A Law Reform Commission for Kuwait?

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"… there are two things which must be kept from the public: what goes into the making of a sausage; and how laws are made."[2]

ABSTRACT:

This paper sets out the view that it is timely and appropriate to establish a specialized Law Reform Commission for Kuwait. Part 1 considers how the existing arrangements for law reform would be improved by the addition of a specialized independent law reform agency. Part 2 considers what such an agency might look like, including such topics as : membership, staffing, including exchange of personnel with law schools; consulting the informed public and stake holders; and the practical problems of converting a good recommendation into law. Part 3 widens the focus and considers how our laws might be made more user- friendly and accessible.

Key terms:

Law Reform Commission, land use planning law, sentencing reform, National Assembly, law schools, Gulf Corporations Council accessing the laws.

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* I am grateful to the Kuwait International Law School Journal's anonymous peer review for the helpful comments, some of which are incorporated in the re-written paper.

(2) This remark is attributed, variously, to the German Statesman, Bismarck, or the US writer, Mark Twain, both 19th Century figures.

PART 1: INTRODUCTION

They say that confession is good for the soul and I ought to make a confession here. The following paper is written largely from a common law and Western point of view, where I have had some experience as a law reformer.[3] Although I have been at KILAW for four years, unfortunately I do not read or speak Arabic. The result is that most of what follows is drawn from my experience outside Kuwait. But I do think that a lot of these problems bring up general questions, which could arise in any jurisdiction. In some places, I have mentioned the types of answer which had been discovered in the West. But these are only examples to start the discussion going. Accordingly, when I say that I would welcome your suggestions, I mean it. So, I hope Mr Chairman, that at the end, we could get some of the experience and wisdom of the many lawyers in the audience.

This paper is about law reform and, especially, about the institutions and techniques which can help to bring it about. In Part 1, I shall consider why law reform might be necessary in Kuwait and why something like a Law Reform Commission (LRC) might be useful in bringing it about. Part 2 takes a more detailed look at what kind of structure an LRC might have in Kuwait. In Part 3, I consider a wider matter, namely how can our laws be made easier to access? Part 4 offers a brief concluding comment.

First, a preliminary point, that is the meaning of 'law reform'. Now, most changes of policy are put into effect by way of a change of law. But, put very simply, one can say that there are two types of law change. The subject matter of the first is areas of policy or politics. And today, we have plenty of papers about this wide field, under the heading of 'law' and 'development', for example, health, education, water.

The second type, usually called 'law reform' (or sometimes

(3) During 1999 - 2003, I was Director of Research, at the (Ireland) Law Reform Commission. Naturally, the Commission bears no responsibility for any views expressed here.

'Lawyers' Law') is a different and narrower, but still vital, field.[4] Some examples: the procedure associated with access to a court[5], including: design and forms; lawyers for poor people; or the time limits within which a case must be taken. A second example: in a contract between a big business and thousands (or more) consumers, the lawyers for the big business party will often include conditions unfairly reducing the rights of the consumer. In some jurisdictions, there is a general pro-consumer law which makes contracts conditions like this void. This may be regarded as a type of law reform. Other more detailed examples are coming up later.

Now I know that, at the moment, matters of this type are usually dealt with by Ministries and/or the National Assembly (NA).

But a major practical point is, because of the nature of law reform, it is never going to be a popular cause, of interest to lay-people, who vote and therefore matter to politicians. In a phrase, it is 'too dull to fire the busy politician's imagination.'[6] It will always be of real interest to only a few dozen specialised lawyers. That is, experts who have a good view of what is happening at the moment and what are the defects and how they can be improved. So what I am suggesting here is that, before a subject for law reform goes to a Ministry or National Assembly, it would be better to consult a wider range of lawyers than one finds in these institutions; and to do so in a semi-formal way. Put simply, this is what a Law Reform Commission does.

To bring this suggestion to life, I should like to set out two examples to show the difficulties of law reform and why an LRC could be a useful agency to meet those difficulties. May I emphasise, as strongly as I can, that these examples could well be the subject

(4) Palmer, 'The Law Reform Enterprise: evaluating the past and charting the future' (2015, 131 LQR, 402. Sir Geoffrey Palmer QC is a former New Zealand Prime Minister and President of the New Zealand Law Commission. For a useful collection, See Zander The Law-Making Process (Butterworths, 2005), Ch. 9.

(5) Zander, The State of Justice (Hamlyn Trust Lectures, Sweet and Maxwell, 2000), Ch. 1.

(6) S. Wilson 'Reforming the Law Commission: A Crisis of Identity' [2013] Public Law 20.

of a paper in themselves. But I am not treating them as subjects in their own right here because this paper is about how a possible LRC might work and they are helpful as illustrations of this.

First, enforcing a law is a subject which sometimes may not receive enough attention. A law may look very good in the books; but that is no advantage if it is not enforced properly. One of the many areas where effective enforcement may need attention is land-use planning law. At present in Kuwait, this is a matter which is settled between the municipality and the developer (the business-person who is making the apartment complex or mall). What happens is that the developer applies for a building licence and the municipality gives the licence either with or without conditions; or refuses. But I suggest that, in this process of awarding a building licence, perhaps the neighbour of the building which is to be constructed should also have some legal status and influence. At the moment the neighbour whose own property or way of life may be affected is not officially allowed even to know about, or see, the building licence. If they do find out, it is often too late to do anything about it. An LRC would be a thorough, impartial way of checking whether any improvement is required in the planning control system.

The important point here is that if the neighbour or perhaps an environmentalist was in a position to know fully what was happening, then they might be a position to enforce good building practice. Moreover, if the building licence is refused at the planning official level, then the developer may appeal to the Director-General of the municipality. But what if the building licence is granted wrongly, unlawfully? The answer is that the neighbour or any other third party does not have the opportunity to appeal to the Director-General (though they can take the matter to the courts, which could be troublesome and expensive).

Now there are lots of powerful vested interests in Planning Law. These forces would probably want to resist any suggestion of a change to the planning system, in the direction which I have

suggested. Are the changes a good idea, in the interests of the community? The answer is that I am not talking about these changes as a subject in themselves. But rather as a way of suggesting that here is a subject to which a law reform could be useful, in giving it a thorough, impartial examination.

Another example of a law reform which may need examination is the area of different types of punishment, following conviction for a crime. In particular, are there effective and better alternatives to imprisonment?(7) The basic point here is that it seems clear that prison is not a very good way of dealing with offenders, not least because a period in prison means that the young offender is educated and influenced by the other prisoners with whom they are forced into contact.He or she is likely to go on to commit further offences, after release: prison are, therefore, said to be 'universities of crime'. But the great difficulty here is to devise alternatives to prison, which have the essential reformative or deterrent effect. Various options(8) have been suggested; unpaid community work; probation or other forms of supervision; restrictions on where the convicted person may live or be employed; or medical treatment; or 'restorative justice'(9).

Legislators and politicians, in most countries are not very interested in penal reform and I do not expect that the National Assembly is very different. (Nor, to take examples from other countries, did I hear much talk about penal reform in recent elections in USA, France or Austria.) The reason is that members of the National Assembly naturally have to be responsive to the feelings of the voters who elect them.

(7) Amongst other things, prisons are expensive. Data from 45 States of the Council of Europe for 2014 shows an average of US$110 per inmate per day, making a total expenditure of US$30 billion each year. The average incarceration rate in Europe was 100 per 1000,000 population, with an average age of 35.

(8) See, for example, Ashworth, Sentencing and Criminal Justice (Cambridge University Press, 2014), Chapters 1, 3, 10 and 12.

(9) This is a vague term for a sanction which means that the victim of the crime is given a big part in negotiating and, sometimes, depending on how generous is the victim, forgiving the criminal.

And most of these people consider that convicted criminals deserve the punishment that they get and do not think much beyond that.

Ministers and civil servant are not so directly concerned with the public's views but they do have to pay some attention to them because Ministers, for whom civil servants work, are responsible to the National Assembly.

Also they will be concerned with the huge public investment in prison buildings: if these were to become partly empty then a great deal of public money would be wasted since it would not be suitable to convert them into (say) universities or hospitals. Again, prison staff do not wish to lose their employment, which is reliable and does not require very many qualifications.

By contrast, an LRC would provide a body of experienced and independent people who could make a thorough, objective review of this question.

You will notice that I have now reached the provisional conclusion that a LRC for Kuwait is an idea which is at least worth considering and I turn in the next part to examine what kind of structure it might it take in Kuwait.

PART 2: WHAT MIGHT A LAW REFORM COMMISSION FOR KUWAIT LOOK LIKE?

For those of you who have not met one, may I give the following very brief introduction to an LRC?(10) This is an official agency whose duty is to advise the government and/or Parliament on Law Reform. Among the oldest(11) of them, are those of the UK(12)

(10) S. Wilson 'Reforming the Law Commission: A Crisis of Identity' [2013] Public Law 20; M McMillan 'Law Reform in the Scottish Parliament' (2014) 2(1) Scottish Parliamentary Review 95 at 114.

(11) The oldest is probably that of India, established in 1955, www.lawcommissionofindia.nic.in. As regards the USA, the closest institution to an LRC is the New York Law Reform Commission; but its work is not as ambitious as that done by the UK Commissions and those which have been modelled on them.

(12) UK Law Commissions Act, 1965, established Law Commissions for England and Scotland. Northern Ireland came later in 2005.

which have recently celebrated their 50th birthday.(13) This idea has been followed, and found useful, elsewhere(14); though mainly in the English-speaking world.((15))

Members

The first thing to be considered is what sort of background and qualifications the President, or leader, of this Commission should have. In the common law world, the judges are the natural leaders of the legal profession, the ones who command most respect. And so the President of the LRC will almost always be a judge or sometimes a retired judge.(16)

But, in the civil law world, of which Kuwait is a part, it may seem

(13) See : (eds.) Dyson, Lee and Start, Fifty years of the Law Commissions Hart Publications Oxford, 2016 ; Lord Thomas, ' Law Reform Now in 21st Century Britain : Brexit and Beyond', Sixth Scarman Lecture Gray's Inn 26th June 2017 ; Palmer, 'The Law Reform Enterprise : evaluating the past and charting the future' (2015) 131 LQR 402.

(14) The best comprehensive list of law commissions is to be found on the Australian Law Reform Commission's website, www.alrc.gov.au/links/overseas-law-reform-agencies. One should also notice the International Law Commission of the United Nations, established in 1947.

(15) A point of interest, though we have not space here to follow it very far, is how is it that LRCs exist only in common law, not civil law, states? One reason is that in countries like Germany or France, there is a greater tradition of legal scholarship among staff of the Ministry of the Interior or of Justice than in the English-speaking, common law world. Together with this, law has been studied for centuries in civil law countries and the Ministers and civil servants are used to turning to the University Law scholars for advice. These scholars would have had some interest in law reform. But, significantly, for legal education and research, in the common law states Law, as a subject studied at Universities, developed comparatively recently (post World War I or even II). The result is that, traditionally, the professors were not regarded as the legal experts. By contrast, in the common law world, the legal experts were taken to be the practising barristers (=advocates). These experts were not interested in Law Reform, only in winning cases.

(16) This may, however, carry its own dangers, for instance that the Government or whoever is selecting members of the LRC may select a judge on the basis that he or she is an extinct volcano and the court is better off in his absence. So this may mean that the LRC is worse off. Another danger is the possibility of conflict of interest. A judge who had been president of the Ireland LRC told me the following story. He was sitting on a case in which the central rule of law was one which the LRC, under his baton, had said was unfair and out of date and ought to be changed. Nevertheless it remained in existence and was being energetically relied upon by one of the parties. So the judge spoke to the two advocates in private. The judge said to the one whose client was relying on the laws which the LRC report had criticised 'Would you rather if I withdrew from this case and it was heard by another judge?' After reflection, the advocate said to the judge that it might be better if the judge withdrew. This the judge graciously did.

appropriate to look outside the ranks of judges, for the President. Maybe, a practitioner who is well respected among his colleagues? The trouble is that a good practitioner might be too busy and not available when they should be. A part-time appointment might be a possibility? But that would leave big danger that the part of the week given to the work of the commission would be too small.

So, perhaps in Kuwait, a good compromise might be a professor of law who had earlier been a practising lawyer: there may be one good candidate of this type, not a million kilometres from here?

A part from the President of the Constitution, who are the remaining six or seven members of the commission? These members will usually be part time, perhaps paid on the basis that they are working the equivalent of one full day in the week. These members should be a good mixture of practising (from local and international law firms) or academic lawyers, covering expertise in a wide range of legal fields which are likely to come up for reform. A good question is whether one of the members should be a Sharia lawyer.

Obviously, this would not be because the LRC would be involved in Sharia l aw. But the advantage of having such a person would be that he would bring an alternative viewpoint and also that, if any issues were to arise regarding the borderline between statutory law and Sharia, he would be of assistance. Secondly, a somewhat similar question would be whether one of the members should be a lay-person, say a social scientist or a business-person. The thinking behind this suggestion is that he or she would bring the common sense of the ordinary user of the law.

Which areas need reform?

How are the areas in need of reform selected? Usually there are two types of method. The first is that for every period of five to seven years, a list of desirable topics for research and reform is drawn up. This list is devised by the Commission, after consulting interested

parties, such as the legal professions and law schools, as well of course as the Government. There may even be advertisements in the news media for suggestions from ordinary citizens.

When the LRC has completed one area from this list, it chooses another one. The second method is that where the Minister with responsibility for legal affairs considers that the area is in need of reform, then he can make a specific request that the Commission work on this area promptly, and report and make its recommendations.[(17)]

This might be the point at which to say something about the independence of an LRC. This cannot mean complete independence. For instances, the Government has to have a big hand in choosing members of an LRC. In addition, it is the Government-Parliament which decides whether to make the LRC's recommendations into law.

But on the other hand, there is a significance difference between an LRC and (say) a Committee which a Minister sets up to give him advice on a specific area.

With such a Committee, its terms of reference are fixed by the Minister and not the Committee itself. By contrast, one of the methods by which the makes the selection of subjects for consideration for reform is made is inclusion on the list just mentioned. method was decided by the LRC.

In the same way, the LRC is responsible for making its own recommendations: the only thing is that, if they are radically disliked by the Government, they will not become the law. So: qualified independence is realistic.[(18)]

Doing the Work[(19)]:

So far, we have talked about the Committee, at the top of the LRC. But most of the work, researching the area and consulting

(17) Marsh 'Law Reform in the United Kingdom' 13 William and Mary Law Review, 1971, p. 263.

(18) Hammond 'The Challenge of Implementation: getting law reform reports onto the Statute Book (2013) 13 OUCLJ 239.

(19) Barnett 'The Process of Law Reform' (2011) 39 Fed. LR 161.

experts and drafting the report, on how it is to be improved, drafting the report will be done by the full-time staff. Of course they will take their draft proposals and reports to the commission sitting as a committee, who will give the final word. But most of the work has to be done by the full-time research lawyers.

A big question here is how these are recruited and organised. One way is that they should be a group of legal civil servants working, it may be for their entire career, in these positions. The alternative is that the researchers are young lawyers, perhaps who have just completed a Masters degree, and who are employed on a temporary contract, like a Teaching Assistant at a University. Each of these alternatives has its advantages and disadvantages

But, either way, it seems to me that one point which may conveniently be thrown in the air here is that a university law school could play a major role in assisting the Commission. The fact is that the LRC is doing a type of research in law; whilst academic lawyers, anyway many of them, spend a good deal of time on research.

Thus, these two groups are not very far apart. It is true that, at the beginning anyway, there will be a lot more specialised and experienced staff working at a Law School. Thus, some of these scholars could help with the research done by the LRC staff, at least to review the work or to mentor young staff; or to serve on LRC committees in their area of specialisation.

The academic lawyers will not want to do this unless there is some advantage for them in doing so. Maybe they could take unpaid leave from the Law School for a semester or so and go to work at the LRC. If their work there is properly organised: they would come back to the law school as better scholars and lawyers.

And so they could be a greater asset to the school. Thus, from the viewpoint of the law school itself, there may be advantages here, to set against any short-term disadvantages.

So, it might be worth devising a scheme so that such arrangements were possible.

In talking about research, one might add the following remark about comparative law: that while it would be good for the LRC to be informed and up to date about legal developments in countries outside Kuwait, one has to be discriminating about this and not to borrow wholesale from other jurisdictions.

The best policy I believe, would be to examine what happened elsewhere, what worked and what did not, and then to decide what it would be useful to adapt in the particular circumstance of Kuwait.

Consultation (working) paper[20]:

In publishing the report, it is usual to follow a two stage process. Here it is usual for a Commission to consult the wider legal community about a draft report and to get their ideas before the report is finalised and sent to the Government.

One way in which this may be done is to publish a draft or preliminary Edition of the report (a 'consultation paper') and recommendations and then to ask for comments and suggestions, from informed persons. After the commission has considered these comments, it then produces its final report and recommendations.

The problem of converting a good recommendation into law[21]:

Every LRC finds that it may produce good recommendations but the Government or National Assembly legislation does not find the time to make these recommendations into law: as they say, you can take a horse to the water but you cannot make it drink.

The essential background here is the competing bills which are crying out for attention, and the relatively few days in the year, when the legislature National Assembly actually sits. The result

(20) Zander,The Law-Making Process, (Butterworths, 2005), p. 424- 428.
(21) Zander,The Law-Making Process, (Butterworths, 2005), p. 424- 428.

of all of these factors is that, as it appears in most states, it is very difficult to get 'parliamentary time' for any Bill, unless it is very, very urgent.

A very practical point here is sometimes an LRC publishes, at the end of its Report, only recommendations but, in other cases, it goes further and publishes a draft bill. There are two aspects to this difference. The first is relevant to the point already made, about the competition in getting the recommendation changed into law: specialised lawyers who draft laws are often overworked and so, if the recommendation of an LRC is presented in the form of a bill, then it is more likely to get to the front of the queue. The second point is connected with the substance of the law change.

The point is that, when a good lawyer sees a proposal properly and exactly drafted as law, one sees difficulties which might not have come to the surface, if one saw only a recommendation. For instance, an LRC recommendation might use a phrase like, "sufficient care" and the exact meaning might not be thoroughly considered. But, when a legal draftsman is involved, he or she is in a good position to speak up and say: "you need a definition of sufficient care" for this law to work.

A general point here is that, if the LRC has developed a good reputation, then the Government or other decision-maker has at least to listen properly to the LRC's recommendations. If it is not going to follow the recommendations, then the Government will be under some pressure at least to give good reasons why not and, if it cannot do this, then perhaps it will feel under some pressure to actually make the law.

Plainly, there would be need for clear lines of communication between the LRC, Government Ministries and the National Assembly. This could be facilitated by the agreed of a protocol, possibly with deadlines.

Gulf Cooperation Council:

My subject is not the GCC. And the question of which subjects of law should be covered at GCC level and which at an individual state level is very much a matter of high politics, and a much bigger subject than law reform. I am not talking about that here, but I just want to note something that might be relevant a generation or so into the future. The point is that, if we make the assumption that the GCC develops to the same extent as the European Union, so that whilst some laws will still be made at national level, while other laws will be made at the Union or GCC level.

The question would then arise of which type of law to make at GCC level. On this, I suggest that there are some features of law reform, which would make it specially suitable for treatment at a GCSE level. In the first place, going to the question of definition, considered in Part 1, of what is the subject matter of 'law reform'. We said that law reform is technical and not politically controversial. At the same time, law reform, done well, takes up quite a lot of able and highly-qualified personnel.

It might make sense to do this for all the Gulf States together, while no doubt allowing for some particular national characteristics. On this assumption, it would be useful to have a common Gulf LRC which produced recommendations for all of the Gulf States.

PART 3: HOW CAN OUR LAWS BE MADE EASIER TO ACCESS?

It might seem obvious to say that law should be perfectly fair and just. But I wonder if there is not another value which is at least as important as perfect justice and that is simplicity and ease of access. My fear is that lawyers and, especially, that subspecies, the law reformers, want law to be perfectly just.

Everything has its price and the price here may be that every slight difference in circumstances should lead to an equivalent adjustment in the law, to allow for this slight difference. The result of this is that usually the law becomes long and complicated. Do

not forget that: ‘the best may be the enemy of the good’.[22]

Now what I am saying is that any system of laws must be responsive to the needs of the people who live under it and what most citizens hope for from the law is, first, that they come in contact with it as little as possible. If this hope is defeated, then what they wish for next is that the law is simple and predictable.

This, of course, is what the political philosopher means by the Rule of Law; also known as L’Etat de Droit or Rechtsstaat. One of the aspects of this idea[23] is that the law should be as simple and accessible; so that a person can readily find out what is the law in relation to them, with the result that they can ensure that their behaviour agree with the law.[24] So I think keeping the law simple is a virtue.

My other point in this section is not about the substance of law, but about how it is presented and made available to lawyers who need to access it. There are two points.

In talking about the law being simple and accessible, I mean two points. The first is that law it should be drafted in a language which it is as easy to follow as the complexity of the subject will permit. The topic of ‘law and simple language’[25] is a big subject which I cannot go into now. The second point is that the laws should be readily available, with obsolete or badly- drafted material removed and sensibly organised so that as little time as possible is taken to reach the particular point one needs.[26]

(22) Voltaire.

(23) See Bingham, The Rule of Law (Penguin Books Ltd, 2011).

(24) You may think that it is unrealistic of me to talk about an individual, a layperson that is, as if they were on their own. Because the individual will often go to a lawyer to explain law’s mysteries to them. But even with a lawyer to advise, the lay person needs the law to be less complicated, because this will mean that the lawyers instructions will be easier to follow and less expensive lawyers’ time has to be used up in discovering what the law is.

(25) Statutory Interpretation and Plain English (Ireland LRC CP 201- 999).

(26) Voermans, ‘Codification and Consolidation in the European Union: A means to untie red tape’ (2008), 29(2) Statute LR 65.

Thus: if a law is amended, the original law and the amendment should be next to each other; laws on connected subjects should be next to each other. In this way, the commission could set a good standard for Ministries to follow. It would also be well, if the main Kuwait legislation will available in English.

A big point in all this is that, as we know, the law comes from different sources: laws, decrees regulations, cases. In many situations the reader needs to use more than one of these sources to reach an answer to the issue. It makes sense therefore that the classification should be by way of subject matter, rather than source.

The object is that the reader, who wants to find the law in relation to (say) criminal responsibility of children and divorce or protection for building workers, has all the law conveniently available. To help the reader, there should be: summaries; headlines; cross references; indices; use of varying type sizes.

Making this happen would obviously require a lot of detailed work and choices about ways in which this was to be done. I'm not going into this now but simply wish to make the following two points. The first is that there would need to be an IT-version of the systematic presentation of the law of Kuwait. In preparing this, an integrated team of IT and legal experts would have to work closely together.

Without this, if the IT experts works on their own, there is the likelihood of legal inaccuracy. And, if the lawyers work on their own, then they will fail to perceive the opportunities for clear and organised presentation which the IT techniques would offer.

The second point comes from an (unpublished) paper drafted by Dr Ardit Memeti and myself, on November 16, 2016. This paper notes that a person who is carrying out a legal transaction or bringing a court case or arbitration usually requires, in addition to the pure law, a great deal of other information. Let us assume

that the lawyer needs information in a particular field, for instance: liability for injuries caused by bad medical practise, the establishment of a company; or the procedure for an appeal to the Court of Cassation.

In each of these areas, in addition to the law, further information will be necessary, including: court forms and procedures; typical draft agreements; and, where relevant, information from ministries or public authorities, including up-to-date statement of their policy and practice.

Part 4: CONCLUDING COMMENTS

Law reform is not one of the law's most heroic or glamorous jobs. From a scholar's point of view, law reform does not provide good academic food: it does not offer concepts which will summarise the whole of law; or give a deep critique as to how law can be made more logical or moral. As I said in Part 3, law reform ought to simplify, rather than to go deeper.

Again, from the point of view of a social scientist who wants to see how law connects up with the deeper forces of economics, politics or sociology, law reform is exactly what is not interesting.

Finally, from the practising lawyer's point of view, law reform does not bring in more clients or make the existing ones more satisfied; it does not make it easier to win a case. In short, when it comes to a respectable legal pedigree, law reform is a rather humble orphan. I must agree that a law reformer is a legal mechanic, rather than a legal engineer. But mechanics can be useful.

Law reform focuses on people, business and society, as it is today, not yesterday. This is especially important in Kuwait, because recently, there have been a lot of changes. Law reformers try to keep the law up to date with these changes.

In addition, their concern is to keep our law in accord with the law of relevant foreign states, especially our neighbours in the

GCC; and with international developments in such fields as: environmental protection, human rights or financial responsibility. In addition, it is necessary for our laws to be made and kept as simple and accessible as possible. This would also vastly improved the visibility of Kuwait in the International arena.

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