait' comes from a diminutive of an Arabic word that literally means "fortress built near water".

3 Note that the meaning of a "state" is clearly defined in international law, but arguably the definition is a Western-oriented definition focusing on the need to have a permanent population, a clearly defined territory, a government and the capacity to enter into relations with other states: see Article 1 of the Montevideo Convention on the Rights and Duties of States, League of Nations Treaty Series, vol 165, pp 20-43 .

4 This phrase was seen on a sign in the Kuwaiti Parliament recently. Member of Parliament Mohammed al-Juwaihel placed a sign on the podium in front of him reading (in Arabic) "Kuwait is for Kuwaitis", which apparently was meant as a protest at other Members of Parliament who possess dual citizenship: see Arab Times Online, 8 May 2013, available at http://www.arabtimesonline.com/NewsDetails/tabid/96/smid/414/ArticleID/182995/reftab/36/Default.aspx last accessed on 1 June 2013. Dual citizenship is forbidden in the State of Kuwait.

there is little pause for thought about the theoretical underpinnings of the origins of the concept of the 'state'.

The state of Kuwait is, according to Article 2 of the Constitution, based on Islamic values. Upon reflection, this creates a strange juxtaposition of Islamic and Western political and legal concepts since, as noted above, Islam itself does not recognize the concept of 'states' – it recognizes only a Muslim 'umma'. An 'Islamic state', then, is practically a contradiction in terms. But this is not a conclusion that could be easily drawn from observing modern-day Kuwait. Take for example the English language newspapers in Kuwait: they frequently feature stories about how to best preserve Kuwait for Kuwaitis. Articles and opinion pieces abound in the English-language press on how to best reduce the number of foreigners residing here (the staged goal is to reduce foreigners by 100,00 per year), how to protect Kuwaiti nationality and why some 'stateless' or 'bidoon' people are not entitled to Kuwaiti citizenship. On top of that, for decades now, Kuwait has struggled with its neighbours over the exact location of its borders. When these facts are read with diffusion in mind, it is clear that Kuwaitis have, as a society, completely embraced and internalized a Western political and legal paradigm – the sovereign and independent nation state – lock, stock and barrel.

It is submitted here that the diffusion of Western laws and legal concepts has occurred on a large-scale and those Western constructs have been assimilated to such an extent that the present generation of Kuwaiti law students barely notice the origins of these laws and concepts as being Western at all. When this author taught a class on public international law, only one student was aware that the sovereign state dates to the Peace of Westphalia. There is a tendency to accept what is has always been.

Thus, the first area of diffusion (which, again, is interpreted in this paper as dispersal, dissemination or transmission) of Western legal concepts relates to the very nature of the state construct and the subtle yet undeniably successful diffusion of this Western concept in the Islamic society and Arab nation of Kuwait (and of course, in the wider Muslim world). The flow-on effects of adopting the sovereign state, such as nationality and citizenship, are also necessarily diffused.

Before moving to the second main point of this paper, it is worth noting that there are other areas related to the constitution of the sovereign state that could be explored in here if space permitted; two in particular spring to mind. Without going into much depth, they are mentioned here in passing.

Separation of powers

First, the concept of 'separation of powers', which is certainly evident in the Kuwaiti Constitution, is possibly a Western concept and capable of inclusion here. The ideas of the French aristocrat Montesquieu may be 'Western' but whether or not they were *first* thought of by Montesquieu is a topic worthy of further analysis. It could be argued that it was a Muslim leader who first practiced the separation of powers in government. The second Caliph of Islam, Umar ibn Al-Khattab (may Allah be pleased with him), is sometimes cited as the first ruler in the history of the world to separate the judiciary from the executive.[1] If that is the case then the 'separation of powers' would not be evidence of a diffusion of Western legal/political concepts to Kuwait but a diffusion of an Islamic concept to the West. That claim cannot be properly

1) **The discussion as to whether the judiciary was a separate branch of government, and Umar ibn al-Khattab's role in separating the judiciary from the executive is discussed in Ata U. Rehman, Mazlan Ibrahim and Ibrahim Abu Baker, "The Concept of Independence of Judiciary in Islam " 4(2) International Journal of Business and Social Science (2013) 67, 69 and elsewhere.**

investigated here and is beyond the scope of this paper. Suffice to say that the modern understanding of the 'separation of powers' does exist in modern Kuwait and is enshrined in the Kuwaiti Constitution.

The rule of law

Secondly, there is a substantial body of literature on the diffusion of the concept of 'the rule of law,' which is tempting to delve into here. The 'rule of law' has a deep historical lineage, possibly traceable to ancient Greece but certainly evident in, and usually referenced to, the Magna Carta/Charta of 1215.[1] Thus, it may seem to qualify as a 'Western legal concept' but on the other hand it may also be disputed that 'the rule of law' is originally a Western concept. There is much scholarly writing on Islamic constitutionalism, which suggests that that 'the rule of law' as that concept is understood in light of the Magna Carta was already practiced in the early years of Islam by the Prophet Muhammad (peace be upon him) and by the 'rightly-guided Caliphs'.[2] Notably, Islam (historically) never had any difficulty with rulers claiming to be divinely inspired. The Prophet Muhammad and the following four 'rightly-guided Caliphs' never claimed to hold their position because God had appointed them to rule. The Prophet Muhammad, like the rulers who followed him, ruled in accordance with God's law not as God's representative on Earth. The 'rule of law', which is captured in the Magna Carta, was a reaction to the assertion of the 'divine right of kings' to rule, but the Islamic

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1) For a brief summary of the history of the rule of law see The Legal History of the Rule of Law, available at: http://www.mansfieldfdn.org/backup/programs/program_pdfs/leghistory.pdf, last accessed on 23 July 2013. See also Ugo Mattei and De Morpungo "Global Law and Plunder: The Dark Side of the Rule of Law" (2009) Law and Globalization Bocconi Law School Student-Edited Papers, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437530.

2) For instance, see Aziza al-Hibri "Islamic Constitutionalism and the Concept of Democracy" 24 (1) Case Western Reserve Journal of International Law (1992) 1.

caliphs never asserted that God had appointed them to rule. Instead, they sourced their authority from the people: the *bay'ah* or declaration of allegiance from the people was the factor that determined the leader.[1] Therefore, the 'rule of law' in Islam began from a different place to that of its counterpart in the West. These days, things are done somewhat differently. Although the *bay'ah* or declaration of allegiance is still theoretically taken, the constitution of Kuwait in common with its other Gulf neighbours, severely curtails who is eligible to be the leader. In Kuwait, only the descendants of the late Mubarak al-Sabah are eligible to hold the title of Emir.[2] Another aspect of the 'rule of law' is that all people are equally bound by the law and no one is above the law. In the author's personal experience, that aspect of the rule of law does not exist in Kuwait. For example, in a recent conversation with the customer services representative of the Al Shaya Group, which owns many of the malls in Kuwait, the author was told that although it is against the law to smoke in public places, such as malls, the management of the malls cannot stop some people from smoking because "some government people believe that they are above the law".[3] In light of the foregoing, it is suggested that it would be an interesting topic in its own right to discuss the extent to which the 'rule of law' is or is not a Western concept and, furthermore, the extent to which the rule of law exists in the modern State of Kuwait, given that the religion of the State is Islam and Sharia' is a main source of legislation.[4]

1) See al-Hibri especially at 11-12.

2) See Article 4 of the Kuwait Constitution 1962.

3) Conversation between the author and a representative of the Al-Shaya Group on 18 February 2014 in response to the author's complaint about excessive smoking in cafes and restaurants in the malls owned by that group. The words in quotation marks are the exact words spoken by the customer service representative. She freely admitted that people who worked for the government often did not respect the law and moreover did not believe that they had to adhere to the law.

4) See Article 2 of the Kuwait Constitution 1962. For a discussion of the negative aspects of the diffusion of the rule of law, see Mattei and De Morpurgo, "Global Law and Plunder:

These two areas – the separation of powers and the rule of law - briefly touched upon above, are not explored in this paper since they require substantial research and more space than can be afforded here. Suffice to say that comparative constitutional law would provide a fruitful opportunity to discuss the diffusion of 'Western legal concepts' in Kuwait, yet the logical starting point would have to be to first determine what *is* a 'Western' concept. The short discussion above shows that determining what counts as a 'Western' concept is a difficult question *per se.*

3.2. Diffusion of Western legal concepts within the Kuwaiti legal system

The second main area of analysis in this paper relates more directly to the Kuwaiti legal system. Kuwait has an interesting and complex legal history. Kuwait's legal system appears to be an amalgam of two legal systems. As mentioned above, Islamic *Shari'a* (or Islamic Law) is present in Kuwait and regulates personal status, that is, laws relating to marriage, divorce and inheritance. Sunni and Shi'a Muslims are each governed by the relevant Islamic Laws pertaining to their faith in personal areas. In all other areas, Egyptian/French-inspired codified law applies. However, it must be noted and understood that *Shari'a*'s influence is not limited to personal status laws alone. Kuwait boasts one of the largest and most diverse Islamic financial service industries in the world. Banking, investment, insurance and other financial services are influenced by Islamic laws, as are some tax laws.[1]

Although these two sources of law (Islamic Shari'a and Egyptian/French-inspired civil law) are both present in Kuwait, schol-

The Dark Side of the Rule of Law", supra n28.

1 For further information see the Oxford Business Group The Report Kuwait 2013.

ars classify Kuwait's legal systems differently. All comparative law scholars are familiar with the debates over classifications of legal systems. This area has historically been one of the mainstays of the discipline. Even if one finds that the topic of categorization/taxonomies of legal families may be exhausted as an area of scholarly writing *per se* and is somewhat lacking in relevance for present-day challenges, nevertheless, it is still a good starting point to ask how a particular legal system has been classified. Vernon Valentine Palmer classifies Kuwait as a "[m]ixed system of civil law and Muslim law"[1] whereas the Central Intelligence Agency's World Factbook describes Kuwait as a "mixed legal system consisting of English common law, French civil law and Islamic religious law."[2] Another source classifies Kuwait as having Muslim law/civil law/customary law.[3] The discrepancy between these classifications might be explained by examining Kuwait's tangled legal history.

In 1899 Kuwait and Great Britain entered into the Anglo-Kuwaiti Treaty. This treaty promised the then ruler of Kuwait, Mubarak bin Sabah al-Sabah (and his successors) protection from outside aggression and non-interference in Kuwait's internal affairs. In return, the ruler of Kuwait was prohibited "from establishing diplomatic relations with any other foreign power and from alienating any part of its territories to any other foreign state or foreign

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1) Vernon Valentine Palmer "Mixed Legal Systems" in Bussani and Matei (ed.) The Cambridge Companion to Comparative Law (Oxford University Press, 2012) at 381.

2) CIA World Factbook, Kuwait, last updated on 7 May 2013 available online at https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html last accessed on 1 June 2013. Other sources that describe Kuwait with this mixture of three types of law include UNICEF: see the 2011 report on Kuwait entitled "MENA Gender Equality Profile Kuwait – Status of Girls and Women in the Middle East and North Africa", at 1, available at http://www.unicef.org/gender/files/Kuwait-Gender-Eqaulity-Profile-2011.pdf last accessed on 1 June 2013.

3) JuriGlobe, University of Ottawa, Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems, available at http://www.juriglobe.ca/eng/syst-onu/index-alpha.php (last accessed on 14 October 2013).

national without the prior consent of the British government."[1]

The relationship between Kuwait and Great Britain led, in 1925, to the establishment in Kuwait of the British Jurisdiction, which was separate from, but running side-by-side with, the National Jurisdiction. In effect, there were two completely separate legal systems operating in Kuwait until its independence from Great Britain in 1961. The National Jurisdiction (which applied to approximately 250,000 people) embraced all Kuwaiti citizens, nationals of independent Arab states, nationals of Iran and citizens of British-protected states in the Persian Gulf. According to Ahmed Hijazi, a Registrar of the British Court in Kuwait in 1954, the National Jurisdiction was semi-tribal except in personal status matters, which were (and still are) governed by Islamic Law.[2] Interestingly, under the National Jurisdiction there were no written laws, no procedure and no defined courts. Hijazi observed as follows:

It is true that in theory the Majellah (the Ottoman Civil Code, based on Islamic Law) was the law of the land but in practice the law was the conscience of the official dispensing justice…[3]

The British Jurisdiction (which applied to approximately 30,000 people) embraced all other persons in the State. These "other persons" consisted mainly of British subjects, citizens of all nations of the British Commonwealth, mainly Indians and Pakistanis, citizens of the United States and a few Greeks, Germans and Italian citizens who came to Kuwait with the oil boom.[4] According to Hijazi:

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1) Ahmed Hijazi "Kuwait: Development from a Semitribal, Semicolonial Society to Democracy and Sovereignty" 13 American Journal of Comparative Law 3 (1964) 428-429.

2) Ibid, 429.

3) Ibid.

4) Ibid.

The British Jurisdiction was administered along English lines. The laws and procedure applied were based on English principles, and the courts functioned like an English court in England, the main difference being the absence of the jury system in Kuwait.[1]

There were apparently substantial differences between the British Jurisdiction and the National Jurisdiction, yet the two systems existed side-by-side for many years and raised many interesting questions (especially relating to conflict of laws), discussed elsewhere.[2] During the oil boom of the 1950s, the British Jurisdiction increased in importance and in the sheer number of cases to come before the British courts. Many expatriate Arabs and non-Arab foreigners were attracted to Kuwait with the development of the oil industry and they seemed to acknowledge the clear advantages of being under the British Jurisdiction rather than being "left at the tender mercies of the arbitrary National Jurisdiction."[3] But eventually, the British Jurisdiction was a victim of its own success. It came under attack from various quarters, including the younger generation, the nationalists and the Islamic sheikhs who felt uneasy with the presence of the British Jurisdiction: a daily reminder of protection and semi-colonialism. The British government was under pressure to give up its jurisdiction but it did not wish to do so unless and until some sort of modern national legal system was set up in Kuwait with written laws, proper and prescribed procedures and a trained judiciary. That is where one of the most famous jurists of the time, the Egyptian Dr Abdel-Razzaq al-Sanhouri, came into the picture. Dr al-Sanhouri was one of the foremost drafters of the 1948 Egyptian Civil Code

1) **Ibid.**
2) **Ibid.**
3) **Ibid, 432.**

and he was commissioned by the Kuwaiti government to modernize and bring up-to-date Kuwait's legal system – which in the end meant introducing or transplanting an entire legal system. As an Egyptian he naturally turned to Egypt for inspiration. Within one year of Britain declaring, in 1959, that British Jurisdiction would be retroceded as soon as a replacement legal system was introduced, the Kuwaiti authorities had settled upon an entirely new legal system. As of 1 July 1961, by enactment of the British Parliament, all British courts operating in Kuwait were closed and all laws in force in those courts were repealed.

The new system was based heavily on the Egyptian system, which in turn was based on the French system. Thus Kuwait turned a sudden corner from having a National/Islamic/British Jurisdiction to a civil law/Islamic law system. But as Hijazi, writing in 1964, pointed out:

[The new system] did not develop as a natural growth from either of the two systems previously in existence; it was borrowed from the outside and implanted in a very short time. This wholesale and hasty introduction of a new legal system with unfamiliar and rather complicated principles led, naturally, to a species of "indigestion" which resulted in hostility on the part of various sections of the community.

Although those comments were written in 1964, the 'new system' seems to have been adopted by today's law students as the only system they have ever known and is rarely questioned. However, the 'indigestion' to which Hijazi refers may still be evident. Students routinely mention issues which rankle with them such as the extremely long periods of time it takes cases to move their way through the court system, the strong presence of foreign (mainly Egyptian) judges working in the Kuwaiti judiciary and the

seemingly complex and lengthy codes which govern their entire civil law structure.

It is indisputable that Kuwait suffers in some areas from unnecessarily complicated, inflexible and sometimes outdated laws and procedures, not to mention frustrating bureaucracy. One might think that this reaction is natural, coming from a New Zealander, where it is relatively easy to do almost anything. But this observation is not just personal bias: the International Bank for Reconstruction and Development/World Bank's *Doing Business 2013* global report comparing business regulations for domestic firms in 185 countries has found that New Zealand is ranked number one in the world in terms of how easy it is to start a business. The latest *Doing Business* report states that in New Zealand it is extremely easy to do business. For example, to start a company in New Zealand it takes one procedure, one day, it costs less than 1% of income per capita and it requires no paid in minimum capital.[1] On the same measure, starting a company, Kuwait does not do so well,[2] being ranked 142 out of 185 countries. The difficulty of starting a company in Kuwait is evident not only in the *Doing Business* data but also in the anecdotal experiences of local business people.[3]

Looking more broadly than just starting a company, Kuwait ranks poorly across all ten business indicators when compared with the 184 other countries, except in two areas (protecting in-

1) Doing Business 2013 – Smarter Regulations for Small and Medium Sized Businesses 10th ed. (World Bank/International Bank for Reconstruction and Development) at 59 available at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf last accessed on 2 June 2013.

2) Ibid, 175, Country Tables "Kuwait".

3) For example, an American woman who wanted to start up a second-hand bookstore and café in Kuwait explained the difficulties and duration (6 months) of dealing with Kuwait's bureaucracy in order to be granted permission: see Arab Times Online "Starting Up Business in Kuwait a Nightmare" http://www.arabtimesonline.com/NewsDetails/tabid/96/smid/414/ArticleID/199621/reftab/36/t/Curiosity-can-foster-love-for-books/Default.aspx last accessed 18 October 2013.

vestors and taxes). The overall ranking for each country is generated by analyzing the regulatory requirements in ten areas, thus, a low ranking means that the regulatory framework makes it easy to do business and a high ranking means it is much harder to do business.[1]

Looking at the evidence, Kuwait is nowhere near as business-friendly as New Zealand.[2] The same could be said for the whole Middle East and North African region[3] but Kuwait ranks surprisingly poorly against its Gulf Co-operation Council (GCC)-member neighbours. Out of the six GCC-member states, Kuwait ranks worst.[4] Out of the 50 states that are considered 'high income', Kuwait ranks a lowly 45th out of 50. One might ask how much impact *the type of legal system* has on these core business performance indicators. Without wanting to delve too far into the realm of law and economics in which this author professes no expertise, it may be noted that in the area of economics and comparative law, research has been undertaken to determine whether there is a connection between economic growth in civil law as opposed to common law countries. Research has shown that "legal systems originated in the English common law have superior institutions for economic growth than those of French civil law".[5] There are essentially two reasons: first, the common law provides more

1) The ten areas that are surveyed in the Doing Business report, with rankings for New Zealand and Kuwait in brackets are: Starting a business (NZ = 1; Kuwait = 82); Dealing with construction permits: (NZ = 6, Kuwait = 142); Getting electricity (NZ = 32, Kuwait = 55); Registering property (NZ = 2, Kuwait = 89); Getting credit (NZ = 4; Kuwait = 104); Protecting investors (NZ = 1, Kuwait = 32); Paying taxes (NZ = 21; Kuwait = 11); Trading across borders (NZ = 25; Kuwait = 113); Enforcing contracts (NZ = 17; Kuwait = 117); Resolving insolvency (NZ = 13; Kuwait = 92).

2) Kuwait's overall ranking is 82; New Zealand's overall ranking is 3.

3) The states in the Middle East and North Africa region rank between 22 and 171.

4) Saudi Arabia is the highest ranked GCC state in the Doing Business report with an ease of doing business ranking of 22; United Arab Emirates is 26; Qatar is 40; Bahrain is 42; Oman is 47 and the non-GCC Arab state of Tunisia also ranks above Kuwait with an index of 50.

5) N. Garoupa and T. Ginsburg "Economic Analysis and Comparative Law" in Bussani and Mattei, supra n3 at 67.

adequate institutions for financial markets and business transactions generally, which in turn fuels more economic growth. Secondly, civil law is based on an assumption of greater state intervention that is generally seen as being detrimental to economic growth and market efficiency. Although these conclusions are contestable, they do appear to be supported by evidence. The authors of the Oxford Business Group's 2013 report on Kuwait, a comprehensive analysis across all aspects of Kuwait's economy, mentions that 'restrictive legislation' is a key challenge in almost all areas that they survey. There is a substantial body of scholarship that suggests that there are clear and proven connections between the type of legal system and the legal origins of that legal system.[1] Many research papers suggest that common law legal systems are more effective for business than civil law legal systems. For example, a study of 49 different countries carried out in 1997 found that "…on all measures, common law countries provide companies with better access to equity finance than civil law countries, and particularly French civil law countries."[2] Common law countries also have more listed companies per person than civil law countries, and far more Initial Public Offerings than civil law countries. That research also found that common law countries come out well ahead of civil law countries in the protection that they offer to shareholders. It concluded, *inter alia,* that French civil law countries have both the weakest investor protections and the least developed capital markets, especially when compared to other civil law countries.[3]

1) See for example the links at Doing Business Research on Legal Origin, Institutions and Institutions, available here http://www.doingbusiness.org/research/legal-origin-and-institutions (last accessed on 12 October 2013).

2) Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert W. Vishny "The Legal Environment, Banks and Long-Run Economic Growth", National Bureau of Economic Research, Working paper 5879, January 1997, available at http://www.nber.org/papers/w5879.pdf last accessed on 20 October 2013.

3) Ibid. Although Kuwait was not one of the French civil law countries, the study examined

It is interesting that Kuwait did not adopt the legal system of its 'colonizer' or 'occupier' (the United Kingdom, but the United Kingdom was not exactly either 'colonizer' or 'occupier', see discussion below) but it decided to transplant a legal system from Egypt. It is argued here that the Egyptian/French civil law legal transplant may have been a quick fix at the time, but it may not have been the best solution in the long run. Kuwait is currently hampered by an inefficient political and legislative environment which is slow to respond to business needs and difficult to navigate. It is not user friendly and is, in many areas, an obstacle to present and future progress.[1] Kuwait suffers from a public-sector dominated environment with 77% of the population being employed by the government.[2] Despite Kuwait's undisputed wealth, its legislative framework is fraught with inefficiency, delay, deliberation and under-development. Although some changes have been made recently,[3] the entire legal system (business and beyond) seems to have inherited the genetic defects inherent in the French civil law legal family.

Could/should Kuwait have gone down a different path and could it/should it instead have adopted English common law? Could a different road have been travelled down in 1961? Instead of opting for an entirely new Egyptian/French legal system, could the Kuwaiti authorities have continued with an English legal system and kept the British Jurisdiction? Could Kuwait have

21 French civil law countries including Egypt and France.

1) For example in the area of international investment, which Kuwait is very keen to increase, the International Finance Corporation ranks Kuwait 119th out of 184 countries in terms of dealing with construction permits: see the Oxford Business Group The Report Kuwait 2013 at 34.

2) See the Oxford Business Group The Report Kuwait 2013 at 37.

3) For example, on 29 November 2012 Kuwait officially received its new companies law after 50 years of waiting. Law No. 25 of 2012, the New Companies Law, was issued and its publication in the Kuwait Official Gazette marked the culmination of a long legislative process.

been a mixed Muslim law/common law legal system like, say, Singapore, Pakistan, Bangladesh and Sudan.[1] Or could Kuwait have been a mixed Muslim law/common law/customary law legal system like, say, Malaysia, Nigeria, Kenya, Brunei, Gambia and India.[2] Kuwait opted for French/Egyptian civil law over English common law and thus, according to the University of Ottawa's JuriGlobe classification, finds itself sharing legal system characteristics with states such as Djibouti, Eritriea, Indonesia, Jordan, Oman and Timor Leste.[3] What is quite interesting is to look at the various groupings of legal systems and see how they rank in terms of the ease of doing business. Out of the first group mentioned above, the mixed Muslim law/common law group, Singapore is ranked number 1 in the world in the 2013 *Doing Business* report (compare with Kuwait at 82). Singapore topped the rankings in 2013 for the 8th consecutive year. The other three countries in the same group as Singapore, which also have Muslim/common law legal systems (Pakistan, Bangladesh and Sudan), do not rank well[4] but to be fair they are not high-income countries like Singapore so that may well impact on their overall business effectiveness.

The question of what 'might have been' for Kuwait becomes even more interesting when one looks at the countries that are classified as having mixed Muslim/civil law legal systems.[5] Those

1) JuriGlobe, University of Ottawa, classifies these four states as having mixed Muslim/common law legal systems: see "Muslim Law Systems and Mixed Systems with a Muslim Law Tradition", available at http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-musulman.php last accessed on 17 October 2013.

2) Ibid.

3) Ibid. These states are listed by JuriGlobe as mixed Muslim law/civil law/customary law systems. In the 2013 Doing Business Report, the countries are ranked as follows: Djibouti = 171; Eritrea = 182; Indonesia = 128; Jordan = 106; Oman = 47; Timor-Leste = 169. See Doing Business, "Economy Rankings" available at http://www.doingbusiness.org/rankings last accessed on 17 October 2013.

4) Pakistan = 107; Bangladesh = 127; Sudan = 143: ibid.

5) Ibid. The JuriGlobe World Legal Systems research lists the following countries as mixed Muslim law/civil law: Algeria, Comoros Islands, Egypt, Iran, Iraq, Lebanon, Libya, Mauri-

countries are ranked very poorly in the 2013 *Doing Business* report.[1] With the exception of Tunisia, which is ranked at 50, all of the other countries with this type of legal system are in the bottom half of the *Doing Business* rankings, some at the very bottom. The JuriGlobe research notes that there is one state that has a mixed Muslim law/customary law legal system, namely, the United Arab Emirates. The UAE is ranked at a respectable 26 in the *Doing Business* economy rankings.[2] The underlying message to come out of this data is that having Islamic law or customary law in a legal system's mix is *no*t harmful to its chances of ranking well across a range of business indicators – it is the ingredient of *civil law* versus common law that seems to be the telling factor. When one looks at JuriGlobe's various groupings of legal systems which have Muslim law in the mix, the only detrimental factor is the inclusion of civil law.

Whilst the World Bank's data and other scholars' research suggests that a French civil law origin is bad for business, the majority of Kuwaiti law students surveyed recently did not seem to think it was a poor choice. Asked whether Kuwait ought to have adopted British common law instead of Egyptian/French civil law, 60% of students thought that the Egyptian/French choice was the right one.[3] This author has not come across any scholarly writing that openly advances the proposition that Kuwait made the wrong choice. Kuwaiti law students mainly seem to have accepted that their system is the way it is. Although they recognize that it has

tania, Morocco, Palestine, Syria and Tunisia.

1) Their overall rankings out of 185 are as follows: Algeria = 152; Comoros Islands = 156; Arab Republic of Egypt = 109; Iran = 145; Iraq = 165; Lebanon = 115; Libya = Mauritania = 167; Morocco = 97; Palestine = 135 (although it is ranked as 'West Bank and Gaza'); Syria = 144; Tunisia =50: ibid.

2) Ibid.

3) In a survey of 45 Kuwaiti law students carried out by the author in October 2013, 27 out of 45 respondents (60%) answered "No" to the question: "Should Kuwait have adopted British common law rather than French/Egyptian civil law in 1961?".

some defects, the majority do not think it is the wrong system,[1] nor do they think it should be changed.[2] They accept their legal system, although acknowledge that it is defective in some areas and in need of improvement. Despite those perceptions, the argument being advanced here is that the Kuwaiti authorities may have made an error of judgment by opting for a French civil law system in 1961. Perhaps it was more of a knee-jerk reaction to semi-colonialism and borne of a desire to end the colonial ties by ending the British Jurisdiction rather than by a desire to choose the most suitable legal system for the situation. The Egyptian jurist, Dr Sanhouri, could not be blamed for resorting to his own experience. Perhaps the Kuwaiti authorities were attracted by the comprehensive code-based approach of the civil law system, the idea that all laws are written down in one place, rather than opting for the uncodified and sometimes seemingly confusing (but more flexible) common law system. Perhaps it was just plain easier, since Egypt was a Muslim, Arabic-speaking country sharing more in common with Kuwait than the United Kingdom. In any case, the die was cast when Dr Sanhouri was engaged and the Kuwati government opted for an entirely new legal system, which, as Hijazi noted, did not develop naturally from either of the two previous systems.

Returning to the original point, about what type of legal system Kuwait possesses, it might be easier to understand the discrepancies between different categorizations when the historical context is understood: some people cite Kuwait as a common law/Is-

1) In the survey, students were asked: "Do you think Kuwait has the "right" type of legal system for its needs". In response, 25 our of 45 students answered "Yes", thus 55% thought that Kuwait has the right legal system.

2) In the survey, students were asked: "Do you think Kuwait needs a different type of legal system?" In response, 27 students answered "No", 16 students answered "Yes" and one student answered "Maybe" which was not a survey response option. Thus, 60% believed that there was no need to change Kuwait's legal system.

lamic law/civil law system and others choose to describe it as an Islamic law/civil law system. Perhaps the former is more accurate than the latter. Kuwaiti law students are just as divided over what type of legal system they have. When surveyed, there was no clear consensus amongst 45 respondents, although there was a slight preference for classifying Kuwait as a mixed civil law/Islamic law system.[1] Students were asked to choose from a range of options and their responses varied widely. The different ways of classifying the Kuwaiti legal system by both scholars and students, professionals and amateurs, is perhaps telling of the subjective nature of making such categorisations. But it also speaks to the complexity of the legal system itself when it is not easy to classify and when Kuwaiti students cannot agree on what legal system they have.

As a postscript to the above analysis, it would be interesting to know what happened to the tribal-based customary laws that apparently existed under the National Jurisdiction. Once the 'modern' French/Egyptian civil law system was implanted in Kuwait, it may have stamped out the local and indigenous customary law. This interesting question merits further investigation to discover whether there are still vestiges of traditional customary law present in Kuwait. Since Kuwait is still very much a tribal society, including the way that political allegiances are expressed, it would be interesting to know more about the tribal-based pre-colonial justice systems. The author is reminded of parallels with New

1) In a survey of 45 students, 7 students thought Kuwait has a civil law legal system, 1 thought it was common law, 1 thought it was Islamic law, 1 thought it was customary law, 11 thought it was mixed civil law/Islamic law, 6 thought it was mixed civil law/common law/Islamic law, 8 thought it was mixed civil law/Islamic law/customary law, 9 thought it was mixed Civil law/Islamic law/common law/customary law and 1 student thought it was something else, which that student defined as mixed common law/civil law. Thus, the most popular choice by students was civil law/Islamic law with 24% choosing this option. But there was no clear winner amongst the students as to what type of legal system they are studying.

Zealand's experiences in this regard. The indigenous Maori people, who lived in New Zealand for around 1000 years before the British colonized it, had their own tribal customs, including tribal justice, and ways of regulating social conduct.[1] In New Zealand, indigenous legal customs were largely overridden and almost obliterated by the introduction of the British legal system, but they are nowadays re-emerging and there is an increasing interest and knowledge of Maori customary law in New Zealand. The author is yet to come across writing on Kuwaiti customary law in English but this could well form the topic of a future paper.

Before concluding this part of the paper, a very brief reference might be made to the famous legal philosopher H.L.A. Hart's comments in *The Concept of Law* when he discussed the meaning of 'law' and the challenges that 'primitive' societies pose. Are primitive legal systems law, Hart asked, when discussing 'persistent questions' regarding the meaning of 'law'.[2] Do primitive legal systems qualify as law? Did Kuwait possess a fully-fledged customary legal system prior to the introduction of French/Egyptian civil law? And if so, are there still remnants of it today? These questions are flagged here as matters of interest that will hopefully be taken up at a later date.

Although it is clear that French/Egyptian civil law has overtaken British common law as an influence in Kuwait it is interesting to ponder over what specific common law influences have remained. The author has asked comparative law students on

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1) Although this is not strictly relevant to a comparative law paper, the author notes that both Maori in New Zealand and some Kuwaitis have a similar social custom of greeting each other by touching noses. My students were intrigued when I shared this strange similarity with them. An anthropologist or sociologist might also draw comparisons between the traditional 'sword' dances of the Kuwaitis and the Maori war dance known as the 'haka'. Both seem to have developed as pre-war or post-war dances but these days are used to celebrate special occasions.

2) H. L. A. Hart, The Concept of Law 2nd ed., (Clarendon Press, 1994) 4.

various occasions whether they see any English common law influences in their present legal system and one of the interesting points they raise is the use of *stare decisis* or precedent, the principle upon which common law legal systems are based. Students have suggested that although precedent does not officially exist in Kuwait, and prior decisions do not bind the Kuwaiti courts, in practice judges usually do follow decisions of other courts. Lawyers have anecdotally mentioned to the author that in preparing cases for trial they try to find similar cases and use them successfully to influence the court's decision, just as common law lawyers would. Although the author has tried to discover some hard evidence of this practice, no such data is available at present to substantiate this claim. If evidence can be found, this may arguably be proof that there is a surviving influence of the British Jurisdiction that once thrived in Kuwait. [1]

3. The diffusion of Western ideas in Kuwait's legal education

The third and final point to be pursued in relation to the diffusion of Western legal concepts in Kuwait concerns legal education. Kuwait has an interesting mix of civil and common law influences in the field of legal education. A brief catalogue of examples may be of interest (these comments are based on the author's limited personal experience teaching law in Kuwait). First, the faculty of law in which the author is currently employed[2] adopts American

1) I would like to admit that I am somewhat hampered in my research by my own lack of Arabic language ability. There is a growing body of scholarly literature on Kuwaiti law in the English language, which is readily accessible, but it mainly focuses on the Iraqi invasion of Kuwait in 1990, financial market analysis or issues around constitutionalism. I have found that there is a scarcity of academic writing, in English on Kuwait's legal system. This is a double-edged sword of course: whilst a lack of writing in an area can be frustrating, it also signals an area that may be ripe for exposition. Indeed, the bilingual law school in Kuwait where I currently teach will become a means by which more English-language legal analysis is developed and disseminated.

2) Kuwait International Law School (KILAW) in the suburb of Doha, in the State of Kuwait. The examples mentioned here are all drawn from KILAW. It is the first private law school

rather than British position descriptions, such as “Assistant Professor” and “Associate Professor” rather than “Lecturer”, “Senior Lecturer” or “Reader” which are more common in British-based legal systems’ law schools. Second, there is a distinct American influence in the semesterization of courses and the ‘credit’ system for organizing courses in Kuwaiti legal education. Likewise the grading system and ‘grade point average’ utilized is American-influenced. However, there is a distinctly French/Continental/civil law influence in the division of both faculty and courses into ‘public’ and ‘private’ divisions. Staff are described as ‘professors of public law’ or ‘professors of private law’ – a distinction that is largely foreign to law schools in common law jurisdictions such as the five that exist in New Zealand. The courses taught also reflect both civil law and common law influences but perhaps more the former than the latter. For example, the law degree includes subjects such as ‘the law of obligations’ from the civil law tradition rather than the law of contract and the law of tort.

Aside from these rather obvious and perhaps superficial Western influences on Kuwaiti legal education there is one other point worth mentioning. When teaching students legal theory based on American concepts such as ‘legal realism’, it has been noted that it is sometimes difficult to persuade Kuwaiti law students of the relevance of legal theories that focus on the role of the judge. As anyone who has read anything about American Legal Realism will know, scholars such as Oliver Wendell Holmes and Jerome Frank place a great deal of emphasis on the role of the judge. When teaching this material for the first time in Kuwait it became apparent that the concerns of the common law legal thinker may not be the same as the civil law legal thinker. For instance, when

in Kuwait. The other law school in Kuwait is a faculty within Kuwait University, a government university.

Jerome Frank wrote about the judge deciding cases based on a 'hunch', a common law scholar might be interested to learn about what really influences a judge to make the decisions he/she makes. But a student of a civil law/Islamic law system appears to see the role of the judge in somewhat more 'black and white', formalistic terms. Students do not generally see that the judge has or should have any personal influence on the outcome of the case. Students believe that the judge is there just to apply the rules and that he (in Kuwait it is always a 'he' because women are not yet permitted to sit as judges) has little personal input in the decision. When law students were asked, "Do you think judges in Kuwait use their own personality and personal values when deciding cases?" 42% responded either "not much" or "not at all". The emphasis seems to be squarely on the black and white letter of the laws, and the judge is seen to be there merely to apply the laws and to come to the same decision as any other judge would reach.[1] Of course, this provides rich material for class discussions but these assumptions are widely and genuinely held. Likewise, when legal formalism and legal realism are explained, the latter being a reaction to the mainly discredited former, many students identify more with legal formalism than with legal realism. The oft-cited cliché that "we are all realists now"[2] might be slightly adjusted for legal education in Kuwait to something along the lines of "we are not all realists yet". There is an understanding amongst law students that the judge is there to apply a formula and give the 'right' answer, uninfluenced by his

1) In a survey of 45 law students, they were asked the question, "When you think about judges in Kuwait's legal system, how much flexibility do you think they have when deciding cases?" In response, only 7 students (15.5%) though that they have "a lot of flexibility". The rest responded that judges have "a little flexibility" (53.5%), or "not much flexibility" (26%) or "none" (4%).

2) See Michael Steven Green "Legal Realism as Theory of Law" Williams and Mary Law Review 46 (6) (2005) 1915-2000 at 1917, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=761007 last accessed on 1 June 2013.

personal biases or prejudices, which probably don't exist anyway if he has been trained properly.[1] This reaction is interesting and one wonders whether the fact that a civil law legal system creates a more formalist approach to learning the law than a common law legal system could be the reason for these beliefs. If the legal system in place in a particular country acts as an all-pervading influence on society, then its effects on law students and lawyers must be visible since they are in closest connection to it. If the civil law, and indeed the Islamic/civil law mixed legal systems, can be said to be based on comprehensive codes, then this may influence the type of thinking that is engaged in by law students and it may become influential on how law students see themselves and other actors in the judicial system. As a law student, lawyer and then law academic, the author has no trouble accepting that judges are greatly influenced by their background and experiences and that they may sometimes have to adapt their interpretation of the law to achieve justice in the circumstances. It is easy, perhaps even obvious, that judges will have personal biases and prejudices and that it is impossible, and perhaps not even desirable, to try to remove these completely from the judging process. Furthermore, the particular make-up of the bench will surely have an outcome on the decisions the courts make.[2] Having read countless cases at law school, the author is aware that judges on the same bench often reach completely

1) The last note is a comment from a law student in Kuwait, who asserted that the legal realists (Jerome Frank in particular) were wrong in stating that judges are like everyone else, influenced by their own moral, economic, political and distinctly personal biases. One particular student asserted that if judges were properly trained, they would not have any of those biases because the judge's job is to apply the law without any bias or prejudice whatsoever.

2) In a Masters of Law class in Kuwait, the author once asked students whether the particular judges on the bench would have an influence on the decisions reached. The discussion was in the context of learning about the United States' Supreme Court. Somewhat surprisingly, the clear majority of students thought that the make-up of the bench would have no impact whatsoever on the outcome of the decisions the court reached.

different but equally well-argued and compelling decisions. But the students that are in mind here, in Kuwait, are different in one key respect: they largely do not read case law in their legal education. They focus on the codes more than the cases. The author is the first to admit that it is sometimes difficult to persuade Kuwaiti law students that these ideas about judging are normal, palatable and not really even objectionable. Perhaps a civil law/ Islamic law system creates different expectations about judges and the judging process than a common law system. Perhaps it creates an expectation that judges have very little room to maneuver and have little impact on the outcome of cases.[1] Again, further research would be needed to substantiate this proposition and this is only offered as an insight based on personal experience of legal education in New Zealand and Kuwait.

Conclusion

This concludes the discussion of the main three points in this brief summary of the diffusion of Western legal concepts in Kuwait. There are many more areas that could be explored and that in the future will hopefully be explored. Besides the points raised here, there are many other areas of law which could form the basis of a discussion about the diffusion of Western legal concepts. For example, the concept of 'insurance' in Kuwait would be interesting to examine further. Insurance is not an Islamic concept, it is distinctly Western, yet it has been embraced and become em-

1) In a survey of 45 Kuwaiti law students, the question was asked: "Do you think judges in Kuwait use their own personality and values when deciding cases?" In response, only 4% of students selected "Yes, a lot"; 51% selected "A little bit"; 26.6% selected "Not much" and 13% selected "No, not at all". That means 96% of respondents did not believe that judges use their own personality and values much when judging cases. It would be interesting to conduct the same survey in a common law jurisdiction to compare the outcomes. It seems to this author to be a rather high proportion of students who do not see any injection of personal values and personality. This leads to the author's observation that these students tend to be more 'formalist' than 'realist' in their thinking about the judicial process. See also footnote 74.

bedded in Kuwait to the point that it is seldom questioned. This seems odd and, on a personal level, is somewhat challenging. To end this paper on a personal note, I recall that as a law student I wrote my LLB honours' thesis on an area of insurance law (the disclosure of information by insurers to insureds). Insurance is an integral part of contract law, and business, in the Western world. But as a Muslim, I have never taken out insurance policies of any kind. In New Zealand, for example, I drive a car without car insurance, I own a house without house insurance, and I live without medical or life insurance. This is not because I do not understand the benefits of insurance but because my personal religious convictions do not permit me to enter into insurance contracts. But in Kuwait, I cannot own or even rent a car without taking out compulsory insurance and I cannot avail medical care without health insurance. Perhaps this is a classic example of a Western economic/legal concept implanting itself into foreign soil and finding a fertile home. The diffusion of Western legal concepts has been occurring for many years and no doubt will continue into the future. But as Carolan argues, detrimental innovations are just as likely to diffuse as successful or beneficial measures.[1]

1) See Carolan, "Diffusing Bad Ideas: What the Migration of the Separation of Powers Means for Comparative Constitutionalism and Constitutional Transplants", supra n7.